

Procedure file

Basic information			
INI - Own-initiative procedure	2006/2043(INI)	Procedure completed	
Public-private partnerships and Community law on public procurement and concessions			
Subject 2.10.02 Public procurement			
Key players			
European Parliament	Committee responsible	Rapporteur	Appointed
	IMCO Internal Market and Consumer Protection		21/02/2006
		PSE WEILER Barbara	
	Former committee responsible		
	IMCO Internal Market and Consumer Protection		
	Committee for opinion	Rapporteur for opinion	Appointed
	ECON Economic and Monetary Affairs (Associated committee)		21/09/2004
		PPE-DE LANGEN Werner	
	ITRE Industry, Research and Energy	The committee decided not to give an opinion.	
	TRAN Transport and Tourism		23/11/2004
	ALDE COSTA Paolo		
REGI Regional Development		11/07/2005	
	ALDE STANISZEWSKA Grażyna		
Former committee for opinion			
ECON Economic and Monetary Affairs			
ITRE Industry, Research and Energy			
Council of the European Union	Council configuration	Meeting	Date
	Competitiveness (Internal Market, Industry, Research and Space)	2731	29/05/2006
European Commission	Commission DG	Commissioner	
	Financial Stability, Financial Services and Capital Markets Union	MCCREEVY Charlie	

Key events			
15/11/2005	Non-legislative basic document published	COM(2005)0569	Summary
16/02/2006	Committee referral announced in		

	Parliament		
16/02/2006	Referral to associated committees announced in Parliament		
29/05/2006	Debate in Council	2731	
10/10/2006	Vote in committee		
16/10/2006	Committee report tabled for plenary	A6-0363/2006	
25/10/2006	Debate in Parliament		
26/10/2006	Results of vote in Parliament		
26/10/2006	Decision by Parliament	T6-0462/2006	Summary
26/10/2006	End of procedure in Parliament		

Technical information

Procedure reference	2006/2043(INI)
Procedure type	INI - Own-initiative procedure
Procedure subtype	Initiative
Legal basis	Rules of Procedure EP 55
Stage reached in procedure	Procedure completed
Committee dossier	IMCO/6/33955; IMCO/6/26955

Documentation gateway

Non-legislative basic document		COM(2005)0569	15/11/2005	EC	Summary
Committee opinion	REGI	PE369.904	28/04/2006	EP	
Committee draft report		PE376.736	18/08/2006	EP	
Committee opinion	TRAN	PE357.741	31/08/2006	EP	
Amendments tabled in committee		PE378.677	27/09/2006	EP	
Committee opinion	ECON	PE376.303	04/10/2006	EP	
Committee report tabled for plenary, single reading		A6-0363/2006	16/10/2006	EP	
Text adopted by Parliament, single reading		T6-0462/2006	26/10/2006	EP	Summary
Commission response to text adopted in plenary		SP(2006)5316-2	23/11/2006	EC	
Commission response to text adopted in plenary		SP(2006)5635	19/12/2006	EC	

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

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

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

The main purpose of Community law on public procurement and concessions is to create an Internal Market in which the free movement of

goods and services and the right of establishment as well as the fundamental principles of equal treatment, transparency and mutual recognition are safeguarded and value for money obtained when public authorities buy products or mandate third parties with performing services or works.

The Green Paper was launched since it was considered necessary, in view of the increasing importance of PPPs, to explore the extent to which existing Community rules adequately implement these objectives when it comes to awarding PPP contracts or concessions. The purpose was to enable the Commission to assess whether there is a need to clarify, complement or improve the current legal framework at European level. This Communication presents the policy options following the consultation, with a view to ensuring effective competition for PPPs without unduly limiting the flexibility needed to design innovative and often complex projects.

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

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

Concessions: the great majority of stakeholders participating in the consultation confirmed the demand for greater legal certainty as regards the Community rules governing the award of concessions. Opinions on how to provide such legal certainty ? via legislation or a non-binding, interpretative instrument ? were, however, divided. Comments indicate that the existing Interpretative Communication (adopted in 2000) on concessions has failed to spell out in a sufficiently clear manner the implications of EC Treaty principles for the award of concessions. Contributions from several important stakeholders were ? surprisingly ? still based on the assumption that existing EC law obligations do not require the award of concessions to be opened up to competition, in particular by enabling all undertakings to express their interest in obtaining concessions.

Having carefully considered all arguments and the factual information submitted in the course of the PPP Green Paper consultation, it would currently appear that a legislative initiative is the preferable option as regards concessions.

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

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

It is not possible to give details on the content of a potential Community initiative on concessions at this stage. The existence and shape of such rules depends on further research the Commission needs to undertake in the course of a full impact assessment.

Institutionalised PPPs: The public consultation on the PPP Green Paper expressed the need to clarify how EC public procurement rules apply to the establishment of undertakings held jointly by both a public and a private partner in order to perform public services (institutionalised PPPs ? IPPPs). It was reported that public authorities abstain from entering into innovative IPPPs, in order to avoid the risk of establishing IPPPs which later on might turn out to be non-compliant with EC law. Only few stakeholders argued, however, that legal certainty in this area needed to be provided by means of a legally binding instrument. At the moment, in the area of IPPPs it seems that an Interpretative Communication may be the best way to encourage effective competition and to provide legal certainty.

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

- to the establishment of mixed capital entities the objective of which is to perform services of general (economic) interest and
- to the participation of private firms in existing public companies which perform such tasks.

In this context, any future Communication should in particular outline ways of establishing IPPPs ensuring that the accompanying award of tasks is EC law compatible. With regard to IPPPs the PPP Green Paper discussed in-house relations. It was stressed that as a rule Community law on public contracts and concessions applies when a contracting body decides to entrust a task to a third party, i.e. a person legally distinct from it. It is established case law of the European Court of Justice that the position can be otherwise only where (1) the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, (2) that person carries out the essential part of its activities with the controlling local authority or authorities. The Commission discusses the in-house concept in the Stadt Halle case of January 2005.

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

Clarification is also needed in order to identify to what extent Community law applies to the delegation of tasks to public bodies, and which forms of co-operation remain outside the scope of internal market provisions. The European Court of Justice has made it clear that relations between public authorities, their public bodies and, in a general manner, non-commercial bodies governed by public law could not a priori be excluded from public procurement law. Clearly, further clarification on this issue could form part of an Interpretative Communication on IPPPs.

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

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

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

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

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

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

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

IPPPs and "in-house relations": Parliament supported the Commission's efforts to take action in the field of IPPPs in view of the clear signs of existing legal uncertainty. In view of the widespread legal uncertainty that has grown up as to the application of in-house criteria, it called on the Commission to devise criteria, based on the current case-law of the Court of Justice, that establish a stable frame of reference for public authority decision-making, and to consider the possibility of incorporating these criteria into Community legislation. It felt that a threshold value, however defined, for the minimum stake of a public contracting authority in an undertaking whose capital is held jointly with private partners, would result in certain permanent protected stakes and that any limit put forward for discussion consequently poses problems.

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