COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 3.5.2005
SEC(2005) 629

COMMISSION STAFF WORKING PAPER

REPORT ON THE PUBLIC CONSULTATION ON THE GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

TABLE OF CONTENTS

1. INTRODUCTION

On 30 April 2004 the Commission adopted the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions[1] (the PPP Green Paper). The aim of the PPP Green Paper was to launch a debate to find out whether the Community needs to intervene to give economic operators in the Member States better access to the various forms of public private partnership under conditions of legal certainty and effective competition. It therefore describes how the rules and principles deriving from Community law on public contracts and concessions apply when a private partner is being selected, and for the duration of the contract, for different types of PPP. The Green Paper also asks a set of questions about how these rules and principles work in practice, so that the Commission can determine whether they are sufficiently clear and suited to the requirements and features of PPPs. The Commission invited all interested parties to send their comments on the 22 questions either by mail or by electronic mail by 30 July 2004.

In line with the Commission's general principles and standards for consulting interested parties,[2] this report analyses the contributions received from Member States, public authorities, European and national associations, public and private enterprises and individuals.

The objective of the report is to reflect the ideas, opinions and suggestions made. It tries to identify, as objectively as possible, the main trends, views and concerns set out in the contributions. In addition, for the sake of transparency, all contributions sent electronically and with no objection to their publication have been published in full on the website of the Directorate-General for the Internal Market and Services (DG MARKT).[3]

The report is structured as follows: this introduction (1) is followed by some general observations on the consultation (2), an executive summary (3), and the detailed analysis of the comments received (4). The structure of the detailed analysis follows the order of the questions set out in the PPP Green Paper. Due to the particularly technical nature of the comments on question 1 ("What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision [legislative or other] in your country?") and question 21 ("Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of 'good practice' in this framework which could serve as a model for the Union? If so, please elaborate.") they have not been included in this report, but will be analysed at a later stage on the DG MARKT website.

It did not appear desirable to indicate the exact number of "votes" of stakeholders in favour or against one or the other position. On the one hand contributions were not always easily and on all issues attributable to one or the other position. On the other

---

1 COM(2004) 327, 30.4.2004.

2 Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, Communication from the Commission, COM(2002) 704, 11.12.2002.

3 http://europa.eu.int/comm/internal_market/publicprocurement/ppp_en.htm.

hand the indication of exact numbers could even be misleading, as some enterprises from the same sector and sharing the same interest submitted each a nearly identical position, rather than sending just one coordinated contribution via their association as most other enterprises did. Questions on how to count such contributions do not need to be accentuated if only general trends are indicated.

The report does not aim to draw political conclusions from the consultation process as such. The Commission intends to present its conclusions in the second half of 2005.

2. GENERAL OBSERVATIONS ON THE CONSULTATION

In total the Commission received 195 replies to the list of questions set out in the PPP Green Paper. Governments or individual ministries from Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Lithuania, the Netherlands, Poland, Portugal, Slovakia, Spain, Sweden and the United Kingdom, 15 other public authorities from these Member States, 111 associations with private and/or public entities as their members, 38 enterprises and 13 individuals contributed in writing to the consultation. No contribution – either from State authorities or from private entities – was received from Cyprus, Estonia, Greece, Hungary, Latvia, Luxemburg, Malta or Slovenia. The strong representation of contributions from Germany, France, UK, Austria and Italy is notable. A large number of European associations contributed to the significant overall participation of stakeholders in this consultation.

Both the European Economic and Social Committee[4] and the Committee of the Regions[5] adopted opinions on the PPP Green Paper. The European Parliament has not yet given an opinion on the PPP Green Paper.

The Commission also received 3 300 standard letters or short notes from individuals, mostly of German origin. These letters expressed concern about any move to liberalise the provision of water.

3. EXECUTIVE SUMMARY

3.1. Horizontal PPP initiative

A slight majority of contributors are explicitly opposed to a horizontal PPP initiative at Community level. In contrast to this, **many stakeholders express support for a horizontal PPP initiative**, be it in the form of a binding or a non-binding instrument. Such an initiative is proposed to cover at least the following issues: generally applicable procedural rules, a clear definition of PPPs, general principles and compulsory advance publication of invitations to tender.

---

4 Opinion on the Green Paper on public-private partnerships and Community law on public contracts and concessions, Brussels, 27-28 October 2004, CESE 1440/2004.

5 Opinion of the Committee of the Regions of 17 November 2004 on the Green Paper on public-private partnerships and Community law on public contracts and concessions (COM(2004) 327 final), ECOS-037.

3.2. Selection of the private partner

Many contributors consider that the transposition of the new procurement procedure known as **competitive dialogue** into national law will provide interested parties with a procedure which is particularly well suited to awarding contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. However, a large majority of stakeholders point to practical problems with applying this procedure and ask the Commission to provide clarification.

In spite of the positive overall perception of the existing Community legal framework, **a clear majority** of stakeholders **favour some sort of Community initiative in the area of concessions,** clarifying definitions and core principles of the award procedure. The number of stakeholders in favour of legislation on this issue approximately equals the number of stakeholders in favour of some sort of guidelines on the rules applicable to awarding concessions.

The great **majority** of stakeholders **believe** that **non-national operators are guaranteed access to private initiative PPP schemes** and that advertising is adequate to inform all interested operators about such schemes. A large number of stakeholders, however, argue in favour of **some sort of encouragement for private initiative PPPs**.

3.3. The contractual framework for PPPs

Few stakeholders report conditions of execution having a discriminatory effect or forming an unjustified barrier to the freedom to provide services or the freedom of establishment. Not many more contributors cite **examples of discriminatory effects of practices for evaluating tenders**. Consequently, the **great majority** of contributors **do not support an EC initiative on the contractual framework for PPPs**.

3.4. Subcontracting

A **significant majority** of stakeholders **do not perceive problems in relation to subcontracting** and **argue against new initiatives in this area.** Conversely, a large number of contributions report problems in relation to subcontracting, including the reduced control public authorities exercise over subcontractors, the difficult position subcontractors have vis-à-vis the main contractors and uncertainties as to which EC rules apply.

3.5. Institutionalised PPPs

There is no agreement on **whether or not Community law on public contracts and concessions is actually complied with** when undertakings are set up jointly by public and private companies to carry out infrastructure projects or to perform public services (institutionalised PPPs – IPPPs). A substantial number of contributions deplore the **lack of legal certainty at EC level** regarding relations between contracting authorities and other parties which are so close that they are treated as relations between entities not legally distinct from each other ("**in-house relations**").

A **clear majority of contributions argue in favour of taking the initiative at Community level** to clarify or define the obligations of contracting bodies regarding the conditions for a call for competition between operators potentially interested in an institutionalised project. A majority of those contributions that favour a Community initiative would prefer the Commission – at least as a first step – to provide guidelines or some other form of clarification on the application of existing public procurement rules to the establishment of IPPPs. Other contributors who favour a Community initiative argue that legislative measures at EC level would be the appropriate response to perceived difficulties in this area.

3.6. Perceived barriers to the introduction of PPPs

Various stakeholders consider the **existence of too many and too strict rules to be an obstacle** to the development of PPPs. In particular, contributors from the public side, but also various private undertakings and associations, complain that EC, national and local rules applicable to PPPs limit the flexibility needed to set up such projects. Another major issue which many stakeholders suspect impedes the development of PPPs concerns EU co-financing under EC regional policy.

3.7. Collective consideration

Stakeholders express **nearly unanimous support for a collective consideration of PPP issues at EC level**. According to a large number of contributions the objective of such collective consideration should be to exchange best practice. To this end the majority of contributions argue in favour of establishing a European PPP agency, a centre of excellence/resources and documentation centre or an observatory. Most of the contributors to the consultation expect the Commission to take such an initiative.

Views of stakeholders on key topics	
• **Horizontal PPP Initiative**	**Slight majority** explicitly **opposed** to a horizontal PPP initiative at EC level.
• **Concessions**	**Clear majority in favour** of an EC initiative on the award of concessions, clarifying definitions and applicable Community rules. **No consensus** on the form of such an initiative.
• **Institutionalised PPPs**	**Clear majority in favour** of an EC initiative on institutionalised PPPs clarifying applicable Community rules and the scope of the in-house exemption. **No consensus** on the form of such an initiative.

4. THE MAIN RESULTS OF THE PUBLIC CONSULTATION

4.1. The suitability of the Competitive Dialogue procedure for the selection of private partners for PPPs

Question 2 of the PPP Green Paper

Question
In the Commission's view, in the context of a purely contractual PPP, the transposition of the competitive dialogue procedure into national law will provide interested parties with a procedure which is particularly well adapted to the award of contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. Do you share this point of view? If not, why not?
Main views of stakeholders • **Many contributors consider the Competitive Dialogue to be well adapted to the award of contracts designated as public contracts.** • **A large majority of stakeholders report problems with applying the procedure in practice, in particular as regards its scope, its complexity, its cost implications and the need to keep intellectual property confidential.** • **Most of the contributors ask the Commission to provide clarification on various aspects of the Competitive Dialogue.**

4.1.1. Scope of Competitive Dialogue

Some contributors argue for a limitation, some for an extension of the scope of application of the Competitive Dialogue procedure. A considerable number of contributors stress that the procedure does not apply to awarding service concessions; a few others say that it is not applicable to PPPs, including institutionalised PPPs, either. The reason most often given is that the Competitive Dialogue is not flexible enough. Conversely, one stakeholder considers the Competitive Dialogue to be particularly well suited to PPPs which are not complex, while two participants in the consultation specifically ask for the Competitive Dialogue to be applied to setting up institutionalised PPPs.

Many contributors are uncertain about the scope of the Competitive Dialogue; some miss a clear delineation of the boundary between this procedure and the negotiated procedure. One law firm considers that the contracting authority enjoys too much discretion in interpreting the criteria which determine whether the Competitive Dialogue applies.

4.1.2. Concerns about protection of confidentiality

The majority of the contributors express concern that participants in the Competitive Dialogue could potentially gain access to confidential data. These contributors point out that under Article 29(6), first subparagraph, of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, contracting authorities shall ask the participants to the dialogue to submit their final tenders on

the basis of the solution or solutions presented and specified during the dialogue. It is claimed that this might lead to the unauthorized transfer of intellectual property, including innovative ideas, from one bidder to his or her competitors. The perceived consequences of this practice include a loss of improvements to public services and of benefits through innovation. Many of the contributors are also concerned that contracting authorities might unduly profit from know-how; unsuccessful bidders are not compensated.

4.1.3. Perceived lack of flexibility of Competitive Dialogue

Various contributors appreciate the structure of the Competitive Dialogue, in particular the fact that a procedure in stages has been introduced and that all aspects of the project are potentially open to discussion in the course of the first stage. One contributor expects that the introduction of the Competitive Dialogue will increase the number of PPPs set up in his country of origin.

Conversely, many contributors complain that the Competitive Dialogue does not provide the degree of flexibility required to negotiate large, complex projects. The Competitive dialogue is perceived as a particularly costly procedure for bidders. Some stakeholders see the cost as being so high as to impede fair competition, as only a small number of competitors – excluding SMEs – can afford it.

In this context, contributors are particularly concerned about the provision in the second subparagraph of Article 29(6) of Directive 2004/18/EC that tenders may – subsequent to their submission as "final" – (only) be clarified, specified and fine-tuned, without changes to their basic features. This might require bidders to finalise many details of the bid before submitting it as the final tender, thus before the respective bidder can be certain of winning the contract. Under the Competitive Dialogue procedure, losing bidders would therefore incur the full cost of employing advisers to negotiate almost fully the terms of a complicated contract to the stage at which it can be signed. Issues such as staff transfer and preparation of the financial and legal documentation would also have to be decided before submission of the final tender, which entails considerable investment for bidders. Another argument against working out the full proposal before being sure of winning the contract is – according to various contributions – that banks are reluctant to carry out a full due diligence exercise until their client has secured the contract.

Against this background, the respective contributors stress the need to grant bidders scope to modify the final tender after the contract is awarded. If the Competitive Dialogue does not allow that flexibility, it cannot – according to these stakeholders – be considered well suited to complex PPPs and this might discourage prospective bidders from participating in such procedures. One stakeholder adds that "clarifications" made after the selection of the preferred bidder need to be made transparent, in order to avoid abuse. Another warns against allowing solutions which deviate from the essential requirements of the invitation to tender.

In order to reduce the cost of the Competitive Dialogue, a number of stakeholders argue in favour of keeping the procedure as short and effective as possible. To this end, two contributors contend that public administrations need to clearly disclose their needs at the outset of the procedure, to impose reasonable deadlines for the

different stages of the procedure and to limit the number of candidates for the phase after the dialogue to two.

While certain stakeholders consider that contracting authorities need to be able to define the technical specifications in a way that secures the comparability of bids, others recognise that it is difficult for contracting authorities to specify all their needs and requirements in the initial contract notice, as they will most probably become aware of other needs and requirements in the course of the dialogue. More generally, several contributors expect that contracting authorities will tend to leave the definition of the requirements of the project to private operators and thereby gradually lose the ability to administer large projects. In this context, one contributor stresses that bidders might be deterred from participating in a procurement procedure if contracting authorities give the impression of opening a procurement procedure without really knowing what they want.

4.1.4. Plea for compensation of non-successful bidders

Many stakeholders argue in favour of a mechanism to compensate bidders who made it to the last round without ultimately being selected. These stakeholders contend that there is otherwise little incentive for potential bidders to develop (costly) technical innovations at the risk of their being disclosed to competitors. One stakeholder from the public sector argues that a requirement to compensate unsuccessful bidders would make the Competitive Dialogue less attractive for small and medium-sized public authorities.

4.1.5. Guidance on applying the Competitive Dialogue is needed

A substantial number of stakeholders argue in favour of adopting a guidance paper on the application of the Competitive Dialogue. One issue which contributors consider worth clarifying is whether the submission of final tenders referred to in Article 29(6) of Directive 2004/18/EC should be based on the solutions presented individually by each bidder – which is, for reasons of confidentiality, explicitly preferred by some contributors – or on a solution proposed by one bidder – which is preferred by those who advocate the comparability of the proposals, in order to ensure equal treatment of bidders. In the view of various contributors, other issues requiring clarification include the scope of the Competitive Dialogue, the need to compensate unsuccessful bidders, the need to continue with the Competitive Dialogue even if, after the procedure has started, it turns out that the project in question qualifies as a concession, the extent of the protection of confidentiality, and certain terms set out in Article 29 of Directive 2004/18/EC, such as "economically most advantageous offer" and "basic features of the tender".

4.1.6. Views on the application of the negotiated procedure

In requesting flexible application of the rules governing the Competitive Dialogue, various contributors criticise the Commission for interpreting the scope of the negotiated procedure too restrictively. The Commission's position is thought not to deliver benefits in terms of transparency, openness or minimising barriers to trade. Easier recourse to the negotiated procedure is – according to various contributors – necessary, as the assignment of economic and legal risks linked to PPP models requires intensive negotiation during all phases of the procedure. Along these lines,

many stakeholders question the need for the Competitive Dialogue, which is thought not to provide any added value compared to the negotiated procedure.

4.2. The selection of private partners for contractual partnerships

4.2.1. Problems related to contractual PPPs in terms of Community law on public contracts

Question 3 of the PPP Green Paper

Question *In the case of such contracts* [meant are the purely contractual PPPs mentioned in Question 2]*, do you consider that there are other points, apart from those concerning the selection of the tendering procedure, which may pose a problem in terms of Community law on public contracts? If so, what are these? Please elaborate.*
Main views of stakeholders • **The main points considered to pose problems in terms of Community law on public contracts include the difficulty of distinguishing between the various types of public contracts and concessions and the related uncertainty as to the appropriate public procurement procedure.**

Various stakeholders point to the difficulty of distinguishing clearly between the various types of public contracts and concessions under EC public procurement law, and the related uncertainty as to the choice of the appropriate public procurement procedure, as key problems of current PPP practice.

Some contributions raise the problem of accuracy: inaccurate bids might unfairly favour certain bidders. Two situations are cited. One is where participants in PPP procurement procedures calculate their bids improperly. In many cases this wins them the contract, but subsequently requires a renegotiation of the terms. Stakeholders raising this problem argue that "creditworthiness" should be an important selection criterion, to ensure that private partners are able to stick to the price they initially offered. The other situation is where (over-) optimistic assumptions are made about certain factual developments, so that the price initially indicated by the respective operator is lower than that of his competitors. Again, if such assumptions turn out to be incorrect in the course of the performance of the contract, it must be renegotiated – and the public authority and competitors have lost out. One stakeholder cites estimates of the frequency of traffic in a given area affecting the profitability of a motorway as an example. To avoid such problems, it is proposed that contracting authorities provide reference estimates for factual developments relevant to the PPP.

Another point which two contributors raise is the de facto exclusion of SMEs from the bidding process for PPPs. The more contracting authorities combine individual small or medium-sized projects into single large projects, the more difficult it is for SMEs to win such contracts or concessions. The Competitive Dialogue,[6] with its financial ramifications for bidders, is specifically mentioned as being disadvantageous to SMEs in this respect.

[6] Article 29 of Directive 2004/18/EC.

An issue raised by a substantial number of stakeholders in the context of the procurement procedure for PPPs is the change of bidding groups (i.e. consortia established for the purpose of PPP award procedures, often in the form of so-called Special Purpose Vehicles – SPVs) in the course of the procurement procedure. These stakeholders favour flexibility in this area and ask for clarification of the law at EC level.

One stakeholder refers to legal uncertainties regarding the participation of consultancies in public procurement procedures, in the event that they assisted the public side in preparing such procedures. Another stakeholder complains that contracting authorities regularly ask just one consultancy for advice on preparing procurement procedures. It is argued that this situation leads to a degree of standardisation of invitations to tender which is considered detrimental to innovation and competition. In the view of this stakeholder, assisting public authorities in preparing invitations to tender should in any case be a publicly procured service as well.

Other contributors are of the opinion that contracting authorities should embark on a real dialogue with bidders, which includes providing proper answers to questions put by bidders in the course of the procedure. One contributor argues that when contracting authorities decide to withdraw an invitation to tender they need to give good, clear reasons for this decision.

4.2.2. The need for legislative initiatives at EC level on the award of concessions

4.2.2.1. Practical experience with award procedures for concessions

Questions 4 and 5 of the PPP Green Paper

Question *Have you already organised, participated in, or wished to organise or participate in, a procedure for the award of a concession within the Union? What was your experience of this?* *Do you consider that the current Community legal framework is sufficiently detailed to allow the concrete and effective participation of non-national companies or groups in the procedures for the award of concessions? In your opinion is genuine competition normally guaranteed in this framework?*
Main views of stakeholders • **Many stakeholders contend that the Community legal framework is sufficiently detailed in the sense of question 5.** • **Problems encountered in the course of award procedures for concessions include a lack of legal certainty, in particular as regards deciding whether a given contract qualifies as a public contract or a concession, discrimination against concession models by Community regional policy and the competitive advantages of national companies.**

While many stakeholders consider the Community legal framework sufficiently detailed to allow non-national companies to participate effectively in procedures for awarding concessions, and a substantial number of contributions describe their

practical experience in this field as positive, various other contributors point to problems encountered. These problems include a lack of legal certainty due to non-standardised public procurement procedures, confusion about which EU rules apply, in particular whether a given contract qualifies as a public contract or a concession, discrimination against concession models by Community regional policy and the competitive advantages of national companies.

In the view of many contributors, the perceived competitive advantages of national companies are not necessarily due to discriminatory national rules, but rather result from the facts on the ground, such as national companies' better knowledge of specific local conditions, including the national legal provisions, and language problems. Many contributors explain that large international companies make up for such disadvantages by establishing national subsidiaries.

4.2.2.2. General support for an EC initiative on concessions

Questions 6 and 7 of the PPP Green Paper

Question *In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?* *More generally, if you consider that the Commission needs to propose new legislative action, in your opinion are there objective grounds for such an act to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements?*
Main views of stakeholders • **A clear majority of stakeholders favour a Community initiative in the area of concessions. Views are divided on the form of such an initiative.** • **A Community initiative in this area should, above all, provide more clarity as regards the award procedure. However, there is broad agreement that public contracts or concessions should not be subject to identical award arrangements.** • **A key argument against any initiative on concessions is the perceived need for flexibility in award procedures.** • **Many stakeholders are in favour, but a slight majority are against a horizontal PPP initiative.**

General views on the necessity and possible shape of an EC initiative on concessions

A clear majority of stakeholders are in favour of a Community initiative on concessions. Overall, the number of stakeholders in favour of legislation approximately equals the number of stakeholders in favour of some sort of guidelines on the rules applying to procedures for awarding concessions. A majority of contributors, however, do not see any objective grounds for new legislative action to cover all contractual PPPs, irrespective of whether these are designated as contracts or concessions, to make them subject to identical award arrangements.

Views in favour of a guidance document on the award of concessions

A large number of contributors say that guidance on concessions should primarily focus on the definition of concessions, clearly delineating these arrangements from public contracts. This initiative should, in particular, clarify which and to what extent risks have to be assigned to the private partner, to justify treating the respective arrangement as a concession. Clarification is also requested on how to apply the basic EC Treaty principles, in particular transparency, when awarding concessions.

Other contributors argue that the new Public Procurement Directives[7] have just been adopted, but not yet implemented by the Member States. Until those Directives are fully implemented, they consider any Community initiative going beyond a guidance document to be premature. They argue that before tackling such a binding Community initiative, the Commission should update its Interpretative Communication on Concessions under Community Law[8] of April 2000, on the basis of experience gained in this area. Another contributor favours a guidance document and questions whether detailed EC legislation is appropriate to change anti-competitive behaviour by public authorities.

One contributor submits that an initiative on concessions should consist in exchanging best practice, rather than drafting rigid legislation.

A considerable number of stakeholders advocate a non-legislative initiative at Community level to provide more clarity on public procurement issues in relation to PPPs in general. One suggestion is to present the different types of PPPs and explain which public procurement procedure is best suited to each of these types. Other demands for clarification cover the definition of PPPs, including the distinction between works concessions and works contracts, and the formulation of general principles applicable to tendering for PPPs. As regards the difficulty of deciding at the outset whether the contract is a public contract or a concession[9], one contributor suggests that, where there is any doubt, the transaction should be treated as a service contract if there is a reasonable chance that it will be so defined later on. Another contributor recommends sticking to the initial qualification even if – in the course of the procedure – it turns out to be inappropriate.

Considerable support for legislation on the EC concession award regime

Most of the stakeholders who argue in favour of a legislative initiative cite the need for legal certainty at EC level for the award of concessions. Uncertain rules are said to impede the protection of private investment and increase consulting and legal advice costs for undertakings. Other stakeholders contend that the provision of a common set of EC rules on this subject would create a level playing field for all competitors, thereby safeguarding the Internal Market, and eventually enhance (transnational) competition and cross-border tendering. A group of contributors say that the general EC Treaty principles do not provide enough legal certainty: they

---

7 Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p.1) and Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p.114).

8 OJ C 121, 29.4.2000, p.2.

9 Point 34 of the Green Paper.

leave too much discretion to contracting authorities and cannot therefore guarantee equal treatment of European companies throughout the EU.

Another key argument in favour of EC legislation is the need to increase transparency. According to one contributor, most problems with PPPs concern the choice of the private partner and consequently one risk to such projects would be reduced if specific PPP public procurement rules at EC level were introduced. In addition, the fact that major concessions in water supply or toll roads are not subject to strict procurement rules is seen as a serious anomaly of EC public procurement law.

As to the content of a legislative EC initiative on concessions, some contributors say that it should at least clearly define the various types of concessions and provide a legal framework for the award procedure for concessions. Some contributions submit that a legislative initiative on concessions should be part of a general legislative initiative on PPPs, which should cover the obligation to open a competitive procedure for the award of a contract, including its proper publication, the definition of "in-house" and the guarantee of equal access to subsidies. The analysis of the large number of contributions from stakeholders who are in favour of a legislative Community initiative on PPPs in principle shows, however, that few are actually in favour of aligning the procedures for contracts and concessions.

On the form of possible legislation, one stakeholder says that a legislative PPP initiative should merely consist in amending Directive 2004/18/EC, rather than "inventing" an entirely new initiative. According to various stakeholders, any EC initiative on the award of concessions should leave sufficient flexibility for projects to evolve into different structures and allow for fundamental differences between projects in different industry sectors. Other stakeholders stress that national experience needs to be analysed carefully before any legislation is drafted in this area.

Many stakeholders are in favour but a slight majority of stakeholders are against a horizontal PPP initiative

Many stakeholders express support for a horizontal PPP initiative, be it in the form of a binding or a non-binding instrument. Such an initiative is proposed to cover at least the following issues: generally applicable procedural rules, a clear definition of PPPs, general principles and compulsory advance publication of invitations to tender. The reasons given for such a horizontal initiative include the need to increase legal certainty, make procedures transparent, save time and money and more generally to encourage competition.

Many contributors are explicitly opposed to such an initiative. They argue that PPPs and public contracts are too different from each other to be subject to the same rules, that setting up PPPs remains a matter for the Member States, that overregulation impedes rather than promotes PPPs and that there has not been thorough analysis nor sufficient experience, in particular with the implementation of the new Public Procurement Directives. Stakeholders supporting these arguments refer, however, to the possibility of revisiting this question once sufficient analysis and experience has been built up.

Views against any EC initiative on concessions

Many contributors opposing any EC initiative on concessions argue that concessions are a special case. They say that such arrangements assign considerable risks to the private party in terms of services of general economic interest. Public authorities awarding concessions therefore need to have full confidence in their private partner. Against this background, they find it difficult to choose the right partner on the basis of a formal procurement procedure and more particularly on the basis of economic criteria.

In this context, some contributors say that when adopting the new Public Procurement Directives the EC legislator explicitly excluded concessions (partly as regards works concessions; entirely as regards service concessions) from the scope of these Directives. There is – according to these contributors – no new evidence to challenge that decision. In addition, many contributors invoke the subsidiarity principle as an argument against a legislative initiative on concessions; several others say the application of the EC Treaty principles is sufficient to ensure competition in this area.

Some of the contributors opposing a new Community initiative on concessions express concern that overregulation, in particular introducing rigid procedures, leads to high procedural costs and a loss of the flexibility needed to negotiate concessions, that it impedes the innovative development of PPPs and generally discourages private operators from entering into PPPs. In addition, many of those contributors who are opposed to aligning award arrangements for public contracts and concessions consider it impossible to define a single procurement concept to suit all PPPs. It is stressed several times that concessions and public contracts are quite different concepts.

Two contributions from the public side say that the award of concessions on the basis of competitive procedures would lead to a "win or die" situation for small public companies which have been specifically established to perform services of general economic interest. If such undertakings lose a competition they may not be able to participate in competitions outside their geographical area of competence – due to national legal restrictions, but also due to their specific competence – whereas large international enterprises could – according to this opinion – more easily withstand failure to obtain one or more small or medium-sized local service concessions. Consequently, according to these stakeholders, submitting the award of public services to competitive tendering procedures leads in the long run to the disappearance of small and medium public enterprises and thus contributes to a non-reversible "oligopolisation" of the market.

4.3. Private initiative PPPs

4.3.1. Accessibility of private initiative PPP schemes to non-national operators

Question 8 of the PPP Green Paper

Question *In your experience, are non-national operators guaranteed access to private initiative PPP schemes? In particular, when contracting authorities issue an invitation to present an initiative, is there adequate advertising to inform all the interested operators? Is the selection procedure organised to implement the selected project genuinely competitive?*
Main views of stakeholders • **Broad agreement exists that non-national operators are guaranteed access to private initiative PPP schemes and that adequate advertising is provided to inform all interested operators about such schemes.**

A large majority of stakeholders believe that non-national operators are guaranteed access to private initiative PPP schemes and that adequate advertising is provided to inform all interested operators about such schemes. Some contributors argue that the problem of access to private initiatives for non-national operators is not a real one, as normally non-national operators are not interested in such projects: two contributors explain that usually enterprises operate abroad through local subsidiaries. Some contributors claim that private initiative projects are extremely rare in the water sector. One large association contends that there are no examples of private PPP initiatives in Germany.

On a more general note, some contributors say that private initiative PPPs tend to be less rigorously scrutinised and are not subject to the same degree of competition as ordinary tenders, which they say favours corruption and causes high costs.

4.3.2. Proposals on the best formula to encourage private initiative PPPs in the European Union

Question 9 of the PPP Green Paper

Question *In your view, what would be the best formula to ensure the development of private initiative PPPs in the European Union, while guaranteeing compliance with the principles of transparency, non-discrimination and equality of treatment?*
Main views of stakeholders • **There is no agreement on the need to encourage private initiative PPPs.** • **Those stakeholders who favour such encouragement advocate financial incentives or the granting of a "right of first refusal" to those who launch private initiatives.**

A large number of stakeholders recognise the need for some sort of encouragement for private initiative PPPs; most of them present ideas. Conversely, a substantial number of contributors explain that the application of existing EC rules, in particular the EC Treaty principles, provides sufficient encouragement for operators to embark on private initiative PPPs. Many stakeholders acknowledge that any measure

encouraging private initiative PPPs needs to strike a balance: motivating operators to invest in such initiatives, while not distorting fair competition. Some stakeholders believe, however, that encouraging private initiative PPPs necessarily conflicts with the principles of transparency and equal treatment.

The majority of those contributors who express themselves in favour of some sort of encouragement for private initiative PPPs consider financial compensation as the appropriate instrument to promote such initiatives, in particular as this incentive appears to be the least damaging to competition. Some argue that such financial compensation should only be granted if, at the end of the procurement procedure launched subsequent to the private initiative, the operator concerned does not obtain the contract or the concession. Such compensation should at least cover the development costs of the project.

A substantial number of contributors consider granting a "right of first refusal" as the most pertinent way of encouraging private initiative PPPs. This would require the contracting authority to offer the contract or concession first to the private initiator. Several contributors add that if the initiator does not take up the offer, he should be granted financial compensation for his work. Other stakeholders argue that granting the "right of first refusal", rather than financial compensation, renders private initiatives more attractive as operators usually initiate PPPs in order to obtain a PPP contract or concession. Other advantages proposed by various contributors include setting relatively short time limits for competitors to respond to the tender, granting the private initiator an exclusive right to a negotiated procedure and introducing a fast-track process to deal with litigation initiated by competitors of the first mover, if the latter wins the contract. According to a large number of contributions the protection of the initiator's intellectual property is a key issue in promoting private PPP initiatives. One contributor suggests awarding part of the overall PPP contract/concession directly to the private initiator. Another stakeholder deplores the fact that most of the really innovative proposals come from medium-sized companies, who – due to their structure – have hardly any chance of winning a PPP competition.

Other contributors express the opinion that tackling overregulation and amending existing national stipulations which impede private initiatives would substantially encourage them. In this context, two contributors cite existing national provisions which exclude from the tendering procedure companies that have – however indirectly – contributed to preparing the specifications of the invitation for tender. One stakeholder draws a parallel between a private PPP initiator and an operator who assists the respective contracting authority in drawing up the specifications for a tendering procedure.

A substantial number of stakeholders explicitly refer to the Italian *Merloni Law*[10] as an example of a specific procedure for unsolicited PPP proposals. The incentive of giving the private initiator the "right of first refusal" and the right to have his costs repaid if the project is awarded to a competitor are considered to be key elements of this Italian law. Another concrete proposal to encourage private initiative PPPs is to

[10] Framework law No 109/94 (G.U. No 41, 19.2.1992) modified by Law No 166/2002 (G.U. No 181, 3.8.2002).

launch a formal public procurement procedure based on a private initiative proposal and to exclude the initiating private party from the procedure. If no better solution comes up in the course of the procurement procedure, the contract should be awarded to the initiating party. If a better solution than the initial proposal comes up, the initiating party should be compensated.

Referring to the trade-off between providing incentives for private initiative PPPs and encouraging competition, one contributor suggests that – subsequent to a private PPP initiative – public authorities should be entitled to award the contract to the private initiator without launching a formal procurement procedure if they expect that – due to the intellectual property rights of the private initiator – competition would produce limited benefits only; conversely, if greater benefits could be expected from competition, a proper public procurement procedure should be carried out.

One stakeholder argues that PPPs should in any case be initiated by the public side and follow a regular public procurement procedure. If the contracting authority is interested in exploring the interest of private parties in the envisaged PPP or in obtaining ideas on alternative solutions for a project before formulating the technical annex to the invitation for tenders, it can undertake "market research" or hold an "ideas competition", which follows precise rules to ensure adequate transparency and equal treatment.

As regards the method of promoting private initiatives, various contributors are opposed to the legislative route. Some fear that new legislation might constrain the establishment of PPPs. Conversely, a substantial number of stakeholders prefer PPP legislation or at least guidance on this issue. In addition to encouraging private initiatives, the legal framework would have to ensure transparency, non-discrimination and equal treatment. Other instruments to promote private initiative PPP schemes mentioned in the consultation included the provision of guidance, the exchange of best practice and the creation of a task force on this subject at EC level.

Some stakeholders argue that private initiative PPPs are attractive enough under existing rules, citing the Competitive Dialogue procedure as particularly suited to encouraging innovative thinking. The know-how acquired in the course of preparing the initiative puts the private initiator in an advantageous position vis-à-vis his competitors. Thus, any additional advantage granted to the respective operator could seriously distort competition. Along these lines, a number of stakeholders argue that the competitive advantage of operators initiating a PPP needs to be "neutralised", for example by making the studies and analysis done by the operator available to competitors.

4.4. The contractual framework for PPPs

4.4.1. Experience with and recommendations for the phase following the selection of private partners

Question 10 of the PPP Green Paper

In contractual PPPs, what is your experience of the phase which follows the selection of the private partner?

Various contributions stress that contracting authorities must prepare the contract well, in order to avoid problems in the phase following the selection of the private partner. The scope of the project, the performance expected from the private contractor and the clauses on adaptation over time should in particular be precisely defined. One stakeholder cites cases in which risk could not be clearly allocated to the private partner because the technical and organisational framework was not clear enough. Another recommends defining precisely the condition in which state property used by the PPP contractor has to be returned. Otherwise, bidders that do not maintain such property properly can offer lower prices than their competitors.

One public body cites negative experiences following selection of the private partner, including the insolvency of the private party, price increases for the services performed by the partner and an oligopolisation of the relevant market. One Member State Government cites good experiences following the award of the project when both the construction and maintenance of a building were contracted to one and the same company.

One stakeholder considers regular reviews of the PPP contract essential.

4.4.2. Conditions of execution – not considered to exhibit discriminatory effects

Question 11 of the PPP Green Paper

Question *Are you aware of cases in which the conditions of execution – including the clauses on adjustments over time – may have had a discriminatory effect or may have represented an unjustified barrier to the freedom to provide services or the freedom of establishment? If so, can you describe the type of problems encountered?*
Main views of stakeholders • **Few stakeholders are aware of cases where the conditions of execution – including the clauses on adjustments over time – had a discriminatory effect or represented an unjustified barrier to the freedom to provide services or freedom of establishment.** • **There is broad consensus that the duration of the contract is not a source of discrimination in current PPP practice and that adjustments to long-term PPPs over time are needed.** • **Those contributors who perceive discriminatory effects complain in particular about the different treatment of public and private companies.**

4.4.2.1. General remarks

Few stakeholders are aware of cases where the conditions of execution – including the clauses on adjustments over time – have had a discriminatory effect or represented an unjustified barrier to the freedom to provide services or freedom of establishment. Those contributors who perceive discriminatory effects complain in particular about the different treatment of public and private companies (preferential tax treatment and the lack of insolvency risk of public undertakings). One stakeholder cites "evergreen" clauses (i.e. requiring the private contractor to keep the technical standard of a project at the state of the art) and automatic renewal clauses as problematic.

4.4.2.2. Duration of PPPs

The general perception of contributors is that the term of the contract is not a source of discrimination in current PPP practice, as long as it is clearly spelt out in the descriptive documents. Various stakeholders contend that an extension of the contract which is not provided for in the initial contract requires a new public procurement procedure.

Several contributors comment on the statement in the PPP Green Paper that the duration of the partner relationship must be set so that it does not limit open competition beyond what is required to ensure that the investment is recouped and there is a reasonable return on invested capital.[11] It is argued that the term of the contract should be principally determined by the life of the infrastructure assets, rather than by the amortisation of a project. Other issues to be considered when deciding on a reasonable term for a PPP are – according to some stakeholders – technical continuity, security of supply, optimisation of maintenance and renovation of infrastructure. It is also contended that training personnel requires a certain length of time, to enable the private contractor to fully benefit from his investment in such training. In addition, frequent competition procedures resulting from short-term PPP contracts or concessions are thought to increase the overall costs of a PPP. One stakeholder says that in many cases it is in the public interest to allow service delivery to mature and improve over a longer period, to ensure greater innovation and experimentation to find the best ways of delivering public services. Shorter-term contracts, on the other hand, might encourage the operator to focus on maximising revenue generation before the next competition.

One contributor suggests that it is in any case difficult to set criteria for an acceptable term for PPP projects. Another warns against limiting the length of PPP contracts, which might decrease private interest in such contracts. Conversely, some contributors share the Commission's concern regarding the effects of long-term contracts on competition and equality of treatment.

4.4.2.3. Adjustments to long-term PPPs over time

An overwhelming majority of contributors to the consultation acknowledges the need for adjustments to long-term PPPs over time. It is considered crucial that the initial PPP contracts provide for a certain degree of flexibility. Various contributors say that public services, in particular, need to be adjusted regularly to the changing needs of consumers and public authorities. Thus, PPP contracts should have some scope for adjustment. Furthermore, such provisions in the initial contract are considered unproblematic as they are laid down under conditions of full competition.

Various stakeholders say a new public procurement procedure is needed if the overall object of the contract changes. Other stakeholders report that in practice abuses such as unwarranted adjustments of PPP contracts are rare and do not justify regulatory action. One contributor refers to experience suggesting that reopening negotiations due to substantial modifications of a contract usually results in a better

[11] Point 46 of the Green Paper.

deal for the original private partner, rather than an improvement in the public interest.

Some stakeholders argue that adjustments to the PPP contract or concession should be allowed, even if they are not provided for in the initial contract or concession. They argue that not all needs for future adjustment of a contract can be foreseen when it is concluded and only practical experience with performance of the contract show whether and where adjustments over time are necessary.

A number of contributors express an interest in EC rules providing clarification on the types of changes in the course of the execution of a PPP which are compatible with EU law.

Among those contributors who criticise the adjustment of PPP contracts and concessions over time, several say that readjustment clauses can have discriminatory effects. As an example they cite the case of exaggerated traffic forecasts in the initial bid making it at first sight economically advantageous. If the public authority agrees to the bidder's subsequent request to readjust the contract, this might discriminate against competitors who based their initial bids on more realistic estimates. Along the same lines, another contributor points out that many bidders tend to assume time limits for completion of the project which turn out to be unrealistic. Subsequent amendment of the contract, leading to an extension of the time limits for completion, would be unfair to those competitors who did not obtain the contract because they were more realistic in their estimates.

4.4.3. Views on potentially discriminatory effects of practices for evaluating tenders

Question 12 of the PPP Green Paper

Are you aware of any practices or mechanisms for evaluating tenders which have a discriminatory effect?

Not many of the contributors are aware of discriminatory practices for evaluating tenders. Some contributors point out that if discrimination occurs, national legislation, rather than EC rules, should address such grievances.

One contributor says that complex selection criteria for evaluating tenders make it easier for contracting authorities to discriminate. Other contributors say there is a risk of discrimination if invitations to tender do not contain all the details of the award criteria or are in other respects not precise enough. Some stakeholders cite cases of evaluation practices with potential discriminatory effects where qualification criteria are used as award criteria and where evidence for quality and competence has to be given in the form of references, proofs of financial standing and experience: they say this favours established bidders.

Another contributor reports cases where evaluation criteria were set which had not been made clear in advance or where over- or underproportional weight was given to known criteria. Other issues raised in this context are amendments to technical requirements or to evaluation criteria made during the tender procedure, the evaluation of subjective award criteria by "experts" who do not know the subject well enough and ratings being given in the course of an evaluation without proper (or any) justification.

One stakeholder refers to the public sector comparator as a useful method of evaluating bids.

4.4.4. Step-in arrangements: considered to be indispensable for the financing of PPPs

Question 13 of the PPP Green Paper

Question
Do you share the Commission's view that certain "step-in" type arrangements may present a problem in terms of transparency and equality of treatment? Do you know of other "standard clauses" which are likely to present similar problems?
Main views of stakeholders
• **There is broad consensus that step-in clauses are of crucial importance for the financing of PPPs without raising particular procurement problems.**

Few contributors consider "step-in" type arrangements to present a problem in terms of transparency and equality of treatment. No other standard clauses are considered likely to present similar problems.

Nearly all stakeholders who express an opinion on this issue explain that step-in clauses are of crucial importance for the financing of PPPs without raising particular procurement problems, as these clauses allow the parties to avert termination of the PPP contract or concession if the private PPP contractor is in breach of the contract. One stakeholder explains that step-in rights are particularly important to safeguard the investment of banks, when the operator is a Special Purpose Vehicle (SPV: a consortium established for the purpose of PPP award procedures) and the value of the bank's investment thus depends primarily on the income stream from that project.

Step-in clauses are considered a substitute for other, more expensive forms of guarantee, such as personal or collateral securities. Thus, they make the overall project cheaper. Apart from this, step-in clauses are considered to be advantageous to contracting authorities as the stepping-in lender could revive the project and therefore avoid disruption of the service.

Some stakeholders point to the alternative scenario to stepping-in by the financial lenders: the potentially badly performing project would have to be put out to tender again and it might be difficult to find someone who is interested. Furthermore, a new public procurement procedure is considered to be time-consuming, and time is particularly tight for projects which are already in a critical condition.

Conversely, the risk of financial parties misusing such clauses is considered to be low, particularly as actual recourse to step-in clauses – often viewed as a temporary crisis measure – is extremely rare in practice. Nevertheless, some stakeholders insist that clear procedures for stepping-in have to be set out in the initial contract, to ensure adequate transparency and to give local authority the possibility of keeping control over a private party stepping into the contract. It is reported that usually step-in clauses are supplemented by a direct agreement between the contracting authority and the lenders. Various stakeholders say that one of the reasons for step-in clauses not presenting a problem in terms of transparency and equality of treatment is the fact that they are concluded under full competition.

Some stakeholders fear that if the EC legislator questions the current form of step-in clauses, this might have negative impacts on the future financing of PPP projects.

On a more general note, some contributors say that cession clauses in PPP contracts should be allowed. Such clauses reflect a balance between the public interest in correct performance and the private interest in being able to treat the PPP contract as an asset, which should in principle be transferable to third parties. Against this background, public authorities should – according to two contributors – be allowed to object to cessions, but need to back any such objection with objective reasons. These principles, according to another stakeholder, should not only apply to a change in the public authority's contract partner, but also to a change in the principal shareholder of the contract partner. One public procurement expert adds that there is no reason for a new public procurement procedure in cases of a change in ownership on the private contractor's side. According to this view, the purpose of public procurement regulation is not to safeguard the authority's freedom of choice, but to limit the authority's freedom to choose its contracting partners to prevent discrimination. This objective is not in any way prejudiced by a decision by a private contracting partner to assign the contract for commercial reasons.

4.4.5. No need for clarification of certain aspects of the contractual framework of PPPs at EC level

Question 14 of the PPP Green Paper

Question *Do you think there is a need to clarify certain aspects of the contractual framework of PPPs at Community level? If so, which aspects should be clarified?*
Main views of stakeholders • **A large majority of stakeholders say that an EC initiative on the contractual framework of PPPs is not needed. A considerable number of stakeholders ask, however, for some sort of clarification in this area.**

A large majority of contributors express themselves against any EC initiative on the contractual framework for PPPs, arguing that on the one hand this area falls within national competence for contract law and that on the other hand new EC rules might complicate existing public procurement procedures and thus lead to more bureaucracy.

A considerable number of stakeholders are, however, in favour of some sort of clarification at EC level in this area. Issues which – according to these stakeholders – require clarification are the extent of the rights and obligations of the contractual partners, the requirement that contracting authorities compare the advantages of private and public performance, the standardisation of contracts and the procedures for regulating conflicts. An argument in favour of such an initiative is – according to one contributor – the possible reduction of sometimes prohibitively high transaction costs.

Many stakeholders believe, however, that the relevant clarifications should be provided at national, rather than at EC level. One stresses that the introduction and assessment of contractual standards for PPPs is an issue for private parties.

4.5. Subcontracting

4.5.1. Perceived problems in relation to subcontracting

Question 15 of the PPP Green Paper

Question *In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.*
Main views of stakeholders • **A significant majority of stakeholders do not perceive problems in relation to subcontracting.** • **Problems reported by many other contributors relate to the supposedly weak position of subcontractors and uncertainties regarding the applicable EC law.**

4.5.1.1. Overview

A significant majority of stakeholders do not perceive problems in relation to subcontracting. Among the large number of contributions reporting problems in this area, one group of stakeholders expresses a certain scepticism towards subcontracting in general, another group welcomes the possibility of subcontracting, but complains about the limiting factors. Issues raised by contributors who are rather sceptical about the current practice of subcontracting in the Member States include the reduced control that public authorities can exercise over subcontractors, the difficult position of subcontractors vis-à-vis the main contractors and uncertainties with regard to the applicable EC law.

4.5.1.2. Problems related to control over the performance of public services

In principle, public services are the responsibility of public authorities. Therefore, in the view of various stakeholders, public authorities have to retain a certain level of control over the actors delivering such services. In the view of these stakeholders, subcontracting limits this control. For example, if public services are subcontracted the contracting authorities might have difficulty contacting the undertaking actually performing the service. This is thought to lead to delays, which might affect the quality of the respective service. One stakeholder therefore suggests setting out clearly in the contractual framework when and under what conditions subcontracting is permitted. This suggestion is supported by another stakeholder who believes that – as a basic principle – the concessionaire needs to perform the public service himself and subcontracting should therefore be considered an exception to this rule, requiring special consideration in the initial contract.

4.5.1.3. Problems related to the position of subcontractors

Some stakeholders point to the pressure various contractors allegedly exert on their subcontractors. According to them, subcontractors have to accept low prices and/or inadequate social rules. In the view of another stakeholder this risks leading to a degradation of the quality of public services.

One association points to the specific problems architects encounter when they obtain subcontracts in the course of a PPP. The association fears that subcontracting dis-empowers architects from influencing how the construction in question is carried out, which might have negative impacts on the final product.

One contributor is concerned about the poor capacity of subcontractors to cover all risks linked to their work, while another warns that, if the global contractor passes all risks to subcontractors, he may have no incentive to manage all the issues arising effectively himself.

4.5.1.4. Uncertainties with regard to the applicable EC law

A number of stakeholders are concerned about the lack of clarity of rules governing subcontracting at EC level as the rules vary depending on whether the underlying legal arrangement is defined as a public contract or a concession and whether the specific Public Procurement Directives apply. Consequently, stakeholders ask for a clearer distinction between contracts and concessions and between the scope of Directive 2004/17/EC and Directive 2004/18/EC. Reportedly, these uncertainties have caused confusion in practice, which is considered not to be sustainable on a commercial basis. One contributor complains about the lack of a clear definition of subcontracting at EC level and – due to different interpretations of EC law – the heterogeneity of contractual clauses applied in the Member States.

4.5.1.5. Other problems related to subcontracting

One contributor highlights the problem of "secondary markets", where a private contractor who entered into the original PPP sells on his share of the PPP contract to another private sector provider. While in these cases the service is still delivered and the requirements of the contract met, the private company that entered into the original agreement can make sizeable profits. There is criticism that none of this additional profit is passed to the public sector.

Another contributor says that – contrary to the ECJ judgment C-314/01[12] – Member States prohibit the transfer of the actual performance from the winner of the competition to a third party.

Some contributors are discontent with the "double tendering" requirement in the case of public contracts awarded to companies which are partly owned by the public sector. As these companies risk being considered contracting authorities, they are subject to tendering procedures in relation to their downstream contracts. This is considered to constitute a competitive disadvantage vis-à-vis their private competitors.

4.5.2. Clear opposition to more detailed rules for subcontracting

Question 16 of the PPP Green Paper

[12] ECJ, C-314/01, ECR 2004, not yet published. In paragraph 46 of this judgment the ECJ states that a tenderer claiming to have at its disposal the technical and economic capacities of third parties on which it intends to rely if the contract is awarded to it may be excluded only if it fails to demonstrate that those capacities are in fact available to it.

Question *In your opinion does the phenomenon of contractual PPPs, involving the transfer of a set of tasks to a single private partner, justify more detailed rules and/or a wider field application in the case of the phenomenon of subcontracting?*
Main views of stakeholders • **There is broad consensus against new initiatives in the area of subcontracting, in particular as regards the potential extension of tendering requirements to such contracts.** • **A substantial number of stakeholders consider additional rules in this area useful, in particular to guarantee fair competition.**

4.5.2.1. Arguments against an extension of tendering rules for subcontracting

An overwhelming majority of contributors argue against new initiatives in the area of subcontracting, in particular as regards the potential extension of tendering requirements to such contracts.

Most of those who oppose rules extending tendering requirements to the conclusion of subcontracts argue that PPPs are characterised by the transfer of risks to one private party. They contend that this private party needs to have full flexibility when fulfilling the contract, in particular when managing the risks assumed as part of the contractual obligations. Rules limiting the main contractor's ability to choose his subcontractors would limit this flexibility unhelpfully, for example by preventing him from cooperating with undertakings with which he has long–standing, smoothly running relations.

This is, however, not the only perceived PPP-specific problem in relation to extending public tendering requirements to the selection of subcontractors. In the case of many PPP procurement procedures bidding consortia – usually referred to as Special Purpose Vehicles (SPV) – are established. A substantial number of contributors consider that the opportunity for members of these consortia to obtain parts of the awarded contract directly is the driving force behind their establishment. These stakeholders believe that introducing an obligatory tendering procedure for subcontracting would have adverse effects on the formation of such consortia and PPPs more generally. One stakeholder summarises these adverse effects as follows: "To introduce rigidity into the subcontract level would decrease the ability of the SPV and its principal subcontractors to manage their risks, potentially increase costs or reduce the level of risk transfer to the private sector and add to the cost and duration of the procurement process."

Other consequences to PPPs of introducing a formal tendering procedure for subcontractors, according to many stakeholders, include delays, higher costs and reduced efficiency. One stakeholder explains that bidders need to include considerable time for procurement activity in their schedules plus a safety margin for legal challenges if procurement rules apply subsequent to the award of a PPP contract or concession. This could – according to this stakeholder – turn a potentially viable PPP project into a non-viable project.

It is also argued that imposing downstream competition would be contrary to the spirit of PPPs leading to a mere set of subcontracts, and that even upstream competition would be distorted as the candidates, faced with the unknown quantity of their subcontractors' future competitive bidding procedures, could not submit their best prices. Many other contributors state that the introduction of a rigid tendering regime downstream of the award of the PPP does not provide any advantages for the public authority compared to the status quo. They argue that public authorities can obtain sufficient control over subcontractors by requiring bidders to indicate their proposed subcontractors in the course of the initial PPP competition. Consequently, the choice of subcontractors would be part of the competition for the initial PPP contract or concession, making downstream competitive tendering redundant. Along these lines, one stakeholder insists that the initial contract should clearly spell out the conditions for changing subcontractors. Another contributor adds that if the contracting authority is dissatisfied with the performance of subcontractors, it has recourse to the payment and termination rights set out in the contract with the main contractor.

Some contributors consider Article 60 of Directive 2004/18/EC, which sets out specific requirements for works concessionaires in relation to subcontracting, as an example of unduly limiting the main contractor's flexibility in choosing subcontractors. This provision is considered to jeopardise the financial viability of PPP concession models, and the scope for setting up such concessions. One contributor criticises it as being at odds with the general lack of regulation of subcontracting pursuant to the award of public contracts.

Another stakeholder argues that the introduction of new tendering rules for subcontracting would not be in line with the existing system of public procurement at EC level as set out in Article 32(2)(c) of Directive 92/50/EC[13] and construed by the ECJ in case C-176/98[14]. This holds that a service provider which does not itself fulfil the minimum conditions required for participation in the procedure for the award of a public service contract is entitled to rely, vis-à-vis the contracting authority, on the standing of third parties upon whose resources it proposes to draw if it is awarded the contract. Such reliance on third parties would – according to this stakeholder – be impossible if subcontractors could only be selected subsequent to a separate formal tendering procedure.

4.5.2.2. Proposals for more detailed rules on subcontracting

A substantial number of stakeholders consider that existing public procurement rules do not provide sufficient guarantee of fair competition in subcontracting and therefore advocate obligatory tendering in this respect. Other advocates of obligatory tendering argue that large sums of public money are involved in PPPs and that the subcontractors usually assume public duties which should – on principle – be performed by the main contractor himself.

---

13 Directive 92/50/EC relating to the coordination of procedures for the award of public service contracts. This stipulation corresponds to Article 48(2)(b) of Directive 2004/18/EC.

14 C-176/98, *Holst Italia SpA v. Commune di Cagliari*, Judgment of 2 December 1999, paragraph 27.

Other stakeholders in favour of more detailed rules say that contracting authorities need to maintain control over subcontracting, implying a right to be informed of the identity of subcontractors and the opportunity to object to the subcontractor.

One stakeholder explains that unless subcontracting is subject to a formal tendering procedure, small and medium-sized enterprises will not take any part in PPPs. Some argue that the subcontracting of substantial parts of the project should in any case be limited, to prevent the whole contract being transferred to subcontractors.

Other stakeholders stress the need for new rules, to avoid undue lowering of social standards when the main contractor awards subcontracts. Such rules should at least prevent the conditions of the contract between the main contractor and the subcontractors from falling below the standard set between the contracting authority and the main contractor. Other rules on subcontracting proposed by stakeholders entail a compulsory minimum share of subcontracts being awarded to SMEs or local companies. Conversely, one stakeholder insists that the choice of SMEs should always be guided by economic, rather than regulatory, obligations.

4.5.3. Majority of stakeholders against a supplementary initiative at Community level to clarify or adjust the rules on subcontracting

Question 17 of the PPP Green Paper

Question *In general, do you consider that there is a need for a supplementary initiative at Community level to clarify or adjust the rules on subcontracting?*
Main views of stakeholders • **There is no agreement on the need for supplementary initiatives in this area.**

A large number of contributors contest the need for clarification on subcontracting. Many other stakeholders disagree and ask for clarification on various issues.

Areas of clarification identified by contributors are the definition of the terms "bodies governed by public law" in the sense of Article 1(9) of Directive 2004/18/EC and "subcontracting", the provision for contracting authorities to require or forbid subcontracting or to limit the number of subcontractors in the invitation for tenders and the delimitation of the scope of Directives 2004/17/EC and 2004/18/EC. The latter refers to the specific subcontracting rules for works concessionaires under Title III of Directive 2004/18/EC and the different rules applicable to subcontracting to related/affiliated undertakings (Article 63(2) of Directive 2004/18/EC and Article 23 of Directive 2004/17/EC).

Another contributor asks for more clarity regarding the application of EC tendering requirements when contracts are subcontracted to sister companies or affiliated companies that are part of the consortium which won the main contract.

4.6. Institutionalised PPPs

4.6.1. Views on the compliance of arrangements for institutionalised PPPs with Community law on public contracts and concessions

Question 18 of the PPP Green Paper

Question *What experience do you have of arranging institutionalised PPPs and in particular, in the light of this experience, do you think that Community law on public contracts and concessions is complied with in such cases. If not, why not* ?
Main views of stakeholders • **There is no agreement on whether or not current institutionalised PPP practice in the Member States actually complies with Community law on public contracts and concessions.** • **Public authorities, public companies and associations of public bodies from various Member States tend to assess compliance fairly positively.** • **Many contributors from the private sector perceive current compliance with Community law on public contracts and concessions as deficient in certain respects, pointing to circumvention of public procurement law and distortions of competition.**

In general, the contributions reflect the divergences between the different national legal traditions and practices as regards undertakings set up jointly by public and private companies to provide infrastructure projects or to perform public services (institutionalised PPPs – IPPPs). While some Member States have had recourse to IPPPs since the beginning of the 20th century, the concept is rather new in other Member States. Depending on their national traditions, some Member States have a quite comprehensive legislative framework in place. It appears from the contributions that, in practice, important fields of application for IPPPs include the water, environment, energy and transport sectors.

There is no agreement on whether or not current IPPP practice in the Member States complies with Community law on public contracts and concessions. Public authorities, public companies and associations of public bodies from various Member States tend to assess compliance fairly positively. Conversely, many contributors from the private sector perceive current compliance with Community law on public contracts and concessions as deficient in certain respects.

The main deficiencies perceived include the circumvention of public procurement law and distortions of competition.

As regards circumvention of public procurement rules, some stakeholders contend that in certain Member States public procurement procedures aimed initially at concluding contractual PPPs finally result in the conclusion of IPPPs with actors who did not participate in the original public procurement procedure. This practice, it is argued, allows the contracting authorities to profit unduly from technical solutions identified in the original tendering procedure.

Distortion of competition is argued to arise in particular from the participation of IPPP-entities in award procedures. It is argued that the public IPPP partner has, firstly, preferential access to information relevant to the proposed project and, secondly, an advantageous cost structure – compared to all private competitors – due to its use of public goods without a payment corresponding to economic reality. In line with this complaint, one contributor reports potential conflicts of interest regarding public authorities acting at the same time both as contracting authorities and as partners of IPPPs.

Independent of their opinion on the compliance of current IPPP practice with the EC Public Procurement Directives, a substantial number of contributors deplore the lack of legal certainty at EC level regarding relations between contracting authorities and other parties which are so close that – in public procurement terms – they are not considered distinct from each other ("in-house relations").[15] Some contributors perceive the lack of clarity on this issue as a source of abuse by public authorities; one contributor believes that this prevents public authorities from embarking on such arrangements at all.

Another contributor argues that the restrictive jurisprudence of the ECJ on in-house relations limited attempts by public authorities to circumvent public procurement law by this means.

Various contributors do not consider IPPPs any different from contractual PPPs from a public procurement perspective. Consequently, these contributions consider the distinction between these two models made in the PPP Green Paper to be artificial. One of these contributions concedes, however, that opening the capital of existing public companies to the private sector might pose certain problems which could justify specific measures.

There is no consensus as to whether public procurement law or other issues, for example free movement of capital, constitute the main legal problems in relation to IPPPs. Various contributors argue that the creation of mixed public private companies has nothing to do with EC public procurement law at all, because it falls within the area of administrative organisation, which is not a matter for the European Union to regulate.

4.6.2. Diverging opinions on the form, rather than on the general necessity, of a Community initiative on institutionalised PPPs

Question 19 of the PPP Green Paper

Question *Do you think that an initiative needs to be taken at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project? If so, on what particular points and in what form? If not, why not?*
Main views of stakeholders

[15] Case C-107/98, *Teckal*, Judgment of 18 November 1999, point 50. The ECJ judgment in case C-26/03, *Stadt Hall*e, Judgment of 11 January 2005, was released after this consultation.

- **A clear majority of contributions favour an EC initiative on institutionalised PPPs, primarily to provide clarification on applying existing public procurement rules to setting up such PPPs.**
- **In particular, there are calls to clarify the definition of in-house relations at EC level.**
- **A majority of contributors favour guidelines or an interpretative communication, rather than legislation, as an appropriate form of clarification on IPPPs.**
- **Many contributors are opposed to any initiative on IPPPs at EC level.**

4.6.2.1. Overview

A clear majority of contributions favour an initiative at Community level to clarify or define the obligations of the contracting bodies regarding the conditions requiring a call for competition between operators potentially interested in an institutionalised project. Some contributions even stress the urgency of an EC initiative in this area. A majority of those contributors favouring a Community initiative would prefer the Commission – at least as a first step – to provide guidelines or other forms of clarification on the application of existing public procurement rules to the establishment of IPPPs. Other contributors in favour of a Community initiative argue that EC legislation would be the appropriate response to perceived difficulties in this area. Conversely, a large number of contributions contest the need for any Community initiative in the area of IPPPs.

4.6.2.2. Views in favour of a Community initiative on IPPPs

Reasons given for a Community initiative on IPPPs

The main reason for requesting a Community initiative on IPPPs is the perceived lack of clarity of the rules governing in-house relations and – this is stressed in particular by contributors from the public side – the restrictive construction of the in-house exemption from public procurement law given in the judgment of the European Court of Justice in the "Teckal" case. Two contributors argue that the EC legislator has to take action, rather than leaving it to the ECJ to settle the issues, as the ECJ is considered not to be in a position to provide the necessary clarity. Another, more general justification for a Community initiative in the area of IPPPs is – according to various contributions – the need for transparent and competitive selection of private partners for these projects. One contribution argues that a Community initiative is needed because the variety of different national approaches on this issue distorts the Internal Market .

With regard to the need for a Community initiative in the area of IPPPs, certain contributions distinguish between cases where mixed capital entities are jointly established by public and private entities and cases where the shares of public companies are opened to private capital. Some contributors say that while, for the first category of IPPPs, concrete clarification at EC level is necessary, the second category of IPPPs should be the subject of an exchange of best practice or a reflection group. Another contributor, however, considers that specifically for the second category of IPPPs clarification has to be provided by means of a regulation.

Form of a Community initiative on IPPPs

A majority of those contributors who are in favour of a Community initiative opt for the adoption of guidelines or an interpretative communication, rather than legislative initiatives, for the following reasons: the expected loss of flexibility hindering the smooth development of innovative IPPPs due to the rigidity of legislation, the lack of sufficient experience as yet to adopt legislation valid for many years, the difficulty of providing clarity by means of legislation, which itself requires interpretation, and the urgency of clarification on this matter, which cannot be catered for by a (usually lengthy) legislative procedure.

Some stakeholders argue that an interpretative communication could pave the way for the subsequent adoption of EC legislation. Whatever the case, guidelines or an interpretative communication must deal with concrete cases to be of real value to practitioners.

Only a minority of contributors advocate specific EC legislation on IPPPs, for example in the form of a proper PPP Directive. According to one stakeholder, only EC legislation could harmonise existing national measures, which risk distorting the common market.

Possible content of a Community initiative on IPPPs

As regards the content of an EC initiative on IPPPs, various public contributors call upon the EC legislator to define "in-house" more broadly than the ECJ did. Other contributors from the public side explain that the correct understanding of "in-house" should allow municipalities to entrust tasks considered to be a local public service to inter-communal structures without obliging them to call for tenders. According to one contribution, a broader interpretation of the in-house criterion would imply that ownership by the relevant contracting authority of a 50% capital share in the IPPP entity would qualify as control over that undertaking. Several contributors argue in favour of drafting "de-minimis rules" for the application of public procurement provisions to local PPPs. Others request the EC legislator to respect the subsidiarity principle when clarifying the notion of "in-house".

One contribution asks for clarification of the application of public procurement rules to IPPPs in general. Various other contributions highlight the need to require publication of public authorities' intention to choose a private partner for an IPPP. Some contributions favour a clearer definition of the status of the IPPP entity, others wish to see public authorities required to justify their recourse to IPPPs. A number of contributions demand equal access to subsidies and more generally the application of the EC Treaty principles to setting up IPPPs. Several contributions oppose compulsory "double tendering" for IPPPs – i.e. tendering to select a private partner for an IPPP followed by tendering for the award of a specific task.

Various contributions highlight the need to clarify the application to IPPPs of EC law principles other than those concerning the choice of a private partner. State aid rules and the free movement of capital (Article 56 of the EC Treaty) are mentioned several times in this context.

4.6.2.3. Views opposing a Community initiative on IPPPs

A large number of contributors argue against any Community initiative on IPPPs.

Some contributors consider an EC initiative redundant on the grounds that the existing public procurement rules provide sufficient clarity on setting up IPPPs. Conversely, some others believe that public procurement rules do not apply to IPPPs and therefore do not require clarification. Various contributors explain that under the subsidiarity principle the Community does not have a legal basis for such an initiative. Two contributors submit that IPPPs often originate from private initiatives. If, however, private participation in an IPPP was subject to prior competition, there would be less incentive for private parties to initiate IPPPs. Furthermore, a group of contributors argue that the existence of several hundred IPPPs in Germany proves, from a German perspective, that an EC initiative in this area is not needed. Some contributors say that no additional initiative should be taken in the energy sector, which is considered to be already overregulated.

The arguments made against an EC initiative on IPPPs are also procedural. So, for example, various contributors refer to the inappropriate timing of taking an initiative in this area now: prior to any Community initiative, the so-called Legislative Package[16] needs to be well implemented in the Member States. Others are of the opinion that national IPPP practices (including economic and social aspects) need to be thoroughly assessed before a decision on an EC initiative in the IPPP area can be taken.

4.7. Measures and practices perceived as barriers to the introduction of PPPs

Question 20 of the PPP Green Paper

Question
In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?
Main views of stakeholders
• **The existence of too many and too strict rules is considered an obstacle to the development of PPPs by a clear majority of contributors.**

A clear majority of those contributors who comment on measures or practices perceived as barriers to the introduction of PPPs say that too many and too strict rules hamper the development of PPPs. In particular, contributors from the public side (but also various private undertakings and associations) complain that EC, national and local rules on PPPs limit the flexibility they say is needed to set up such projects. The restricted recourse to the negotiated procedure is cited as one example of rules adversely affecting PPPs. National tax legislation is also singled out by several stakeholders as being detrimental to the formation of PPPs. A considerable

[16] Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

number of contributors say that this perceived plethora of rules applicable to PPPs results in high transaction costs. They argue that these costs may discourage public authorities from launching PPP projects and private parties from participating in competitions for the award of PPPs.

A substantial number of stakeholders consider that the lack of legal clarity and common rules for the formation and performance of PPPs across all Member States jeopardises their potential success. Many stakeholders say that uncertainty about future EC legislation on PPPs, possibly including the adoption of more rigid rules, adversely affects the setting up of such projects. A number of stakeholders who complain that the rules on PPPs are unclear conclude that a regulatory framework for PPPs needs to be established at EC level. In this context some stakeholders are particularly concerned about the lack of proper review mechanisms for disputes arising when PPPs are awarded or when public procurement rules are entirely ignored by contracting authorities. Another example of rules not defined clearly enough are those relating to in-house constellations. Divergences between national rules on PPP are also cited as barriers to the introduction of such projects.

In relation to the establishment of PPPs, several stakeholders complain of undue privileges being granted to public companies to the detriment of their private competitors. According to some contributors, such discriminatory practices include different tax provisions, allegedly unduly favouring public undertakings, unequal access to subsidies and the recourse to in-house constellations referred to above.

Other major issues which many stakeholders suspect impede the development of PPPs include EU co-financing as part of the EC Regional Policy and, to a lesser extent, state aid rules. The perceived incompatibility of Cohesion and Structural Funding with PPPs, and more particularly the presumption that EU grant aid must imply public ownership of the infrastructure resulting from a PPP, appears to be a problem which goes beyond the water sector. In general, the application of Regional Policy to PPPs is considered to require clarification. Various other contributors ask for clarification of the relationship between state aid rules and the EC Public Procurement Directives.

Many stakeholders cite lack of experience, the slow liberalisation of certain sectors and – more generally – the absence of strong political will at all levels to promote PPPs as barriers to their development.

4.8. The need for collective consideration at Community level with regard to PPPs

Question 22 of the PPP Green Paper

Question *More generally, given the considerable investments needed in certain Member States in order to pursue social and sustainable economic development, do you think a collective consideration of these questions pursued at regular intervals among the actors concerned, which would also allow for the exchange of best practice, would be useful? Do you consider that the Commission should establish such a network?*
Main views of stakeholders • **There is broad support for some sort of collective consideration of PPP issues at EC**

level.

- **No agreement exists on the content and form of such an initiative.**

4.8.1. Views on the possible scope of collective consideration at Community level

A large number of contributors favouring a collective consideration of PPP issues at EC level advocate the exchange of best practice, although some stress that one also needs to learn from bad experiences. Some contributors consider the Resource Book on PPP case studies released by the Directorate-General for Regional Policy in June 2004[17] as a good example of a European initiative promoting the exchange of experience with regard to PPPs.

A substantial number of contributors expect this collective consideration to result in clarification of applicable Community rules and the establishment of guidelines. Some contributors contend that clarification on PPPs should not be limited to legal issues. Others express their interest in standardised rules or model invitations to tender based on experience to date. Other suggestions on the scope of collective consideration of PPPs include European-wide dissemination of PPP information, promotion of "scientific assessments", coordination of existing national networks, training and certification of "PPP mediators" and the resolution of potential conflicts between EC and national law on PPP-related issues. One contributor from the public sector believes that such collective consideration should ensure a level playing field between public and private operators as regards PPP know-how, from which small contracting authorities, in particular, could benefit.

Another contributor suggests that a collective consideration of such matters should include the monitoring of transparency, non-discrimination and more generally the proper functioning of PPPs in the Member States. Another important topic is setting up a benchmarking exercise, one contributor adds.

A substantial number of contributors are of the opinion that the result of such collective consideration should be left open and in no case prejudge the question of whether Community legislation on PPPs is appropriate, while two stakeholders suggest that the collective consideration should contribute to the preparation of an EC initiative on PPPs.

4.8.2. Views on the form of a collective consideration of PPPs at Community level

Compared to the opinions on the possible scope of a collective consideration of PPPs at EC level, the contributions on its form are less varied. The majority of contributions argue in favour of establishing a permanent PPP unit, which might take the form of a European PPP agency, a centre of excellence/resource and documentation centre or an observatory. At least for the observatory some contributors argue that it should be independent. One contributor recommends that a High Level Group should supervise and coordinate the work of the PPP unit.

[17] Published on the website: http://europa.eu.int/comm/regional_policy/sources/docgener/guides/pppguide.htm.

A substantial number of other contributors vote for less institutionalised models, in particular arguing that a permanent structure would add to existing bureaucracy. Their preferred option is a Task Force. One stakeholder favours opening a dialogue between the Commission and interested parties. Another recommends building the collective consideration on existing fora such as the Advisory Committee for Public Works Contracts.[18]

One contributor stresses that any collective consideration of these issues needs to be transparent.

If a collective consideration of PPPs were to be established at EC level, the large majority of contributions leave no doubt that this would be the task of the European Commission. Some contributors state that a European Commission initiative could be limited to promoting successful national PPP networks.

4.8.3. Arguments against collective consideration at Community level

Few contributors argue against any collective consideration of PPP aspects at EC level. Those that do cite the existence of a European Platform already dealing with issues such as PPPs, making a parallel discussion forum redundant, the need to deal first with the PPP-related issues highlighted in the "Report of the High Level Group on the Trans-European Network Group"[19] and concern that collective consideration at EC level might lead to Community legislation on PPPs, thereby fostering an approach to this subject which the stakeholder concerned considers to be inappropriate.

Some contributors' support for collective consideration of PPP issues at EC level is conditional upon the participation of specific stakeholders such as representatives of local and regional government, civil society and employees.

---

[18] See Council Decision 71/306/EEC setting up an Advisory Committee for Public Works Contracts (OJ L 185, 16.8.1971, p.15).

[19] Accessible from the PPP website of the Directorate-General for the Internal Market and Services: (http://europa.eu.int/comm/internal_market/publicprocurement/docs/ppp/2003_report_kvm_en.pdf).

ANNEX: LIST OF CONTRIBUTORS[20]

1.	3P Public Private Partnership Forum
2.	Agenzia Sviluppo Lazio SpA
3.	AKD Prinsen Van Wijmen
4.	Aktionsgemeinschaft Wirtschaftlicher Mittelstand – AWM
5.	Algemeen Verbond Bouwbedrijf – AVBB
6.	Allen & Overy
7.	Architects' Council of Europe – ACE
8.	Arrowsmith Sue
9.	Asociacion Espanola de Abasteciminetos de Agua y Saneamientos – AEAS
10.	Asociación Española de Empresas Gestoras de los Servicios de Agua a Poblaciones – AGA
11.	Asociación para la mejora del servicio farmaceutico
12.	Association des Maires de France – AMF
13.	Association des Maires de Grandes Villes de France – AMGVF
14.	Association of European Chambers of Commerce and Industry – EUROCHAMBRES
15.	Association of Public Sector Trade Unions – CESI
16.	Associazione Imprese Generali – AGI
17.	Associazione Italiana Societa Concessionarie Autostrade e Trafori – AISCAT
18.	Associazione Nazionale Costruttori Edili – ANCE
19.	Associazione Nazionale dei Comuni Italiani – ANCI
20.	Autobahnen und Schnellstrassen Finanzierung Aktiengesellschaft – ASFINAG
21.	Autorita per la Vigilanza sui Lavori Pubblici
22.	Bayerisches Staatsministerium für Wirtschaft, Infrastruktur, Verkehr und Technologie

[20] This list includes all contributors who have authorised the publication of their comments

23.	Beachcroft Wansbroughs
24.	Belgique
25.	Berliner Senatsverwaltung für Finanzen
26.	Bezirksregierung Münster (Vergabekammer)
27.	Blaiklock Martin
28.	Bombardier
29.	Bouygues Construction
30.	Bouygues SA
31.	British Consultants and Construction Bureau – BCCB
32.	Bundesarchitektenkammer /Bundesingenieurkammer
33.	Bundesministerium für Wirtschaft und Arbeit (Deutsche Bundesregierung)
34.	Bundesverband BPPP
35.	Bundesverband der Deutschen Entsorgungswirtschaft E.V. – BDE
36.	Bundesverband der Deutschen Gas- und Wasserwirtschaft E.V – BGW
37.	Bundesverband deutscher Unternehmensberater – BDU
38.	Bundesverband öffentlicher Banken Deutschlands – VOB
39.	Bundesvereinigung der Kommunalen Spitzenverbände
40.	C.R.E.A.M. Europeaid
41.	Caisse des Dépôts et Consignations
42.	Centre Européen des Entreprises a Participation Public et des Entreprises d'intérêt Economique Général – CEEP
43.	Chambre de Commerce et d'Industrie de Paris – CCIP
44.	Community of European Railway and Infrastructure Companies – CER
45.	Confédération Européenne des Distributeurs d'Energie Communaux – CEDEC
46.	Confindustria
47.	Confservizi
48.	Conseil National de l'Ordre des architectes français

49.	Construction Confederation
50.	Convention of Scottish Local Authorities – COSLA
51.	Cosmopoli consultants
52.	Council of European Municipalities and Regions – CEMR
53.	Coutts Allister
54.	Delcros Peyrical Mirouse
55.	Department of Finance (Irish Government)
56.	Det Kommunale Kartel
57.	Deutsche Dienstleistungsgewerkschaft Ver.di
58.	Deutscher Gewerkschaftsbund – DGB
59.	Deutscher Städtetag
60.	Dexia Credit Local
61.	Electricité de France – EDF
62.	Erno Saisanen
63.	EUROCITIES
64.	European Aeronautic Defence and Space Company – EADS
65.	European Broadcasting Union – EBU
66.	European Builders Confederation – EBC
67.	European Construction Industry Federation – FIEC
68.	European Council for Non-Profit Organisations – CEDAG
69.	European Dredging Association – EuDA
70.	European Federation of Engineering Consultancy Associations – EFCA
71.	European Federation of Public Service Unions – EPSU
72.	European Free Trade Association – EFTA
73.	European International Contractors – EIC
74.	European Liaison Committee on Social Housing – CECODHAS

75.	European Transport Workers Federation – ETF
76.	European Union of House Builders and Developers – UEPC
77.	Eversheds
78.	Fédération Française des Entreprises Gestionnaires de Services aux Equipements, à l'Energie et à l'Environnement – FG3E
79.	Fédération Française du bâtiment
80.	Fédération nationale des collectivités concédantes et régies – FNCCR
81.	Fédération nationale des Travaux Publics
82.	Federation of national associations of drinking water suppliers and waste water services – EUREAU
83.	Federazione Imprese di Servizi – FISE
84.	Federazione Italiana per la Casa – FEDERCASA
85.	Flemish interprofessional employers' association – VOKA
86.	Foreign Office (Portugal)
87.	Forum Européen de l'Energie et des Transports
88.	France Telecom
89.	Gaz de France – GDF
90.	Gesellschaft für öffentliche Wirtschaft e.V.
91.	Grant Thornton UK
92.	Groupement des Autorités responsables de transport – GART
93.	Hauptverband der deutschen Bauindustrie
94.	Helman Wojciech
95.	IMS Ingenieurgesellschaft mbH
96.	Industriellenvereinigung
97.	Initiative pour des services d'utilité publique en Europe – ISUPE
98.	Institut de la gestion déléguée
99.	International Financial Services

100.	International Project Finance Association – IPFA
101.	Irish Business and Employers Confederation – IBEC
102.	Iron David
103.	Istituto Grandi Infrastrutture
104.	Istituto Studi Sviluppo Aziende Non Profit – ISSAN
105.	Karlavicius Vytautas
106.	Kauppa – Ja Teollisuusministeriö
107.	Kocian Solc Balastik
108.	Koninkrijk der Nederlanden
109.	KPMG Corporate Finance
110.	Local Government International Bureau
111.	Lopez-Ibor Mayor
112.	Société d'Economie Mixte
113.	Ministerio de Economia y Hacienda (Spain)
114.	Ministry of Economy on behalf of the Republic of Lithuania
115.	Ministry of infrastructure, Poland
116.	Mouvement des Enterprises de France – MEDEF
117.	National Assembly for Wales (Economic Development and Transport Committee)
118.	National Assembly for Wales (Local Government and Public Services Committee)
119.	Norton Rose
120.	Office for Public Procurement of the Slovak Republic
121.	OGNET
122.	Økonomi- og Erhvervsministeriet
123.	Österreichische Vereinigung für das Gas- und Wasserfach – ÖVGW
124.	Österreichischer Gemeindebund
125.	Österreichischer Rechtsanwaltskammertag – ÖRAK

126.	Österreichischer Städtebund
127.	Österreichischer Wasser- und Abfallwirtschaftsverband – ÖWAV
128.	Pinsents
129.	Polish Confederation of private employers
130.	PricewaterhouseCoopers
131.	Przespolewski Robert
132.	Regeringskansliet, Finansdepartementet (Swedish Government)
133.	Republik Österreich
134.	République Française
135.	Revue des concessions et des délégations de service public
136.	Royal Institution of Chartered Surveyors – RICS
137.	RWE Thameswater
138.	Schmidt Bechtle GmbH
139.	Schmitz et al
140.	SUEZ International Industrial and Services Group
141.	Svenska Kommunförbundet / Landstings Förbundet
142.	Syntec Informatique
143.	T & D International
144.	Tobin Christopher
145.	Unioncamere / CCIAA
146.	Union des Transports Publics – UTP
147.	Union des Villes et Communes de Walloni
148.	Union nationale des services publics – UNSPIC
149.	Union Network International – UNI
150.	Union of European Rail Industries – UNIFE
151.	Union of Industrial and Employers' Confederations of Europe – UNICE

152.	United Kingdom Government
153.	Veolia/Vivendi Environnement
154.	Verband der Elektrizitätswirtschaft – VDEW
155.	Verband deutscher Verkehrsunternehmen – VDV
156.	Verband kommunaler Unternehmen – VKU
157.	Verband kommunaler Unternehmen Österreichs (VKÖ) – eigene Stellungnahme
158.	Verband der Öffentlichen Wirtschaft und Gemeinwirtschaft Österreichs
159.	Verbindungsstelle der österreichischen Bundesländer with contributions from • Amt der NÖ Landesregierung • Amt der OÖ Landesregierung • Amt der Tiroler Landesregierung • Amt der Vorarlberger Landesregierung • Amt der Wiener Landesregierung
160.	Verbond der Verzorgingsinstellingen – VVI
161.	Wirtschaftskammer Österreich – WKÖ
162.	Zentralverband des Deutschen Baugewerbes – ZDB
163.	Zweckverbände im Bereich der deutschen Wasserversorgung • Ammertal-Schönbuchgruppe • Fernwasserversorgung Franken • Wasserverband Siegen-Wittgenstein • Zweckverband Fernwasserversorgung Spessartgruppe • Zweckverband Hardtwasserversorgungsgruppe • Zweckverband Hohenloher Wasserversorgungsgruppe • Zweckverband mittelhessische Wasserwerke • Zweckverband Mutlanger Wasserversorgungsgruppe • Zweckverband Nordostwürttemberg

	• Zweckverband Reckenberg-Gruppe • Zweckverband RiesWasserVersorgung • Zweckverband Söllbachgruppe • Zweckverband Wasserversorgung Kleine Kinzig • Zweckverband Wasserversorgungsverband Allmersbach im Tal
164.	One position signed by four Portuguese individuals • Luis Parreirao • Rafael Rossi • Gustavo Fontes • Daniel Lopes • Duarte Leite de Campos