

Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP)

(Text with EEA relevance)

(2008/C 91/02)

1. INTRODUCTION

In recent years, Public-Private Partnerships (PPP) have developed in many fields. The hallmark of this form of cooperation, which is generally geared to the longer term, is the role of the private partner, who is involved in the various phases of the project (planning, implementation and operation), who is intended to bear risks that are traditionally borne by the public sector and who often contributes to financing the project.

Under Community law, public authorities are free to pursue economic activities themselves or to assign them to third parties, such as mixed capital entities founded in the context of a PPP. However, if public bodies decide to involve third parties in economic activities and if this involvement qualifies as a public contract or a concession, the Community provisions for public procurement and concessions must be complied with. The aim of these provisions is to enable all interested economic operators to tender for public contracts and concessions on a fair and transparent basis in the spirit of the European internal market, thereby enhancing the quality of such projects and cutting their costs by means of increased competition⁽¹⁾.

The public consultation on the Green Paper on Public-Private Partnerships and Community law on public contracts and concessions⁽²⁾ showed⁽³⁾ that there was considerable need for clarification on the application of these rules to so-called 'institutionalised' PPP (IPPP). IPPP are understood by the Commission as a co-operation between public and private parties involving the establishment of a mixed capital entity which performs public contracts or concessions⁽⁴⁾. The private input to the IPPP consists — apart from the contribution of capital or other assets — in the active participation in the operation of the contracts awarded to the public-private entity and/or the management of the public-private entity. Conversely, simple capital injections made by private investors into publicly owned companies, do not constitute IPPP and are therefore not covered by the present Communication.

The perceived lack of legal certainty in relation to the involvement of private partners for IPPP may undermine the success of such projects. The risk of establishing structures based on contracts which might subsequently turn out to be non-compliant with EC law may discourage public authorities or private parties from entering into IPPP at all.

The European Parliament, in its Resolution on Public-Private Partnerships of 26 October 2006⁽⁵⁾, acknowledged that practitioners want clarity about the application of procurement law to the creation of public-private undertakings in connection with the award of a contract or concession, and it called on the Commission to provide the relevant clarifications at the earliest opportunity.

The present Communication sheds light on the Commission's understanding of how the Community provisions on public procurement and concessions⁽⁶⁾ are to be applied to the founding and operation of IPPP⁽⁷⁾. The Communication aims at enhancing legal certainty and, in particular, assuaging repeatedly expressed

⁽¹⁾ The European Parliament noted in this connection that compliance with these rules 'can be an effective mechanism for preventing inappropriate restrictions on competition by enabling, at the same time, the public authorities themselves to lay down and monitor conditions for ensuring quality, availability, social standards and compliance with environmental requirements' (European Parliament Resolution on the Green Paper on Services of General Interest [P5_TA(2004)0018], paragraph 32).

⁽²⁾ COM(2004) 327 of 30 April 2004.

⁽³⁾ Communication on Public-Private Partnerships and Community Law on Public Procurement and Concessions, COM(2005) 569 of 15 November 2005, page 9.

⁽⁴⁾ The Member States use different terminology and schemes in this context (for instance *Kooperationsmodell*, *Joint Ventures*, *Sociétés d'Economie Mixte*).

⁽⁵⁾ P6_TA(2006)0462, paragraph 35.

⁽⁶⁾ 'Public works concession' is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment; 'Service concession' is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment (see Article 1 paragraph 2(3) and (4) of Directive 2004/18/EC (OJ L 134, 30.4.2004, p. 114)).

⁽⁷⁾ The present Communication does not cover those public service contracts and service concessions to which Article 5 paragraphs 2 to 7 of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1) apply.

concerns that applying Community law to the involvement of private partners into IPPP would make these arrangements unattractive or even impossible. The present Communication is part of the Commission's commitment to provide legal guidance in the area of services of general interest as set out in the Commission Communication on services of general interest, including social services of general interest ⁽⁸⁾ of 20 November 2007.

This Communication does not create any new legislative rules. It reflects the Commission's understanding of the EC Treaty, the Public Procurement Directives and the relevant case-law of the European Court of Justice (ECJ). It should be noted that, in any event, the binding interpretation of Community law is ultimately the role of the ECJ.

2. THE FOUNDING OF AN IPPP

2.1. Principles

At Community level there are no specific rules governing the founding of IPPP. However, in the field of public procurement and concessions, the principle of equal treatment and the specific expressions of that principle, namely the prohibition of discrimination on grounds of nationality and Articles 43 EC on freedom of establishment and 49 EC on freedom to provide services, are to be applied in cases where a public authority entrusts the supply of economic activities to a third party ⁽⁹⁾. More specifically, the principles arising from Article 43 EC and Article 49 EC include not only non-discrimination and equality of treatment, but also transparency, mutual recognition and proportionality ⁽¹⁰⁾. For cases which are covered by the Directives on the coordination of procedures for the award of public contracts ⁽¹¹⁾ ('the Public Procurement Directives'), detailed provisions apply.

The fact that a private party and a contracting entity ⁽¹²⁾ co-operate within a public-private entity cannot serve as justification for the contracting entity not having to comply with the legal provisions on public contracts and concessions when assigning public contracts or concessions to this private party or to the respective public-private entity. In fact, the ECJ held ⁽¹³⁾ that the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting entity in question is also a participant excludes in any event the possibility of an in-house relationship — to which, in principle, public procurement law does not apply — between that contracting entity and that company ⁽¹⁴⁾.

2.2. The founding process

In practice, an IPPP is usually set up:

- either by founding a new company, the capital of which is held jointly by the contracting entity and the private partner — or, in certain cases, by several contracting entities and/or several private partners — and awarding a public contract or a concession to this newly founded public-private entity,
- or by the participation of a private partner in an existing publicly owned company which has obtained public contracts or concessions 'in-house' in the past.

⁽⁸⁾ COM(2007) 725 of 20 November 2007; see also the Commission Staff Working Document 'Frequently asked questions concerning the application of public procurement rules to social services of general interest' SEC(2007) 1514 accompanying the Communication of 20 November 2007.

⁽⁹⁾ Case C-458/03, Parking Brixen, ECR 2005, I-8612, paragraph 61.

⁽¹⁰⁾ Cf. Commission interpretative communication on concessions under Community law (OJ C 121, 29.4.2000, p. 6).

⁽¹¹⁾ Directive 2004/18/EC, see footnote 6 above, and Directive 2004/17/EC (OJ L 134, 30.4.2004, p. 1).

⁽¹²⁾ In this Communication the term 'contracting entity' covers both contracting authorities within the meaning of Article 1(9) of Directive 2004/18/EC and contracting entities within the meaning of Article 2 of Directive 2004/17/EC.

⁽¹³⁾ Case C-26/03, Stadt Halle, ECR 2005, I-1, paragraph 49.

⁽¹⁴⁾ According to the ECJ (Case C-410/04, ANAV, ECR 2006, I-3303, paragraphs 30 *et seq.*) it is not only the actual participation of a private party in the capital of a publicly owned company that excludes the in-house status of a publicly owned company, but also a contracting entity's intent to open up the capital of its daughter company to private third parties in the future. Thus, public contracts or concessions could not be awarded 'in-house' to publicly owned companies the capital of which is intended to be opened to private parties in the course of the performance of the respective public contracts or concessions. Conversely, the theoretical possibility of a private party participating in the capital of a public authority's subsidiary does not, as the Commission sees it, in itself undermine the in-house relationship between the contracting entity and its company.

Irrespective of how the IPPP is set up, Community law on public contracts and concessions requires a contracting entity to follow a fair and transparent procedure, either when selecting the private partner, who supplies goods, works or services through his participation in the IPPP ⁽¹⁵⁾, or when granting a public contract or a concession to the public-private entity ⁽¹⁶⁾. It is important to note that public authorities are not permitted 'to resort to devices designed to conceal the award of public contracts or concessions to semi-public companies' ⁽¹⁷⁾.

In any case, the Commission does not consider a double tendering procedure — one for selecting the private partner to the IPPP and another one for awarding public contracts or concessions to the public-private entity — to be practical.

One possible way of setting up an IPPP, which is, in the Commission's view, suitable for complying with the principles of Community law while at the same time avoiding a double tendering procedure, is as follows: The private partner of the IPPP is selected by means of a procedure, the subject of which is both the public contract or the concession ⁽¹⁸⁾ which is to be awarded to the future public-private entity, and the private partner's operational contribution to perform these task and/or his contribution to the management of the public-private entity. The selection of the private partner is accompanied by the founding of the IPPP and the award of the contract or concession to the public-private entity.

2.3. The selection of private partners for IPPP

2.3.1. *Legal basis*

If the task assigned to the public-private entity is a public contract fully covered by the Public Procurement Directives, the procedure for selecting the private partner is determined by these Directives. If the task is a works concession or a public contract that is only partially covered by the Directives, the fundamental principles derived from the EC Treaty apply in addition to the relevant provisions of the Directives. In case of services listed in Annex II B of Directive 2004/18/EC the fundamental principles of the EC Treaty as set out in Articles 43 and 49 apply if these contracts can be expected to be of certain interest to undertakings located in a different Member State to that of the relevant contracting entity ⁽¹⁹⁾. Finally, if it is a service concession or a public contract not covered by the Directives, the selection of the private partner has to comply with the principles of the EC Treaty.

The case law cited in this document refers in part to public contracts that are fully covered by the Public Procurement Directives. However, since this case law is often based on principles of the EC Treaty it may also be pertinent when applying Community law to other situations, such as concessions or to public contracts that are not, or not fully, covered by the Directives ⁽²⁰⁾.

2.3.2. *Procurement Procedure*

If the founding of an IPPP involves the award of a public contract fully covered by Directive 2004/18/EC to a public-private entity, the open and restricted procedures defined in that Directive may, due to the particular

⁽¹⁵⁾ A fair and transparent selection of the private partner of an IPPP ensures that the objective of free and undistorted competition is met and the principle of equal treatment is complied with, in particular by avoiding undue advantages of the private undertaking with a capital presence in the IPPP over its competitors. Thus, the founding of an IPPP via a fair and transparent selection of the private partner of this public-private entity meets the respective concerns expressed by the ECJ in Case C-26/03, *Stadt Halle*, see footnote 13 above, paragraph 51.

⁽¹⁶⁾ Contracting entities are entitled to award public contracts covered by Directive 2004/17/EC directly to their affiliated undertakings as defined in Article 23 of this Directive.

⁽¹⁷⁾ Case C-29/04, *Commission v Austria*, ECR 2005, I-9705, paragraph 42.

⁽¹⁸⁾ If the IPPP in question is set up by the participation of a private partner in an existing publicly owned company, the subject of the selection procedure of the private partner for this IPPP could be the award of public contracts or concessions which were performed 'in-house' by the respective publicly owned company in the past.

⁽¹⁹⁾ Case C-507/03, *Commission v Ireland* [2007], paragraph 32, not yet published in the ECR.

⁽²⁰⁾ See for guidance on the award of these contracts Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ C 179, 1.8.2006, p. 2). A number of Member States and the European Parliament have asked the Court of First Instance to annul that Communication. At the time of the adoption of the present Communication the case is still pending before the Court of First Instance.

financial or legal complexity of such contracts, not offer sufficient flexibility. For cases like this, Directive 2004/18/EC introduced a new innovative procedure — the competitive dialogue ⁽²¹⁾ — the aim of which is not only to preserve competition between economic operators but also to take into account the contracting authorities' need to discuss all aspects of the contract with each candidate ⁽²²⁾.

For the award of public contracts fully covered by Directive 2004/18/EC the negotiated procedure with publication of a contract notice can only be used in exceptional cases ⁽²³⁾. Conversely, contracting entities could always resort to the negotiated procedure with publication of a contract notice when awarding concessions or public contracts other than those fully covered by Directive 2004/18/EC.

2.3.3. Information about the project

If the public task connected with the setting up of an IPPP falls within the scope of the Public Procurement Directives, or of sector-specific Community rules providing for public procurement obligations ⁽²⁴⁾, special requirements for publication must be complied with ⁽²⁵⁾. With regard to other public contracts and to service concessions, the principles of transparency and equal treatment arising from the EC Treaty ⁽²⁶⁾ require potential bidders to have equal access to suitable information about the intent of a contracting entity to set up a public-private entity and to award it a public contract or a concession. Suitable information can best be guaranteed by publicising a notice that is sufficiently accessible to potentially interested parties before the private partner is selected.

2.3.4. Permitted selection and award criteria and transparency requirements for the criteria

In the Commission's view, Community law requires the contracting entity to publicise the selection and award criteria for identifying the private partner for the IPPP. The criteria used must comply with the principle of equal treatment. This applies both to public contracts fully covered by the Public Procurement Directives ⁽²⁷⁾ and in the view of the Commission also to other public contracts and concessions. The choice of the tenderers or the candidates who will participate in the tendering procedure and the choice between the bids submitted must be made on the basis of these criteria, and the contracting entity needs to follow the procedural rules and basic requirements originally laid down ⁽²⁸⁾.

The Public Procurement Directives specify objective requirements related to the personal capacity of the private partner, such as the personal situation of the candidate, his economic and financial standing, his suitability to pursue the professional activity in question and his technical and/or professional ability ⁽²⁹⁾. Such criteria may also be used in the context of concessions and public contracts not fully covered by the Public Procurement Directives.

In the area of social services of general interest clarifications on possible selection and award criteria have been made in the Commission Staff Working Document 'Frequently asked questions concerning the application of public procurement rules to social services of general interest' ⁽³⁰⁾.

2.3.5. Specific elements of statutes and articles of association, the shareholder agreement and the public contract or concession

The principles of equal treatment and non-discrimination imply an obligation of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition ⁽³¹⁾. In the context of the founding of an IPPP, this obligation implies, in the view of the Commission, that the contracting entity should include in the contract notice or

⁽²¹⁾ See Article 29 of Directive 2004/18/EC.

⁽²²⁾ See recital 31 of Directive 2004/18/EC.

⁽²³⁾ See Articles 30 and 31 of Directive 2004/18/EC.

⁽²⁴⁾ See for example Article 4 of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 15, 23.1.1993, p. 33).

⁽²⁵⁾ See Articles 41 *et seq.* of Directive 2004/17/EC and Articles 35, 36 and 58 of Directive 2004/18/EC.

⁽²⁶⁾ Case C-324/98, *Telaustria*, ECR 2000, I-10745, paragraphs 60 and 61.

⁽²⁷⁾ Case C-19/00, *SIAC Constructions*, ECR 2001, I-7725, paragraphs 41-45; Case C-31/87, *Beentjes*, ECR 1988, page 4635, paragraphs 29 *et seq.*

⁽²⁸⁾ Even if the specifications provide for the possibility for candidates to make technical improvements to the solutions proposed by the contracting entity (and this will often be the case for IPPP), such modifications may not relate to the basic requirements of the project and must be delimited.

⁽²⁹⁾ Articles 45 to 48 of Directive 2004/18/EC and Article 54 of Directive 2004/17/EC.

⁽³⁰⁾ See footnote 8 above.

⁽³¹⁾ Case C-324/98, *Telaustria*, see footnote 26 above, paragraph 62; Case C-458/03, *Parking Brixen*, see footnote 9 above, paragraph 49.

the contract documents basic information on the following: the public contracts and/or concessions which are to be awarded to the future public-private entity, the statutes and articles of association, the shareholder agreement and all other elements governing the contractual relationship between the contracting entity and the private partner on the one hand, and the contracting entity and the future public-private entity on the other hand. If the contracting entity applies the competitive dialogue or the negotiated procedure, some of this information may not need to be fixed in advance but could be left to be identified and defined during the dialogue or the negotiation with the candidates. The call for competition should include some information on the intended duration of the public contract or concession to be performed by the public-private entity.

In the Commission's opinion, the principle of transparency requires the disclosure in the tender documents of optional renewals or modifications of the public contract or concession initially awarded to the public-private entity and the disclosure of optional assignments of additional tasks. The tender documents should cover at least the number and conditions of these options. The information thus provided should be sufficiently detailed, in order to ensure fair and effective competition.

It is advisable that the contract between a contracting entity and the private partner determines from the outset what happens if the public-private entity does not receive public contracts in the future and/or public contracts which have already been awarded are not extended. In the view of the Commission the statutes and articles of association should be so formulated that it is possible to change the private partner in the future. As the private partner cannot automatically be excluded from participating in a renewed tender procedure, the contracting entity must pay in such a case particular attention to the obligation of transparency and equal treatment of all bidders.

3. THE PHASE AFTER FOUNDING OF THE IPPP

The ECJ held that companies, the capital of which is open, at least in part, to private parties are precluded from being regarded as structures for the 'in-house management' of public services on behalf of the contracting entities which form part of them ⁽³²⁾. This means that procurement rules, whether derived from the EC Treaty or from the Public Procurement Directives, must also be respected when awarding to the public-private entity public contracts or concessions, other than those public contracts and concessions that have already been subject to competition in the tender procedure for the founding of the IPPP in question. In other words, IPPP must remain within the scope of their initial object and can as a matter of principle not obtain any further public contracts or concessions without a procedure respecting Community law on public contracts and concessions.

However, as the IPPP is usually set up to provide a service over a fairly long period, it must be able to adjust to certain changes in the economic, legal or technical environment. Community provisions on public procurement and concessions do not rule out the possibility of taking into account these developments as long as the principles of equal treatment ⁽³³⁾ and transparency ⁽³⁴⁾ are upheld. Thus, should the contracting entity wish, for specific reasons, to be able to amend some conditions of the invitation to tender after the successful tenderer has been selected, it is required expressly to provide for that possibility, and for the relevant detailed rules, in the notice of invitation to tender or in the tender documents and to define the framework within which the procedure must be carried out, so that all the undertakings interested in taking part in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders ⁽³⁵⁾.

Changes to essential terms of contracts not provided for in the initial tender documents require a new procurement procedure ⁽³⁶⁾. The ECJ considers the terms of a contract as essential, particularly if it is a condition which, had it been included in the contract notice or the tender documents, would have made it possible for tenderers to submit a substantially different tender ⁽³⁷⁾. Examples of such essential terms of a contract include the scope of the works undertaken or services performed by the contractor or the charges levied on the user of the service provided by the contractor.

⁽³²⁾ Case C-231/03, *Coname*, ECR 2005, I-7287, paragraph 26; Case C-410/04, *ANAV*, see footnote 14 above, paragraph 32.

⁽³³⁾ See, *inter alia*, Joined Cases C-285/99 and C-286/99, *Lombardini and Mantovani*, ECR 2001 I-9233, paragraph 37, and Case C-315/01, *GAT*, ECR 2003, I-6351, paragraph 73.

⁽³⁴⁾ See, *inter alia*, Case C-92/00, *HI*, ECR 2002, I-5553, paragraph 45, and Case C-470/99, *Universale-Bau and Others*, ECR 2002, I-11617, paragraph 91.

⁽³⁵⁾ Case C-496/99 P, *Commission v CAS Succhi di Frutta SpA*, ECR 2004, I 3801, paragraph 118.

⁽³⁶⁾ Case C-337/98, *Commission v France*, ECR 2000, I-8377, paragraph 50.

⁽³⁷⁾ Case C-496/99 P, *Commission v CAS Succhi di Frutta SpA*, see footnote 35 above, paragraphs 116 *et seq.*

It should be pointed out that, as far as public contracts fully covered by the Directives and works concessions are concerned, secondary legislation lays down the exceptional situations in which additional works or services not included in the project initially considered may be awarded directly, without a call for competition ⁽³⁸⁾.

Under EC law, a public-private entity is — like any other economic operator — free to participate in public tenders ⁽³⁹⁾. This also applies to tendering procedures which have become necessary as a result of a major amendment to or extension of those public contracts or concessions which the public-private entity was awarded in the past by the contracting entity that set it up. In such a case, the contracting entity must pay particular attention to the obligation of transparency and equal treatment of all bidders. Specific safeguards have to be taken to ensure a strict separation of those preparing the call for tenders and deciding on the award of the contract within the contracting entity, on the one hand, and those managing the IPPP, on the other hand, and that no confidential information is passed on from the contracting entity to the public-private entity.

⁽³⁸⁾ Articles 31 and 61 of Directive 2004/18/EC and Article 40 paragraph 3(f) and (g) of Directive 2004/17/EC. In the view of the Commission, the relevant derogations may be applied to the award of contracts not covered by the Directives, such as service concessions as well (See Opinion of Advocate General Jacobs in Case C-525/03, *Commission v Italy*, paragraphs 46 to 48). The Commission considers as a matter of principle that modifications of essential terms of service concessions not catered for in the tendering documents are acceptable only if they are made necessary by unforeseen circumstances, not attributed to any of the contracting parties, or if they are justified on grounds of public policy, public security or public health (Article 46 EC Treaty).

⁽³⁹⁾ Recital 4 to Directive 2004/18/EC requires Member States to ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.