

**Charlie McCREEVY**

European Commissioner for Internal Market and Services

## **Public-Private Partnerships – Options to ensure effective competition**

*Check Against Delivery  
Seul le texte prononcé fait foi  
Es gilt das gesprochene Wort*

PPP Global Summit – The 6<sup>th</sup> Annual Government-Industry Forum  
on Public Private-Partnership

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## **Introduction**

Ladies and Gentlemen,

It is a pleasure to be here with you today, to talk about PPPs – Public-Private Partnerships. From my point of view the timing of this conference could not be better: Two days ago, the Commission adopted a Communication on PPPs and Community Law on Public Procurement and Concessions. This Communication sets out the Commission's views on future policy to make public authorities choose their private partners for PPPs on a more competitive basis than is done today.

Now is an opportunity to inform you of the main content of this Communication which will be the subject of a press conference in Brussels later this morning.

## **Background**

As far as I am concerned, in the field of public procurement there is enormous untapped potential across Europe, not least in some of the Member States that are struggling most with their public sector deficits.

Improved public procurement practices and procedures and more effective and timely enforcement of existing rules are, I hope, going to have a major role to play in coming years in terms of contributing to the resolution of public sector financing problems that will inevitably become more acute as demographics shift in a direction that makes higher State dependency levels inevitable.

I am currently giving thought to how – aside from planned legislative and communication initiatives – we might be able to “get more bang for our buck” on the public procurement side – by, for example, speedier and more rigorous enforcement procedures. I am also looking to ensure we are applying the appropriate resources in the public procurement enforcement and policy areas where significant further added value may be had.

Public Private Partnerships have, as you know, been developed in several areas of the public sector and are widely used within the EU, in particular in transport, public health, public safety, waste management and water distribution. In times of tight public budgets their importance for the European Economy can hardly be underestimated.

For new Member states whose economies are not well developed, value for money in public procurement is key – especially for key infrastructure projects that are vital for sustained economic development.

But in the more advanced economies, maintaining a state of the art infrastructure is also key to sustaining competitive advantage.

For Germany alone, between now and 2010, investment of the order of 700 billion is needed for maintenance and renovation of the transport infrastructure and for municipal construction. The contribution PPPs can make in this context becomes apparent when we consider that in the UK up to 20% of public financing is provided by PPPs.

Value for money in the context of PPPs can obviously best be achieved if private partners are chosen on the basis of fair competition. Widescale public consultation – launched by a Green Paper adopted by the Commission in April 2004 – showed, however, that fair competition is not guaranteed throughout the Community at present.

The reported reasons for the dissatisfaction of stakeholders with the status quo are manifold and certainly not limited to areas where the European Community has the final say. Some issues raised in this context – and certainly not the least important ones – do, however, concern my area of responsibility. Stakeholders participating in the discussion argued that the regulatory framework at EU level governing the choice of private partners for PPPs is incomplete or lacks clarity.

I can give you concrete examples of the issues at stake.

## **Concessions**

Take the case of a public authority in a Member State looking for a company to maintain and operate a motorway. In practice, the company doing this job is usually interested in the right to exploit the service provided – in the case of motorways we are talking about the revenues from the tolls levied for using the motorway – rather than in direct payment from the contracting authority to the private party. As you know, such contracts where the contractor bears much of the operational and financial risk inherent in the management and use of the facility are called “concessions”.

At present, a public authority is obliged only to apply the broad principles of the EC Treaty, specifically, transparency, non discrimination and proportionality when awarding a service concession – whether for operating a road, a prison, a waste management facility, or a hospital. These general principles leave, however, many questions open when it comes to awarding service concessions. Similarly, the award of works concessions, granted for building infrastructure or other public facilities, is basically governed by the EC Treaty principles. Only a few detailed provisions of secondary Community legislation exist for works concessions.

I wasn't surprised that in the course of the PPP Green Paper consultation many stakeholders complained about the lack of legal certainty as regards the rules applicable to the choice of private parties for concessions.

Respondents highlighted major difficulties faced when disputing the legality of allegedly discriminatory award decisions before national courts on the basis of general EC Treaty principles. They argued, with good justification, that these principles are not detailed enough to effectively assist parties discriminated against. Thus, to obtain legal certainty in this area in particular, practitioners have asked for a clear, self contained set of rules which govern the award of PPP concessions.

Other respondents highlighted the need for a clearer line to be drawn between concessions and other public contracts. A potential lack of clarity is unacceptable as under current law quite different legal rules apply depending on whether a PPP is a concession or a public contract: As I said, the award of concessions is mainly governed by EC Treaty principles. In contrast, public contracts are subject to the detailed rules of the public procurement directives.

The uncertainty as to what set of rules apply to the award of a given PPP can clearly become an obstacle to effective competition in the area of concessions. This can limit the potential for private project financing in times of tight public budgets. The estimated investment to upgrade the infrastructure within the ten new Member States to the standard of infrastructure in the EU 15 is about 500 billion euros. So it is hardly surprising that in the consultation these new Member States in particular expressed their interest in a stable and clearer Community framework for the award of concessions. In the absence of Community rules, some of them have launched national legislative procedures on this issue.

The fact that this has simply added to the existing patchwork quilt of applicable rules is not particularly helpful in terms of developing a coherent framework in the context of an integrated internal market in this area.

So it is clear – and has been confirmed by the PPP consultation that a legislative initiative at EC level is required. This should provide a stable legal framework for the establishment of PPPs.

I intend, however, to intervene and propose legislative measures in this area only when I am absolutely certain that this will be the best way to achieve our policy objectives. We will thus look more closely into the costs and benefits of such binding initiatives as well as alternative measures to address the problems at stake.

Based on the results of this Impact Assessment – probably at the end of next year – we will decide whether or not the balance between benefits and costs justifies a legislative initiative on the award of concessions.

### **Institutionalised PPPs**

I will give you another practical example of the problems we are facing in the context of PPPs and public procurement law.

In one particular case, a municipality decided to establish a public company to take care of a waste management scheme which had been performed up to then by the municipality's own departments. This public company obtained the contract without a competitive tendering procedure. At that stage of the procedure this direct award appeared to be legitimate: it could be argued that the municipality wanted to do the job through its wholly owned public company quasi in-house – thus as if its own departments did the job.

However, this “outsourcing” to the public company was not the end of the story. A few months after the establishment of the public company and the direct award of the task of waste management to that public company, a private undertaking bought 49% of the shares of this initially 100% public company. This private undertaking thus became responsible for waste management operations within the geographical area of the municipality.

Is this type of procedure, which does not involve a competitive award procedure, the magic formula for outsourcing public tasks? I don't think so. I believe this way of organising the performance of services of general interest does not conform to EC law and I am content that the European Court of Justice shared our view – I am in fact describing one case of the municipality of Mödling in Austria, which was decided by the European Court of Justice just a few days ago.

Against this background, one question to emerge from consultation on the PPP Green Paper was whether and how the Commission could clarify the application of EC public procurement rules to the described outsourcing of public tasks, which involves the creation of public service undertakings held jointly by both a public and a private partner. These arrangements are referred to as "Institutionalised PPPs".

A clear majority of stakeholders participating in the PPP Green Paper consultation are not satisfied with the current practice of creating Institutionalised PPPs. It is too cosy an arrangement. The consultation indicated, however, that legislation is not the preferred way of moving forward in this area. There appears to be a general view that the Commission should provide clarity by means of a non-legislative interpretative document and they want this as a matter of urgency.

They have signalled to the Commission that public authorities are reluctant to enter into innovative PPPs involving the establishment of mixed capital companies, in order to avoid the risk of establishing companies which might turn out to be non-compliant with EC law later on. Those of you who are familiar with the legislative process at EC level will understand that a relatively quick response to the problems at hand could be provided by an interpretative document of this kind rather than by way of fully-fledged legislation. In most Member States the establishment of public-private entities to perform services of general economic interest is a rather new and innovative concept. A non-binding initiative in this area should provide the required guidance without stifling innovation but would also leave space for a legislative initiative further down the road.

### **Some final remarks**

To conclude, consultation on the PPP Green Paper has highlighted various problems in applying EC public procurement law to the choice of private partners for PPPs. Many of these problems result from uncertainty about what rules are applicable. We are aware that such uncertainties might be an obstacle to the development of the PPPs we need for the private financing of infrastructure and services of general interest. There is, however, no one size fits all solution to the problems in question. A legislative initiative is likely to be necessary for the award of concessions, while non-binding guidance might be sufficient to clarify what rules apply in other areas, such as the establishment of Institutionalised PPPs.

Ladies and Gentlemen, developing or clarifying EC rules in this area is obviously not a goal in itself. The prime objective of any Community initiative in this area is to provide the public and the private side with legal certainty to facilitate a framework within which PPPs can work most efficiently.

I have little doubt that as economic pressures intensify and as pressures on Member State governments intensify in terms of containing their spiralling public sector deficits and delivering value for money to the taxpayer, public pressure for efficient and innovative solutions towards the procurement of public services will also intensify. It is a very unusual citizen who likes paying taxes. But there can be no citizen who enjoys paying a huge chunk of his hard earned money every month to a government that fails to use it efficiently or to deliver the best services and infrastructure at the most economical cost. That's why good public procurement policy is important – economically and politically. That's why too I am determined to make progress in this area. I am not satisfied with the status quo. I have had my spotlight more intensely on other areas of my portfolio over the past year but now I intend shining it a little more intensely on public procurement - not least on fast, vigorous, and effective enforcement of the powers we already have. Maybe I will tread on a few toes in the process. But as I said last week in a different context, I didn't come to Brussels to tiptoe around in my slippers.

Thank you very much for your attention and may I wish you success with the rest of the conference.