

EFCA RESPONSE TO THE COMMISSION CONSULTATION ON ITS GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON CONTRACTS AND CONCESSIONS

Q 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?

The concession model is prominent: many of the new investments are contracted in the form of Design – Build – Finance – Operate – Maintain (DBFOM) with a direct or an indirect toll / payment system.

In some countries public authorities established a Public Private Partnership Knowledge Centre designed to assist in the set up and monitoring the PPP projects. These Centres collect and share information on the development of different types of PPP. This information would be available to the public and private sector.

Most of the combinations of DBFOM seen in contractual PPPs also apply institutional PPPs.

There are already many general contract documents available which have a relation to PPP projects.

Examples of existing national legislation:

- In Germany in the so-called Kreislaufwirtschaftsgesetz (Krw-/AbfG) and a specific regulation for Water and Waste Management.
- Italian legislation on public concessions, including concessions related to project finance initiatives (law 109/94) or “the promoter legislation” as it is sometimes called, is an advanced law that encourages private investments in public works which are suitable for management by companies. In particular, the current law in force mixes the need for transparency and free competition with the need to guarantee a certain freedom to the concessionary in his following subcontracting.
- In Spain, the new legislation (law 13/2003) provides a good framework for the whole process and most precisely for the private financing method.
- In France concession legislation is strongly developed and specific new legislation is currently being introduced.

Q 2. 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?

PPPs are not necessarily complex by nature and therefore don’t necessarily require the use of the competitive dialogue. An excessive use of the competitive dialogue as the basic procedure may induce distortion of competition.

The excessive use of the competitive dialogue procedure impairs fair competition and evaluation of tenders. A true dialogue between the partners of any contract is only possible if they are at the same level of knowledge and practice. With an extensive use of the competitive dialogue some knowledgeable private partners might influence less experienced public authorities. There is a need for involvement of both independent advisors and skilled consulting engineers to assist awarding authorities.

Experience with PPPs shows that procurement needs to be strictly framed. To be transparent and fair the awarding authority has to be able and capable to define its project, its needs and the technical specifications in a way that secures the comparability of bids.

The possible use of the competitive dialogue procedure provided for in national legislation may be advantageous in extra-ordinary complex PPP’s. But this does not mean that the competitive dialogue procedure should be automatically favoured or recommended above more traditional instruments. The project definition and the specifications can be made so clear and concrete in many cases that a straight decision would be possible without further consultation.

Tenderers and operators will be very anxious in safeguarding their intellectual property. Great emphasis has to be put on the compensation of the tenderers’ expenses in the dialogue phase. If the contracting authority expects to receive solutions which are based on the use of the tenderers’ know-how to the full extent and also requiring the solutions to comply exactly or even better with the functional specifications, the contracting authority has to safeguard the interests of the bidding competitors. The risk of cherry picking has to be minimised.

Long-term key performance indicators will have to be developed to make the procedure and the selection decisions more transparent.

Criteria as to how long this competitive comparison (if any) is allowed to take, and to what extent the contracting authority is obliged to publish beforehand the decisive criteria according to which the contract shall be awarded, will be essential for the success of this dialogue.

However the same pros and cons of this new procedure would also apply to the award of public contracts in the form of both contractual and institutionalised PPPs. Institutional PPPs often handle particularly complex projects too.

Q 3. In the case of such contracts, 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.

Difficulties could be encountered in specifying the focus of a public contract awarded in the context of a PPP where this is – as is typical of a PPP – a mixed-type contract with public works, supply and service components. According to the “focus theory”, developed by the European Court of Justice, clear solutions are not provided in all cases.

It will be very challenging to elaborate more detailed legislation for a contract type where long-term and unforeseeable later political and economic developments could have

retrospectively a lot of influence on the level of transparency during the evaluation before contract award.

In line with the focus theory it would have to be ensured that the substantial know-how contribution of the “engineer” in the tendering and the award dialogue be adequately and even separately rewarded.

This is particularly relevant with regard to the design and realisation of an economically outstanding and most advantageous solution with a very good economic result. As the share / participation of the technical and or economic consultants’ service in the initial investment of a project is usually below 10 percent of the costs and the effect of a good or bad design in the operational phase can be enormous, the protection of intellectual property should be taken into account duly.

The effect of independent, intellectual, conceptual thinking is not sufficiently considered and sometimes underestimated in PPP thinking.

PPPs might be a source of reducing competition by some public authorities thus awarding the contracts to a restricted group of private partners. Since PPPs might also be considered as a barrier to market access in some national legislation (France Conseil constitutionnel 2003), it might be of interest to examine these laws and the risks they entail. In addition an assessment of the use of PPPs would be required prior to choosing this procedure.

Q 4. 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?

As this is a report of 25 engineering associations with a great number of very successful projects in which members participated the experience is enormous.

A number of issues are worth mentioning when considering developing legislation:

- The required audit of the evaluation for the private partners.
- Key specifications are not always clearly defined at the invitation stage or even clear before contract signature. Problems come later in the execution and financing of the project.
- Political risks - which are normally public risks and sometimes too high risks - were allocated to the private partner and consequently costs increased extremely. These costs could have been foreseen and taken into account in the contract or even been avoided.
- The process of building up trust and confidence between the two parties was sometimes extremely harmed because of lack of key specifications in the bidding phase.
- Existing national laws regulating similar processes are laws on concessions. They are very strict on deadlines (for example: 90 days for reaching a financial close is not enough to reach success). The procedures are not always clearly stipulated.
- More specifically EFCA would like to draw the attention to frequent imbalance of risk allocation between the financier / contractor and the designer (consulting engineer / architect) – see Q 15.

Q 5. 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?

Although it is probably possible to exclude non-national companies or groups in the procedures for the award of concessions, more detailed legislation is not required. National

contracting authorities have to publish tenders and use clear selection criteria in addition to developing commercial key performance indicators which have to be known at the start of tender procedure.

Nevertheless secondary EU legislation simply refers to principles of the EU Treaty such as non-discrimination, transparency etc.; this causes uncertainty with persons concerned, even with national legislators. The Community law at hand should perhaps be more precise instead of prescribing more detailed rules.

Q 6. In your view, is a Community legislative initiative, designed to regulate the procedure for the award of concessions, desirable?

A Community legislative initiative to regulate the procedure for the award of public works concessions is not believed to be necessary.

If the Commission decides to initiate something in this field it should consider looking at the legal framework in the long term and its influence on the evaluation. These effects are hardly to be regulated in detailed Community legislation.

In any event Community law should be more precise, more clear but not more detailed and stricter. The definition of quality criteria for intellectual services should be more concrete.

For service concessions, a clear EU-wide delineation of the term concession needs to be laid down first.

Q 7. 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?

See Q 5 & 6

Q 8. 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?

The legislation and the procedures are sufficient.

It appears necessary to face a more general type of problem that is the level of existing competition in concessions and particularly in the concessions for motorways and public services, especially on a local level (municipality transportations, water, gas, etc). The decreasing number of market players and the growing monopolies in some countries are becoming a problem.

Q 9. 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?

Generally it is felt that the application of the existing open or restricted procedures can guarantee compliance with the principles of transparency, equal treatment and non-discrimination in private initiative PPP's as well. But understanding the words transparency, non-discrimination, level playing field, equality of treatment and audit can be difficult in so many languages.

If a contracting authority wants to realise a given project based on fair competition and in the PPP context, it's possible to oblige them to publish their invitation at European level and to follow the standard award procedures. Nothing wrong with that.

The solution for the success of the PPP has to be found in the initial phase and the development of a genuine market interesting for many players, small and large, consultants, engineers, facility managers, contractors and financiers in joint companies, joint ventures whatsoever.

The actual problem with private initiative PPP's is rather to gain sufficient companies as initiators. In the meantime companies proposing their ideas are not given any guarantee that they will be involved in the execution of the PPP. The proposal to pay the initiators for their efforts and their intellectual property at an attractive level (see No. 41 of the Green Paper), is right and necessary and will create many initiatives.

Private initiatives require tactful treatment. The author of the idea should be rewarded and protected, which could represent at the same time a non-genuine competence practice and contracting authorities should compensate for generating projects and perform control in a non-restrictive way.

A proposal is to act as follows: if there is a private initiative, it shall be detailed, then on that basis the public partner could launch a tender with the exclusion of the initiating private partner, but agreeing in advance what happens if there are better offers / solutions. The outcome can be as follows: no better solution then the contract is awarded to the initiating partner. If there is a better solution then there should be compensation for the initiating partner and / or striving to set up an agreement / co-operation between the winner and the original initiating party.

Q 10. In contractual PPPs, what is your experience of the phase, which follows the selection of the private partner?

Some countries complain that no clear risk allocation was possible as the technical and organisational framework was too unclear and there was only little experience on the public side.

Comparability of the bids was hardly reached, as the framework of the bids did not comply with the specifications. In addition even during the negotiations new circumstances appeared (tax changes environmental requirements, competing new public projects affecting the cash flow of the concession takers).

Q 11. 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 freedom of establishment? If so, can you describe the type of problems encountered?

There are no examples or statistical information yet. This has to be developed. No country organisation will disclose negative information.

An example is that in long-term projects technical innovations appear. Consequently the legal situation is not clear; if the contract contents are changing the contract has to be re-negotiated or even according to for example the German Procurement law a new tender would be required. This is unrealistic in a PPP, but could lead to monopoly situations which are harmful in their nature if not open to new bids.

Q 12. Are you aware of any practices or mechanisms for evaluating tenders which have a discriminatory effect?

By using complex selection criteria for the evaluation of tenders it's probably well possible to create a discriminatory effect. However there are no clear examples available.

Many factors can influence this phenomenon: insolvency, liquidation, selling of companies during the concession phase can easily disrupt the original contract. Contract clauses can solve these "problems". But including or excluding new partners in the later phase cannot be regulated by legislation.

Q 13. 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?

The change of a single project manager (personnel) doesn't present a problem, but the forced cancellation of a concession and subsequent change of the private companies can. Especially if the involvement of the private company in the PPP is considerable.

It could be impossible to create regulation, tender and award procedures in which the later change of the partners can be completely excluded. That is against the nature of economy.

EFCA does not share the Commission's view. The PPP's singularity, mainly in financial aspects, requires flexibility and a field of application as wide as possible. The real competence is already demonstrated in the awarding phase with step-in conditions specified in the contract clauses. Furthermore, financial markets act under standards which make it possible to set up project under their conditions.

Q 14. 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?

According to EFCA the national contract law and regulations for the execution of PPP's are more than sufficient. Most member countries do not think that any action is necessary here.

Many other countries are still developing momentum in PPP's. They require framework and guidelines to create their national legislation on this subject.

Q 15. In the context of PPPs, are you aware of specific problems encountered in relation to subcontracting? Please explain.

Comparable to Q13 (changing commercial partners) subcontracting of substantial parts of the works in the contractual (concession) arrangement should be limited, but also subject to the approval of the original awarding public authority within the framework of the EU rules.

Is the Concession Company allowed to transfer all risks, works and services to a number of different sub-contractors suppliers and facility managers? Is the Concession Company then becoming the contracting authority? Legally this cannot be avoided. There should be guidelines at national level.

In case architects and designers are assumed to take up responsibility for tasks in the general interest, EFCA suggests that such professions could be directly contracted by the public authority. When they are part of the contractor team, the proposal must point out clearly their position, responsibility and tools all along the project duration, in order to put to the public authority in the position to clearly select its partners.

Q 16. 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?

At the moment there are too many possibilities to escape from the basic legislation. See further Q15

Some countries oppose further legislation. They believe that the private partner should manage the project in freedom since the contract contains specific terms of functional requirements and performance.

However, it might be a possibility in some cases to have the national contracting body force the concessionaire to award a part of the public works to third parties. This subcontracting would concern solely the works, and not the whole concession. The reasons for stipulating this is that if it concerns an economically important work it could of a public interest to have various companies execute those works.

In some countries there is already the risk of abuse of a dominant position.

Q 17. 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?

See Q16.

Q 18. 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?

Cooperation between private companies is governed by market economy, competition, profitability, and private law. As most institutionalised PPP's are founded to facilitate monopolies for private companies supervised and influenced by public authorities improper, unrealistic economic conditions are temporarily created which normally cause great output insufficiencies and at the end financial overruns.

Initially attempts were made to circumvent the application of procurement law through specific company law made up in the context of institutionalised PPP's. The verdict of the EJC in the case C 107/98 (Teckal) and the restrictive decision-making practice of the national procurement inspection bodies based on this, however, caused the number of cases to drop significantly.

How to implement private, legal and economic principles in cooperation with public authorities. The participation of public authorities should be in the initiative phase only on transparent conditions and complying with all procurement laws and regulations. Most institutionalised PPP's can be replaced by purely contractual PPP's.

In many PPP projects private companies have already a commercial position which is introduced as an asset to create an institutionalised PPP. Ground positions and the like. To solve this issue in the European procurement legislation is a very challenging task for the Commission in order to create clarity for many public-private initiatives.

Q 19. 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?

Yes. See the answer to Q18 This could be done in the form of a guidelines document for companies statutes, business principles, business ethics, legal form of the business, and the

required minimum capital in relation to risk involved and the maximum involvement of the public authorities etc.

Q 20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?

The non-willingness of public parties, civil servants more than politicians, to involve private parties can be a barrier. The reasons can be various: no trust in private parties, loss of control etc., loss of public jobs and lack of experience in assessment of private business.

If the need exists and the law requires to comply with the regulations of public procurement law, then this could unnecessarily constrain even the effort to explore the creativity of both contracting authorities and private tenderers.

Also a lack of information and uncertainty among the contracting bodies as to when it makes sense to form PPP's, and the expertise how to structure them successfully;

A lack of willingness on the part of the public contracting authorities to give up intervention rights and commercial opportunities for the treasury and transfer these to private companies.

At national level political discussions and decisions to pay toll instead of taxes. At national and international level investors could simply decide not to invest in contractual PPP's, concessions, preferring to invest only in PPP's with involvement of public authorities and covered by public guarantees.

Q 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.

Q 22. 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?

Yes, the exchange of best practice in the form of market consultations can be very successful. EFCA created for this particular consultation a task force, consisting of project managers / engineering consultants from many member states, who are already working on this subject before the green paper was publicised. This proved to be a very interesting exercise, especially when you take the big differences in implementation between member states into account.

The establishment of a European network by the Commission would only be useful if the consulting industry was involved in a partner-like manner. The focus of such a network should be the exchange of information and experiences.

These considerations should extend to those PPP projects, which enjoy non-refundable EU support e.g. from the Cohesion Fund, which are becoming a part of the national budget, and no particular supervision by the Commission on these funds can be observed.