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Council of European
Municipalities and Regions

PPPs - The Local and Regional Perspective

CEMR response to the European
Commission's Green Paper on public-private
partnerships and Community law on public
contracts and concessions (COM 2004/327)

Brussels, September 2004

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Executive Summary

INTRODUCTION

1. We welcome the publication of the Green Paper on Public-Private Partnerships (PPPs) and Community law on public contracts and concessions. Noting that the present Green Paper concentrates on the technical legal issues, **we hope that the Commission will launch a wider debate to examine the positive and negative experience of PPPs to date, in order to promote their best use across Europe.**
2. We do not fully accept, as regards local and regional government, the Green Papers proposition that “the development of the PPP is also part of the more general change in the role of the State in the economy, moving from a role of direct operator to one of organiser, regulator and controller.” There are advantages and disadvantages to each of the methods of service delivery – whether by the public authority itself, by outsourcing to the private sector, or by using public-private mixed companies or other forms of PPP. For each service, local and regional governments need to make pragmatic decisions based on their own circumstances. **We consider that the principle of local and regional self-government – now expressly recognised in Article I - 5 of the European Constitution – must enable local and regional authorities to decide democratically the best means of delivering each service, including decisions to use companies they own or control.**
3. We also believe that **there needs to be a wider political debate about the future of local and regional public services within the EU, to discuss the proper balance between, on the one hand, local self-government and subsidiarity, and on the other, the rules of competition that need to apply in the European interest.** Several connected issues – the White Paper on Services of General Interest, the “Monti package” on the relationship between public service compensation and state aids rules, and now this Green Paper – need to be seen and debated politically as a coherent whole.

THE EXISTING LEGAL FRAMEWORK FOR PPPs

4. A principal concern for European local and regional government relates to the uncertainty that applies to what the Green Paper calls “institutional PPPs”, i.e. mixed public-private legal entities. **Our response therefore sets out our understanding of the current main legal rules that apply, which differs in some important respects from that of the Commission** as set out in the Green Paper.

5. The new EU Public Procurement Directive of 2004 lays down a clear code of rules for the tendering of public works and service contracts, which accordingly apply also to many contractual PPPs. However, the Directive does not apply to service concessions, where the private party is given the power to “exploit” the service, i.e. to charge users of the service (with or without additional payment from the public authority). A key issue raised in the Green Paper is whether service concessions should be brought under the same or similar legal rules as works and service contracts. **CEMR believes that service concessions should not be subject to the detailed and complex EU procurement regime**, since the nature of most concessions, with the additional risk passing to the private party requires more flexibility than is possible under the current Directive.

6. The European Court of Justice (in the **Teckal** case) decided that, under the public procurement Directive, all relevant contracts must be tendered out by local authorities wherever a contract is to be concluded between it and “a person legally distinct” from the authority. The only exception the Court permits is where the authority exercises over the com-

pany a control similar to that it exercises over its own departments, and the company carries out the essential part of its activity with its parent authority. **CEMR considers that the Commission gives an unduly limited interpretation to this exception, and in particular believes that, when the Directive falls to be amended, this exception should be expanded to cover companies owned or legally controlled by the local authority.**

7. The Green Paper expresses the Commission’s view that, in relation to service concessions, and despite the absence of any Directive, there are Treaty rules that require all concessions to be tendered, including (it appears) the case of local authority controlled public-private mixed legal entities. **CEMR on the other hand believes that there is no EU law that requires local services to be tendered, if the local authority chooses to allocate the concession task to a company it wholly owns, or a mixed public-private entity that it controls.**

PURELY CONTRACTUAL PPPs

8. **We agree that for purely contractual PPPs that fall within the public procurement Directive, the new “competitive dialogue” procedure appears to offer an appropriate means to enable the parties to work out the best solution and to select the best private partner for the task.** This will need to be kept under review as this procedure is a new one, not yet operational. We recommend that the Commission issues guidance to public authorities in relation to complex cases where it may not be fully

clear at the outset whether the proposed PPP will be a works or service contract, or a concession. Public authorities should err on the side of caution, and use the Directive's procedure in case of doubt.

9. We believe that further consideration needs to be given before reaching a view on whether further incentives should be given by law to promote "private initiative PPPs", i.e. where the concept for the proposed PPP comes from a particular private sector body.

INSTITUTIONALISED PPPs (PUBLIC-PRIVATE MIXED LEGAL ENTITIES)

10. This section of the Green Paper raises very important issues for local and regional government, since our authorities use a very wide range of legal entities which they either wholly own, or which are mixed public-private companies. These companies to date have a wide range of public service tasks and missions entrusted to them, often because they can combine the benefits of access to private sector investment and know-how, together with public control and adaptability to meet new needs and circumstances.
11. In the light of the Commission's legal analysis (which we do not wholly share), **CEMR is in particular concerned to avoid an excessive administrative and financial cost and delay that would be involved in any legal situation that would require a "double tendering"** – i.e. one process of competitive tendering for the selection of the private partner, followed by another such process for the award of the public contract or concession. Our experience

shows that the costs and delays are very real in such a scenario.

12. **We therefore propose that, to avoid costs and unnecessary regulation, double tendering be avoided, by permitting authorities to invite tenders to carry out a defined task or service by using a public-private company only.** The tender documentation would make clear the proposed legal format, as well as the technical specification etc., and the competitive dialogue process could be used to make the choice. In this way, all private sector companies could bid, but the public sector's choice of means of delivery would be respected.
13. Our response looks more specifically at the Green Paper's comments in relation to (a) the creation of an ad hoc legal entity jointly owned by the public and private sector, and (b) the control of a public entity by a private entity. We point out that in fact there are two scenarios under each heading. When a new legal entity is created, it may be controlled by the public or by the private sector. Likewise, in the second case, an existing company wholly owned by an authority may become a mixed public-private entity, with legal control either remaining with the public authority, or passing to the private sector.
14. **CEMR believes, in relation to these scenarios, that there is a clear distinction between publicly controlled companies, and privately controlled ones.** In either case, the authority should be able to use the process of a single tender (as outlined above) for the choice of partner and attribution of the contract / concession. In general, a

privately controlled mixed entity should be treated similarly to other private sector companies. However, we consider that local and regional authorities have, and should have, more discretion over companies they own or control, e.g. they may (where appropriate) lawfully entrust concessions for local services to such entities without a tendering process.

15. **In relation to the choice of private sector partner for mixed legal entities, we consider that the principles of transparency and good public administration should apply.** Any public authority must be able to justify its decision to its citizens. Whilst we envisage that the private sector partner will often be selected via an advertising process, there may also be proper grounds, based on local circumstances, for selecting an individual partner.

INTER-COMMUNAL STRUCTURES

16. We draw attention to one form of public-public partnership where we have concerns about the approach currently being taken (outside the Green Paper process) by the Commission. This relates to inter-communal structures, where two or more municipalities jointly establish a legal entity to deliver specific services solely for their joint area and population. The Commission has challenged the legality of local authorities entrusting services to such structures without those services being tendered out. **We believe that it normally is, and should be, lawful for the relevant municipalities to entrust local public service tasks to such structures, on the same basis (mutatis**

mutandis) as a single local authority can do in relation to its own company, and the Teckal case should be interpreted on this basis.

CONCLUSION

17. We share the view of Commissioner Bolkestein who in a speech on the launch of the Green Paper queried whether "the most classical instrument" – new legislation – was, at least at the outset, the best way forward. He suggested that at this stage we should seek pragmatic solutions to such problems as exist, and actively promote exchange of good practice.
18. We believe this is right, even though we have proposed amendments to legislation (to extend the Teckal exception), in particular because the Green Paper has a relatively narrow agenda, namely the legal rules. **We consider that any changes to the law should flow from a wider information-base and understanding of the current uses of PPPs, their advantages and disadvantages, and the obstacles to their wider use where it may be beneficial to do so. They should also take into account the principles of subsidiarity and local self-government.** The law should not be seen simply through an abstract economic prism of "eliminating barriers to competition", but as a more pragmatic tool to enable the public and private sector to work together for common advantage, respecting the roles of each, in the interests of the citizens.

CEMR Position paper

INTRODUCTION

1. The Council of European Municipalities and Regions (CEMR) welcomes the Commission's initiative in publishing the Green Paper on Public-Private Partnerships. Given the growing role and importance of PPPs, it is timely to commence a discussion about the legal framework and options for the future, to ensure that the positive role of PPPs across the 25 EU countries, and at all levels, can be promoted. Local and regional governments across Europe value the opportunities that, in many circumstances, PPPs offer to increase investment and to achieve creative and cost-effective infrastructure and service developments. PPPs have been shown to provide many advantages, and often yield important savings to the public sector partner; but this is not always the case, and it is also important to learn the lessons from less successful ones. We therefore feel that the Commission needs to engage in a wider consultation process that examines this broader experience, to help all of us to learn.
2. We note that, in his speech of 17th May 2004, to a Brussels conference on PPPs and concessions, Commissioner Bolkestein emphasized that the Green Paper:
"s'inscrit dans le cadre de l'initiative lancée l'année dernière par la Commission, avec la Banque Européenne d'Investissement, pour stimuler la croissance en Europe. Il s'agit notamment pour la Commission d'étudier les meilleurs moyens d'accroître la participation du secteur privé au financement de projets qui stimuleront la croissance et créeront des emplois".

He commented that in this context, PPPs are an attractive tool, used more and more by national or local governments to carry out infrastructure projects or the management of missions of general interest. He then emphasized the importance for the actors of legal security, given the long duration of most PPPs, and the important financial stakes involved.

3. The Green Paper, accordingly, is about the European-level legal rules that apply, or should apply, to PPPs. In this context, we think it is worth citing, at the outset, paragraph 17 of the Green Paper, which raises issues to which we will return:

“The aim of this Green Paper is to launch a debate on the application of Community law on public contracts and concessions to the PPP phenomenon. Once underway such a debate will concentrate on the rules that should be applied when *taking a decision to entrust a mission or task to a third party*. This takes place downstream of the economic and organisational choice made by a local or national authority, and can in no way be perceived as attempting to make a value judgement regarding the decision to *externalise the management of public services or not*; this decision remains squarely within the competence of public authorities. Indeed, Community law on public contracts and concessions is neutral as regards the choice exercised by Member States to provide a public service themselves or to *entrust it to a third party*.” (Our italics).

4. Though not the only issue of interest to us, the definition of what is a “third party”, and what European rules do or should apply, in the context of public-sector undertakings or publicly controlled mixed entities (institutional PPPs), is at the heart of our concerns.

5. Moreover, it is important to bear in mind the aim of the Green Paper – it is to “launch a debate”. This debate, we believe, will be greatly enhanced by the quality and content of responses to the Green Paper – but we believe the next stage will be even more important. Once the Commission has considered the responses, it is vital that (unless there is an overwhelming consensus) clear options for the future are more clearly identified and subjected to a wider dialogue.

6. We would wish to make a final point by way of introduction. Our response to this Green Paper is for the most part of a

rather technical nature, which itself reflects the somewhat technical nature of the Green Paper itself. But we believe that there is a need for a wider political debate about the future of local and regional public services within the EU. Several wholly inter-connected issues are currently being treated separately by the different services of the Commission. There is the debate on the future of Services of General Interest, where the Commission has now published its White Paper. There is the debate on the relationship between public service compensation and state aids (the current “Monti package”). And now there is the Green Paper on PPPs, raising key questions in relation to wholly owned, as well as mixed public-private, local government undertakings. We believe it is time to discuss openly the proper balance that needs to be struck between, on the one hand, the principles of local and regional self-government and of subsidiarity, and on the other, the rules of competition that need to apply in the European interest.

THE LOCAL AND REGIONAL PERSPECTIVE

7. In our response to the Green Paper on Services of General Interest, CEMR emphasized that our members, of different political parties and coming from different national and local traditions, have no a priori view on whether services should be provided in-house or externally. For us, what is important is that the choice is made by the democratic processes at regional or local level, in the interests of the citizens.

8. Moreover, we cannot accept the sweeping generality of the proposition, in paragraph 3 of the Green Paper, that:

“The development of the PPP is also part of the more general change in the role of the State in the economy, moving from a role of direct operator to one of organiser, regulator and controller”.

This may be true to some extent, in particular in relation to certain national governments. But a very high proportion of the most fundamental public services are delivered by local authorities, and we are clear that there is no absolute rule about the advantage of externalising all or most services. It is on the contrary necessary to be pragmatic, to consider the pros and cons of the different modes of service delivery, in each practical context.

9. In general terms, we see advantages and disadvantages in each of the possible methods of service delivery. We may summarise them, highly indicatively, as follows:

(a) Direct provision by the public authority itself

Possible advantages: retention of ongoing democratic control, with ability to make changes and to innovate without rigid contractual framework; more flexibility to adapt level of service to changing citizen needs and to the financial situation of the authority; better in-house understanding of the service.

Possible disadvantages: less state of the art management know-how; possible higher cost base and less efficiency; no access to private investment to enhance service.

(b) Outsourcing to the private sector through contract

Possible advantages: sector-specific private management know-how and experience; increased productivity and efficiency, leading to lower costs; access to private capital investment to improve service; release of public authority's senior management from the day-to-day management responsibility for major services.

Possible disadvantages: rigidity of contractual framework, which restricts major innovation and new developments during the life of the contract; loss of democratic control over the service for the life of the contract; risk of service failure in mid-contract if the contractor gets into financial difficulties; lock-in to an annual

contract price which may lead to cuts in other higher priority services if the authority hits financial problems in subsequent years.

(c) Mixed public-private entity, with public control

Possible advantages: a combination of private sector management know-how and investment, allied to a greater degree of democratic involvement and sensitivity to citizen needs; greater internal flexibility to respond to public authority's changing circumstances.

Possible disadvantages: disagreements between public and private partners; lack of commercial experience on the public authority's side.

(d) Mixed public-private entity, with private control

In general, the advantages and disadvantages in this case approximate to those set out in (b) above.

10. Of course, these are to some extent generalisations that do not apply in many cases. Many publicly run services are efficient, innovative and high quality, whilst some private sector operators are less than competent. On the other hand, some directly provided services are in practice quite rigid, with change being seen as unacceptable, and the interests of the workforce taking precedence over citizens' needs. But our key point is that there is, and must continue to be, a range of possible means of delivering a public service which Community legal rules should avoid restricting, and where over-regulation will have damaging consequences. We must avoid hollowing out local democracy by removing the key decisions from locally elected people.

THE EXISTING LEGAL FRAMEWORK FOR PPPs

11. Within the overall purpose of the Green Paper, we find the distinction drawn between contractual PPPs and institutional PPPs to be helpful conceptually (though some of our

members indicate that a few PPPs may combine both aspects). For local and regional government, a key problem area at present relates to the uncertainty that applies to the institutional PPP, i.e. the mixed public-private legal entity. In order to explore the issues and our proposed way forward, it is useful to recap our understanding of the current legal position, which is not wholly identical to that of the Commission as set out in the Green Paper.

12. The principal Community legal framework is now provided (once operational) by the Public Procurement Directive 2004/18/EC, which regulates, in particular where the value exceeds the defined threshold:

- Public works contracts
- Public supply contracts
- Public service contracts
- Public works concession contracts (on a more limited basis),

which are let by a “contracting authority”, which includes national, regional or local authorities, or bodies governed by public law (such bodies being, per Article 1(9) of the 2004 Directive, legal entities established to meet general interest needs, not of an industrial or commercial character, and mainly financed, managed or controlled by public authorities).

13. In any event, for such contracts, the contracting authority is legally obliged to follow the procedures laid out in the Directive. For contracts below the financial threshold, Article 2 (headed “Principles of awarding contracts”) provides that: “Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.”

14. The difference between a public works contract and a public works concession is that, in the case of a concession, the consideration for the works to be carried out consists either solely in the right to exploit the work (i.e. in particu-

lar to charge end users), or in this right together with payment. Likewise, in the case of a public service concession, the consideration is the right to exploit the service, or in that right plus payment.

15. Most importantly for the purpose of the discussion on PPPs, whether contractual or institutional, “service concessions” are explicitly excluded from the ambit of the Directive (Article 17), save for one limited point. Even Article 2 does not apply as such. To give one simple example of a service concession, a contract to another legal entity to run a municipally owned-swimming pool, under which the operator charges fees to users, is a service concession, not covered by the Directive’s rules, even where the operator receives a compensation from the local authority for the purpose (say) of subsidising swimming by the elderly or unemployed.

16. For contracts that are covered by the Directive, the contracting authority must follow the prescribed rules for the tendering and letting of the contract, subject only to the few special cases set out in the Directive. There is only one exception to this obligation, which does not appear on the face of the Directive, but which results from European Court of Justice case law, based on very similar previous respective Directives. This is the **Teckal** case, which is of great interest, for obvious reasons, to local government. The crucial point of the judgement, in this context, is at paragraph 50:

“...it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which *is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.*” (Our italics).

As the Green Paper indicates, this issue of controlled entities (often known as “in-house”, though this is a confusing term) is currently the subject of several pending cases before the ECJ. The Commission is seeking to place a very narrow interpretation on the Teckal exception (in our view to the point of defining the exception out of existence), whilst we suggest it should be given an effective meaning, namely whether the control is broadly similar to that exercised if the service were run directly by the municipality – i.e. does the local authority really control the legal entity in question.

17. We now come to the question – what if any are the European-level legal rules that apply to service concessions, given that they are not covered by the Directive (not even Article 2)? If we look to the Treaties, there is no explicit reference to them. Paragraph 8 of the Green Paper asserts the following:

“It nonetheless remains true that any act, whether it be contractual or unilateral, whereby a public entity entrusts the provision of an economic activity to a third party must be examined in the light of the rules and principles resulting from the Treaty, particularly as regards the principles of freedom of establishment and freedom to provide services (Articles 43 and 49 of the EC Treaty), which encompass in particular the principles of transparency, equality of treatment, proportionality and mutual recognition.”

18. This very broad claim, which the Commission considers arises from the totality of the case law, was also reflected in the Commission’s Interpretative Communication on Concessions under Community Law, issued in 2000. It is to be noted that this interpretation appears at first sight curious, since Article 43 of the Treaty relates to freedom of establishment, and Article 49 prohibits restrictions on the freedom to provide services within the Community. Neither Article, therefore, bears any direct relationship to the issues

in question. We are not able to accept that the sweeping generalisation in paragraph 8 is a fully accurate summary of the legal position. We acknowledge that the ECJ has gone some way to accept the Commission’s view in the **Telaustria** case of 2000, but we note that this relies mainly on the principle of non-discrimination. The key passage is the following (paragraphs 60 - 62):

“In that regard, it should be borne in mind that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of [the Directive], the contracting entities concluding them are, nonetheless, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular.

As the Court held in [another case], that principle implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.

That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.”

19. It is important to note that the Court’s decision in the **Telaustria** case explicitly referred to the fact that the beneficiary undertaking under the service concession was a *private* undertaking, and one can understand the Court’s concern to ensure that the non-discrimination principle applied via advertising etc. This is crucial. It does not in any way follow, in our view, that a decision by a local or regional government to grant a service concession to its own wholly-owned public undertaking, or to a mixed undertaking in which it has the controlling interest, is unlawful. Since there is no Community law requiring a local autho-

rity to tender or privatise services which it chooses to deliver itself (a principle emphasized in paragraph 19 of the Green Paper), it would be quite wrong – save in a blindly legalistic world that ignores all other realities – to consider a wholly owned undertaking, wholly or mainly serving the local authority’s territory, as being a third party for such a purpose.

20. Likewise, we consider that a mixed enterprise over which the local authority has a dominant control is itself to be considered as an extension of the local authority for the purposes of the general principles of the Treaty, or as a legitimate exercise of its democratic and administrative power of decision over its own affairs. After all, since the principle of non-discrimination does not apply to a decision to run a service in-house (even though that prevents other service providers from being able to tender for the task), it is quite illogical to prevent the authority from deciding to run the same service concession through a body over which it has legal and effective control.

21. That said, we accept that all public authorities should act transparently, that is, they must be able to justify decisions made (including a decision not to tender) on proper public interest grounds. But as we have set out above, the choice of means of service delivery is a pragmatic one, based on the perceived advantages and disadvantages of each of the options. This is also the essence of local self-government. Provided the authorities act for proper public interest purposes, the existing law, in our view, does not require every service concession to be tendered – but where a service concession is opened to private undertakings (or privately controlled mixed undertakings), the principle of non-discrimination must apply, as per the *Telaustria* case.

SHOULD CONCESSIONS BE REGULATED
BY EUROPEAN COMMUNITY LEGISLATION?

22. From the above analysis – on which we are willing to continue a dialogue with the Commission’s services – it is clear that the present distinction between public works and service contracts on the one hand, and public works and service concessions on the other, is fundamental, whether we are discussing relationships with private sector operators, or with public-private undertakings.

23. It is relevant to note that the new public procurement legislative package is extremely recent, and the European legislators (Parliament and Council) have therefore very recently declined to use the opportunity to include concessions in the new Directives, save to the limited extent referred to above in relation to works concessions. So we believe this places a high burden of proof on the Commission in any event to justify a new legislative package, with all the costs associated with the endeavour.

24. We believe that no such case is remotely made out in the Green Paper, even as the basis of consultation at this stage. On the other hand, we see strong reasons to maintain the existing legal distinction in relation to concessions. Of course, there may be some cases which are borderline as to their definition – but that is quite normal. In general, the rule in such cases is to err on the side of caution, i.e. in this area, to treat the transaction as a service *contract* if there is a reasonable chance that it will be so defined.

25. The main objective reason for the distinction between contracts and concessions (as respectively defined) is the transfer of risk in the case of concessions. By definition, the “concessionaire” needs flexibility downstream of the letting of the concession in order to achieve the necessary income from users of the service. The service concession contractual documentation is not normally as complex and

prescriptive as that which is required in the case of classical service contracts for which the operator does not receive payments from users of the service. Yet the Directive – and the Green Paper – make clear that there is only very limited scope to vary the terms of a contract without requiring a retendering (which by its nature is lengthy, costly and, if translated to the world of concessions, likely to deter making what would otherwise be sensible changes to a service in the light of practice).

26. Accordingly, most of our members are strongly against the concept of new Community legislation to regulate concessions. If, contrary to our conclusion, the Commission considers following full consultation that there is a case for some European-level legislation, we propose that it be limited to complex, long-life, high value concessions (which can be the case with some kinds of contractual PPPs) where the contract/concession borderline might be unclear at the outset. In all other cases, we believe the value of having a more simple, cheaper and more flexible process – taking into account advice such as that contained in the Commission's 2000 Interpretative Communication on Concessions – far outweighs any benefits of the Community public procurement regime. Furthermore, if there is to be any such legislation, it is essential that there be a clear exemption for local and regional publicly-owned or controlled undertakings (i.e. going beyond the Teckal exception), on the grounds set out above.

PURELY CONTRACTUAL PPPs

27. In essence, the concept of purely contractual PPPs raises few issues of principle – though many of practice – which do not apply to all forms of public procurement processes geared towards the involvement of the private sector. As we have seen from the analysis of the current European Community legislative and Treaty framework, contractual

PPP's are either public contracts or concessions, as respectively defined. Since the very notion of contractual PPP's is rather inchoate (see paragraph 21 of the Green Paper) it would not seem possible or desirable to legislate specifically for them, separate from other analogous contracts.

28. Accordingly, we agree that for PPP contracts that fall within the Public Procurement Directive, the new competitive dialogue procedure appears to offer an appropriate means of enabling the respective parties to resolve the issues satisfactorily. Of course, this will need to be kept under close review of the coming years, in order to check whether in the light of experience any specific modifications in the procedure are required. This is where trans-national exchange of experience will be particularly important.

29. In relation to PPP concessions, since the partner is by definition a private one, the Treaty rules laid down in the *Telaustria* case will apply, in relation to transparency, advertising and impartiality of procurement procedures. For the reasons set out above, most of our members oppose any new legal regulation at European level of concessions. We suggest that further guidance is given by the Commission to public authorities in relation to possible borderline issues that have arisen or may arise, to use the Procurement Directive process in any case of reasonable doubt.

30. We are not aware of any cases of particular difficulty in relation to the phase following the selection of the private partner such as to justify new legislation. We have already raised the complex issue of the need, on the one hand, to enable sensible variations to the contract to reflect real needs in the light of experience (but without changing the contract's character), and on the other hand to prevent any unjustifiable benefit to the successful candidate/partner, that substantially disadvantages the unsuccessful tenderers. These are competing public interests, and we believe the existing law on contracts and concessions is suffi-

ciently robust. Again, transnational exchange of experience over the coming years will help to identify problems, of over-rigidity or of excessive flexibility.

31. The issue of “private initiative PPPs” causes us some concern. We appreciate the need for common basic rules to apply to procurement, chief amongst which is the need for advertising and competition for the private contractor/partner. Yet there are circumstances where it is positively in the public interest for a private company to propose an innovative way of resolving an investment problem or new service solution, e.g. in relation to a piece of contaminated land. We are not convinced that the solutions put forward in the Green Paper are sufficient to ensure the continued interest of the private sector in making such proposals, if the only result is to be sucked into a complex and lengthy procurement process in which they have no better chance of success than others who, by definition, have not come up with the creative concept. We have not reached a final view on this issue, and believe that options should be kept open during a fuller debate than the limited period of this Green Paper.

INSTITUTIONALISED PPPs

32. This section of the Green Paper raises extremely important issues, in particular for local and regional authorities which – as paragraph 35 of the Paper indicates – often choose to have recourse to mixed public-private legal entities for the delivery of public service tasks and missions. As indicated above, such mixed entities may combine the advantages of access to private sector investment and know-how with public control and adaptability. We confess that we have found this section of the Green Paper in places somewhat difficult to follow and therefore to address. We hope that what follows deals with the key issues nonetheless.

33. Fundamentally, we have a basic concern to avoid an excessive administrative and financial cost that would be involved in any legal situation that would or might involve a double tendering – i.e. one process of competitive tendering for the selection of the private partner, followed by another tendering process for the attribution of the public contract or concession. This is particularly onerous in the case of public contracts under the Public Procurement Directives, but also important in the case of concessions.

34. We have experience of involvement in double tendering situations, which confirms our worries in this regard. We may cite an example under then (early 1990s) applicable UK practice and legislation, in relation to the letting of a major contract for the reconstruction of a large waste incineration plant, which had been owned and run by a public waste authority covering seven London boroughs. The plant required major investment to meet EU environmental standards, and the authority considered that this would be best achieved by a public-private joint venture company. The authority advertised for possible partners, and went through a selection process. Because of the legal, financial and administrative complexity, it was essential to use external consultants and lawyers to assist, which was itself expensive. The process was lengthy. In tandem, the letting of the contract itself had to be prepared, including creation of a detailed technical specification etc. Once the joint venture company was formed, the formal public procurement process was opened, under which the JV company had to compete with other (private sector) companies. Following evaluation, the JV company was awarded the contract, not without the threat of legal proceedings from one of the competing bidders (though this was not pursued). The whole process lasted about 4 years, took up a huge amount of organisational energy and focus, and cost a great deal of money just to get to the stage of award of contract.

35. We propose that, in order to avoid cost and unnecessary regulation, double tendering should be avoided. One way to do so is to enable public authorities to decide, if they consider it appropriate, to invite tenders to carry out a defined task by using a public-private company only. The tender documentation would make clear the proposed legal format, as well as the technical specification etc., and the competitive dialogue procedure would be used to make the choice. In this way, all private sector partners would have the chance to bid without discrimination etc., but the public sector's choice of legal construction and means of delivery would be respected.

36. We now look at more specific scenarios. The Green Paper identifies two different situations in relation to public-private legal entities. The first (3.1) deals with "partnerships involving the creation of an ad hoc entity held jointly by the public sector and the private sector." The second (3.2) deals with "control of a public entity by a private operator". In our view, each of these needs to be subdivided into two scenarios. Under the first, the creation of the new entity may involve the private sector controlling the new entity, or it may involve the public sector controlling the new entity. Likewise under the second – where the title is misleading – there are two scenarios. The first involves an existing wholly publicly owned legal entity which becomes a mixed public-private entity by the new involvement of one or more private sector partners, but in which the public authority retains the controlling interest. The second involves cases where the private sector is granted a controlling interest in a legal entity that was previously owned, or controlled, by the public authority. We take each scenario separately.

(a) the creation of a new mixed entity controlled by the private sector

37. In this case, we consider that a public authority wishing to let a contract or concession to such a mixed but privately

controlled legal entity should have two options. First, to treat the new entity as if it were a private undertaking, and follow the requisite legal procedures in relation to public contracts and concessions, as per the legal analysis set out above. The mixed entity takes its chances in the market-place. The second option would be that outlined above – the key decision would be made at the outset to award the contract to a mixed entity, and the advertising and tendering (according to the relevant legal processes for contracts or concessions) would be for a private sector partner which best met (a) the requirements as legal partner in the company, and (b) the requirements in relation to the technical specification etc.

(b) the creation of a new mixed entity controlled by the public sector

38. In this case, the considerations should we believe be somewhat different. There is a fundamental difference between a publicly controlled, and a privately controlled, company. In the case of potential concessions, we consider that it must be the right of the public authority to decide whether to run a service itself, to do so via a legal entity it owns or controls, or to tender it. In the case of public contracts covered by the procurement Directives, the Teckal case provides a limited exception to the duty to tender etc., and if the private sector owns more than a modest interest in the company, the Teckal exception may not be deemed to apply.

39. In such a case, we propose that it should be possible to tender on the basis set out in (a) above, i.e. via a single tendering process which covers the choice of legal partner, and the award of the contract to carry out the task. We should add that, if and when the Public Procurement Directives fall to be amended, the opportunity should be taken to expressly permit the grant by public authorities of tasks to publicly controlled legal entities, whether wholly or domi-

nantly owned by the public authority, and thereby broaden and make explicit the Teckal exception.

40. In the case of concessions, we strongly believe that the existing law enables (and in principle should enable) the public authority to grant to its publicly owned or controlled legal entity the task of running the concession, without an obligation to advertise or tender. This is part of the freedom of choice which logically derives from the principle that it is not for the EU to define what services should be run by the public sector itself, directly or via its undertakings, and what services it should put out to tender or privatise. This general principle is now all the more relevant, given the direct reference in Article 5.3 of the new European Constitution to the principle of local and regional self-government. The essence of local self-government involves a choice of how services within the municipality's competence are to be delivered, in the interests of its citizens.
41. This leaves the question of whether there are, at EU level, legal rules that require a specific process in relation to the selection of the private partner for the mixed legal entity. We believe that any public democratic authority must be able to justify to its citizens the reasons why it has made a decision – i.e. it should comply with the principle of transparency as a matter of good public administration. Whilst this will often involve advertising in some form, there may also be good reasons to select a partner without recourse to advertising. One example (though not involving a profit-making partner) might be the creation of a mixed entity involving a locally-operating charity that specialises, for example, in the care of children in need. There may be powerful reasons, based on local circumstances and knowledge, to grant a relevant concession to a partnership between the local authority and the charity, without advertising for other possible bidders.
- (c) changing a wholly owned public legal entity to a mixed public-private entity, still controlled by the public authority*
42. This case involves an existing wholly publicly owned legal entity which becomes a mixed public-private entity by the new involvement of one or more private sector partners, but in which the public authority retains the controlling interest. By definition, the legal entity will already have a public service task allocated to it, which – unless the law requires otherwise – will continue after the injection of a private sector dimension, either for an indefinite period, or until the end of the prescribed term already foreseen.
43. If the wholly-owned legal entity has previously been selected following a tendering process, then the choice of private partner raises no major issue in terms of European legal rules. Here again, the key principles are transparency and good public administration, i.e. the selection of the private partner must be made on clear public interest grounds. Whilst this will often involve advertising etc., as stated in paragraph 41 above, there may also be rational grounds for selecting a particular partner without advertisement, though the decision should be explicit, and demonstrate clearly the advantage of the selection. The principle of non-discrimination must of course be adhered to, i.e. the selection of the private partner must be fully justifiable in the public interest on grounds other than national origin.
44. If on the other hand, the publicly owned legal entity has been granted a public service task without taking part in a tender, the situation requires further consideration. In the case of public works and service contracts, under existing law the Teckal exception, as currently understood, may no longer apply. In such a case, the duty under the Directive to tender may arise. Once again, we recommend that the need to double tender should be avoided, so that the public authority letting a contract should be able to tender on the basis that the service will be delivered by an institutional

PPP, uniting the phases of choice of partner and award of contract (see above) in a single process. We also recommend that the Directives should be amended to widen the Teckal exception to cover all publicly controlled companies delivering public services limited to a specific locality. In other cases (service concessions etc.), where the Procurement Directives do not apply, the issue is simpler, i.e. the choice of the private sector partner needs to follow the principles of transparency and good public administration.

(d) changing a wholly owned public legal entity into a mixed public-private entity, controlled by the private sector partner

45. In this case, and following the logic of our basic distinction between publicly controlled companies and privately controlled ones, we believe that the principles should in general follow those set out at paragraph 37 above, unless the public legal entity has already won the contract under a tendering process, in which case the only issue relates to the choice of private partner (see paragraph 43 above). To recap, there should be two options available for the public authority. First, from the time of change of control to treat the mixed entity as a private undertaking, and to follow the relevant legal procurement processes in relation to public contracts or concessions, as the case may be. Or second, from the outset – and before selecting the private partner – to decide to award a contract to a mixed entity. Accordingly, the advertising and tender selection would be for a private sector partner who best met the combined requirements as legal partner in the company and the service / technical requirements of the contract(s) to be delivered.

46. To complete the picture, there is logically a final scenario, in which an existing mixed entity, controlled by the public sector, changes to a mixed entity controlled by the private sector, usually by one or more existing private partners taking an additional equity stake. The same principles apply, we suggest, as in relation to the previous scenario.

PUBLIC-PUBLIC PARTNERSHIPS: INTER-COMMUNAL STRUCTURES

47. Whilst this Green Paper is about Public-Private Partnerships, we wish to comment briefly on the legal position of local / regional institutional Public-Public partnerships. We are aware that the Commission has over recent months engaged in correspondence with certain governments in which, amongst other matters, the legality of the attribution of public service tasks to inter-communal legal entities without tendering has been challenged – for example the letter of Commissioner Bolkestein to the Belgian Minister of Foreign Affairs of 16th December 2003. We have major concerns about the nature of the legal arguments put forward by the Commission in this correspondence, which in our view go, at certain points, well beyond anything justified by the clear terms of the Treaty, Directives or case law. We are in particular concerned at the implications for inter-communal structures, in which several local governments combine together to deliver important public services for their joint areas, which in their view are more efficiently and effectively delivered through such vehicles than by each commune alone.

48. Without reiterating the arguments set out above, we believe that local and regional self-government must involve freedom on the part of the local / regional authority to decide the means by which a service should be delivered, including via inter-communal co-operation arrangements and inter-communal joint legal entities. In relation to service concessions, the principles we have set out and proposed above should equally apply to publicly controlled inter-communal undertakings. We believe that the Teckal “in-house” exception, in the case of public works and contracts, should apply *mutatis mutandis* to inter-communal legal entities, where the control exercised by the local authorities is broadly analogous to the control each would have if the service were delivered directly, *and provided that the entity does not compete or offer services outside its constituent municipalities’ areas*. If this is no existing law, then the law needs to be amended.

CONCLUSIONS

49. In our introduction, we recalled that the express aim of the Green Paper is to launch a debate, and we believe that the issues we have raised – and there are many we have not touched on – demonstrate the need for such a public debate, based on better and wider information and understanding, before any new legislation is proposed at Community level.
50. Indeed, we note and share the perspective of Commissioner Bolkestein, who in his speech of 17th May queried whether, at least at the outset, the “most classical instrument” – legislation – was the best way forward; he suggested rather that at this stage we should seek pragmatic solutions to such problems as exist, and actively promote exchange of good practice.
51. We make this point in particular because the Green Paper

has a relatively narrow agenda – the legal rules – rather than a wide one about how best to promote knowledge and understanding of the roles and possibilities afforded by different models of PPP. Any changes to the law – and we have recommended some, in particular in relation to the current Teckal exception – should flow from a wider information-base and understanding of the current uses of PPPs, the advantages and disadvantages they offer, and the obstacles to their wider use where it might be beneficial to do so. They should also take into account the principles of subsidiarity and local self-government. The law should not be seen simply through an abstract economic prism of “eliminating barriers to competition”, but as a more pragmatic tool to enable the public and private sectors to work together for common advantage, respecting the roles of each, in the interests of the citizens.

Answers to the Green Paper's Questions

[We have summarised the questions for the sake of brevity.]

1. *What types of purely contractual PPP set-ups do you know of; are they subject to supervision?*

The principal common kinds. As a European organisation, we are not aware of any special innovative types of PPP. We are not aware of national supervision arrangements.

2. *For purely contractual PPPs, will the transposition of the competitive dialogue procedure into national law provide a well-adapted procedure in relation to public contracts?*

We believe so, for most cases, but this will need to be tested in practice.

3. *In the case of such contracts, are there other points which may pose a problem in terms of Community law on public contracts?*

We are not aware of any.

4. *Have you organised, participated in, a procedure for the award of a concession within the EU? What was your experience of this?*

Our members' authorities have of course organised procedures for the award of concessions. The general experience is that the procedures for granting concessions are generally simpler and less costly than those under the public procurement Directives.

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? Is competition normally guaranteed in this framework?*

The simple answer is "yes". Given the nature of most works and services required by local and regional authorities, our general experience is that even when going through the processes required for public contracts, few non-national companies show interest, except for those who already have a presence in the country of the authority, for most contracts.

6. *Is a Community legislative initiative to regulate the award of concessions desirable?*

For reasons set out in our response, we do not favour a new Community legislative instrument for concessions.

7. *If the Commission should propose new legislative action, should such legislation cover all contractual PPPs, whether designated contracts or concessions, and make them subject to identical award arrangements?*

Even if we were in favour of a new Community legislative instrument for concessions, we would not favour using the same

award arrangements for all. It is true that some types of PPP may be difficult to define at the outset as contracts or concessions; we believe that in any case of doubt, the public authority should assume from the outset that the Directive applies. To make all contractual PPPs subject to the identical award arrangements would involve a clear legal definition of what is a PPP in this context, something not attempted in the Green Paper, and which may be difficult to get agreement on. The only other way of doing so would be to make all concessions subject to the same detailed procedures as public contracts, which we would strongly contest.

8. *Are non-national operators guaranteed access to private initiative PPP schemes? Is there adequate advertising? Is the selection procedure genuinely competitive?*

We do not have sufficient information to answer this point.

9. *What would be the best formula to ensure the development of private initiative PPPs while guaranteeing compliance with the relevant principles?*

As indicated in our response, we do not yet have a fixed view on this point, and believe a fuller debate is required.

10-14. *These deal with the phase following the selection of the private partner.*

We are not generally able to assist on these points. However, some of our members have indicated that they do not fully share the Commission's concern over step-in arrangements (Q13), which may be necessary to ensure that a project (which has been tendered) is carried through. In general, we consider that the approach taken in this part, both in the text and the questions, is rather one-sided and rigid. Everything seems to be looked at from the point of view of "barriers" to freedom of establishment etc., rather than looking at what is the correct balance between contractual certainty and the need for a reasonable degree of flexibility to deliver, and even adjust, a project over its lifetime.

15. *Are there specific problems in relation to subcontracting?*

We are not aware of any.

16. *Does the phenomenon of contractual PPPs, involving transfer of a set of tasks to a single partner, justify more detailed rules for subcontracting?*

No.

17. *Is there a need for a Community level initiative to clarify or adjust the rules on subcontracting?*

We believe not, subject to the product of this consultation.

18. *What experience do you have of arranging institutionalised PPPs, and do you think that Community law on public contracts and concessions is complied with in such cases? If not, why not?*

Our members across Europe have a wide and diverse experience, under differing national legal systems, of institutional PPPs (i.e. public-private mixed entities). In general, we and they consider that they comply with Community law on public contracts, and with relevant national and, so far as applicable, Community law on concessions. However, many of our members do not agree with all aspects of the Commission's opinion on the current Community law on concessions (see our main response), in particular in relation to public service missions assigned to their publicly controlled legal entities.

19. *Do you think 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 points and in what form? If not, why not?*

No. We believe that where there is a requirement or a choice to advertise to find an institutional PPP private partner, it is for

the public authority in question to carry out. This is an area where exchange of good practice may be beneficial.

20. *Which measures or practices act as barriers to the introduction of PPPs within the European Union?*

We do not believe that it is helpful to look at the question in terms of "barriers". What is needed, at least for local and regional authorities, is a European exchange of practice and guidance for public bodies on the pros and cons of different types of PPP, assistance with legal documentation, etc. The issues are pragmatic and technical. Most of the support needs to be provided at national level, but a European dimension would be beneficial.

21. *Do you know of other forms of PPP developed in countries outside the EU?*

No

22. *Would a collective consideration of these questions pursued at regular intervals among the actors concerned, also allowing for exchange of best practice, be useful? Should the Commission establish such a network?*

We strongly support this point. We believe it would be useful for the Commission to take the initiative in setting up such a network, including of course local and regional government involvement. CEMR would be pleased to co-operate in this.

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CONSEIL DES COMMUNES ET REGIONS D'EUROPE (CCRE)

COUNCIL OF EUROPEAN MUNICIPALITIES AND REGIONS (CEMR)

Bureau de Paris / Paris Office

15 rue de Richelieu

F - 75001 Paris

Tel. +33 1 44 50 59 59

Fax +33 1 44 50 59 60

E-mail : cemrparis@ccre.org

Web : www.ccre.org

Bureau de Bruxelles / Brussels Office

Rue d'Arlon 22

B - 1050 Bruxelles

Tel. +32 2 511 74 77

Fax +32 2 511 09 49

E-mail : ccre.bruxelles@ccre-cemr.org

Web : www.ccre.org