UNICE
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UNICE RESPONSE TO THE COMMISSION CONSULTATION ON ITS GREEN PAPER ON

PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON CONTRACTS AND CONCESSIONS

UNICE primarily wishes to stress that many of the questions in the Commission's Green Paper referring to possible legislation cannot be answered without first having a clear definition of what a Public Private Partnership (PPP) is in the sense of the Community. In this context, we would like to point to the UNICE paper **Recommendations for Promoting Public/Private Partnerships (PPP)** published on the 25th February 2002 which addresses this matter.

Question 1.

What types of purely contractual PPP set-ups do you know of? Are these set-ups subject to specific supervision (legislative or other) in your country?

Examples of purely contractual PPPs are the operator model (with varying works scope) the concession model and institutionalised PPPs. They correspond to the models listed in Nos. 22 and 23 of the Green Paper.

With the exception of the Spanish Law 13/2003, which regulates and creates a specific framework for public works concessions we are not aware of any other framework conditions for contractual PPPs that are in existence.

Question 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?

Competitive Dialogue is intended for use in any contract which is complex, howsoever that complexity may have arisen. PPPs, by their very nature, are likely to be complex. It is thus probable that Competitive Dialogue will need to be used in most PPPs.
However, it is not logical that this new procedure should, as contemplated by the phrasing of the Commission's question, only apply to purely contractual PPP. Institutionalised PPPs often handle particularly complex projects too.

It is to be hoped that the regulations in Article 1 Para 11 Letter c and Article 29 of the Directive 2004/18/EC provide sufficient legal certainty to enable Competitive Dialogue to be used for PPPs. Article 29 Para. 8 only allows for the possibility but not the obligation to pay candidates who are then not involved in the contract. The tendering process for PPPs is very expensive; at the end of the day the purchasers pay the cost – there is no other source of revenue – and it makes sense for the Contracting Authority to pay the reasonable costs of tendering at the time. Should they not offer to do so, it may stop many companies from participating in such a tender.

Question 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. The "focus theory" developed for this by the European Court of Justice does not provide for clear solutions in all cases. There are other areas which might pose difficulty, for example the application of Public Procurement rules on PPPs (to the leasing/acquisition of property) or the lack of legal protection in the case of complete contempt of the public procurement rules, which can be of particular importance in the field of PPPs, since these are typically long-term contracts.

Question 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?

Experience gathered so far in the award and processing of works concessions has, in general, been positive.

Question 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?

In the field of works concessions, the relevant regulations of the Public Works Directive have proven to be sufficiently precise. In any case, no criticism has been received so far. In the absence of any proof to the contrary, it is assumed that there is general competition in this area as well.

Question 6.

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

Repeating the content of our reply to question 5, we do not believe that a Community legislative initiative to regulate the procedure for the award of public works concessions is necessary. For service concessions, a clear EU-wide delineation of the term "concession" needs to be laid down first.

Question 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?

The regulations in the existing directives, apart from the present exclusion of service concessions, are sufficient for the purpose. With regard to PPPs which are not concessions, there is as yet insufficient experience for sound regulations to be drawn up. UNICE recommends that the question might be revisited in due course when more experience has been gained. It is of the view that, should additional regulation for non-concession PPPs prove to be necessary, it may well have to be different from that for concessions, but only time will tell.

Question 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?

As far as we know, PPP schemes are generally publicly tendered so that in this context – if they are above the EU threshold – access for foreign operators is ensured.

Question 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?

As already mentioned in our answer to question 8, it is assumed that the application of an open or restricted procedure will guarantee compliance with the principles of transparency, equal treatment and non-discrimination in private initiative PPPs as well.

The actual problem with private initiative PPPs is to find companies willing to develop ideas without any guarantee that they will be involved in the execution of the PPP realising that idea. The proposal to pay the initiator for their efforts in such a case (see No. 41 of the Green Paper) would therefore seem useful.

The public authority has to take care that eventual advantages of the company initiating the PPP are neutralized, in order to put it in the position to participate in the tendering, without violating the principles of equal treatment and non-discrimination.

In general there should be no different rules for public or private initiative PPPs.

Question 10.

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

Since competitors rarely become aware of possible adjustments to contracts (which might properly require a new tendering procedure), they have no chance to take legal action. Accordingly, the regulatory authorities do not become aware of many of these cases. However and especially in very complex PPPs, adjustment to the contract should be possible.

Furthermore, unlike public purchase contracts, PPPs (whether or not they are concessions) need adjustment over the duration of the PPP. Indeed, it is necessary to adapt PPP conditions over its life to take account of changes in the environment, in the priorities of the public authority, in technical changes, and other circumstances largely without the control of the operator

Question 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?

The automatic contract renewal clauses which have come up in several cases could lead to the object of contract being closed for competition permanently if the term for which the contract is renewed when the option to terminate is not exercised is lengthy.

Question 12.

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

Question 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?

UNICE feels, in line with the Commission's view, that "step-in" type arrangements as they are currently constituted can be a problem and as such steps should be taken (e.g. more transparency and easily understood rules) which will guarantee the compatibility of such actions with Community law on public contracts and concessions.

It is also UNICE's view that private companies involved in PPPs should also have the right to transfer their contracts subject to the compatibility of such actions with Community law.

Question 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?

A stipulation at Community level would, in our opinion, necessarily lead to rejections of national regulation of contract law and cause problems without a European contractual framework actually bringing any tangible benefit. The national contract law regulations for the execution of PPPs are wholly sufficient. We do not think that any action is necessary here.

Question 15.

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

We see no need for more extensive regulations for the award of subcontracts in the context of a PPP. It would, at most, be conceivable to include an obligation whereby subcontractors may not

be submitted to worse conditions than those agreed in relation between the contracting authority and the main contractor.

Question 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?

Question 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 answer to question 15.

Question 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?

UNICE feels that the Commission ought to be aware of the possibility to use institutionalized PPPs to circumvent the application of procurement law.

It is also the case that sometimes if there has been a correct tendering procedure for the initial contract, there is still the question of whether the public authority as associate can conclude a contract with a subsidiary without tendering and to which limits the subsidiary can operate on the market without loosing its in-house privilege. Therefore a clear guideline to which extent the Teckal[1] criteria are applicable to such cases would be welcome.

Question 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?

It would be very welcome if the Commission's Green Paper and the collected answers from the consultation resulted in detailed Commission guidelines on PPPs which sets out obligations to apply Community law on public contracts and concessions in the setting up of a PPP.

[1] *Teckal SRL v Commune di Viano & Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia,* Judgement of the ECJ 18/11/1999, C-107/98.

In general and independently of the questions raised in this document:

Question 20.

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

- A lack of information and experience as well as uncertainty among the contracting bodies as to when it makes sense to form PPPs, and how to structure them successfully;
- A lack of political will to give up intervention rights and opportunities and transfer these to the private partner;
- Protection of in-house interests (interpreted in the strictest possible terms) against foreign participation and application of public procurement rules,
- Too hesitant liberalisation and opening of the market in certain sectors, e.g. railway;
- Open questions regarding the stability and growth pact concerning criteria budget deficits and national debt;
- Tax discriminations against private companies;
- Unequal access to local, national and European subsidies between public and private operators;
- Current accounting harmonisation proposals, if not appropriately adapted, could prove to make the PPP process impossible.

Question 21.

Do you know of other forms of PPPs which have been developed in countries outside the Union? Do you have examples of "good practice" in this framework which could serve as a model for the Union? If so, please elaborate.

Question 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?

The establishment of a European network by the Commission would only be useful if industry was involved in a **partner-like manner**. The exchange of information in such a network should not take place "anonymously" but be gathered and included in the position papers put forward by the parties involved, i.e. the contracting bodies and the executing industry, before Commission's recommendations, communications or other statements based on these are made. The focus of such a network should therefore be the exchange of information and experiences.