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COMMENTS

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COMMENTS ON THE COMMISSION COMMUNICATION ON PUBLIC PRIVATE PARTNERSHIPS, PUBLIC PROCUREMENT AND CONCESSIONS

SUMMARY

PPPs are diverse and include different types of relationship between the public sector, the private sector and the citizen or service user. The case for PPPs needs to be more widely understood and communicated.

We do not believe new legislation on PPPs is necessary or even desirable. However the Commission's intention to clarify in respect of services concessions would be timely and is necessary.

With Institutionalised PPPs the problem of compliance arises from the manner in which this mixed capital operator has won the right to deliver the service. Clarification of the current situation is desirable.

BACKGROUND

In November 2005 the European Commission followed up its earlier Green Paper[1] on Public Private Partnerships (PPPs) with a communication[2] which laid out the policy options being considered in the area of PPPs and concessions[3].

From an industry/business point of view we would like to repeat our general view that it takes commitment and skill from the public and private sectors to handle PPPs and concessions well. Given the growing role of PPPs and concessions to improve public services and infrastructure, both the public and private sectors need to build on progress to date and increase their capacity.

The debate about how best to do this must recognize two things. First, that PPPs are diverse and include different types of relationship between the public sector, the private sector and the citizen or service user and secondly, that they will and should evolve over time.

PPPs (and concessions) have many advantages. These include that:

[1] Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions COM (2004) 327 final, Brussels, 30th April 2004.

[2] Communication from the Commission… on Public Private Partnerships and Community Law on Public Procurement and Concessions COM (2005) 569 final, Brussels, 15th November 2005.

[3] For the purpose of this paper, we distinguish carefully between PPPs and concessions. That is because PPP is a generic term, without special legal meaning, referring to any form of agreement between a public and a private entity. This agreement is typically underpinned by a contract for the delivery of services; subject either to procurement legislation under directives 2004/17 or 2004/18; or to rules applying to concessions.

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- they are predicated on competitive approaches and generate productivity gains;
- they are based on sound economic approaches, i.e. life-cycle analysis of new investments and holistic approaches to delivering a service of quality, underpinned by performance indicators and contractual commitments;
- they focus on long term performance, not on short term optimisation of inputs;
- they allow services to move towards increased quality and more responsiveness to customers' needs;
- they are based on transparent approaches and offer contractual guarantees that public sector management does not provide, and;
- where the private sector is involved in operation, private funding can be mobilised.

We believe that the case for PPPs needs to be more widely understood and communicated. The success of PPP contracts is based on the way in which they focus on good performance. Financial incentives and penalties are designed to ensure that projects are delivered on time and to budget - and that service quality is maintained throughout the life of the contract. Performance management frameworks based on "payment for results" can achieve value for money gains by creating a sharper focus on risk management and accountability. Private financiers, who tend to be risk-averse, can add additional pressure and discipline on the public and private sectors to ensure that projects are robust when signed and then to ensure that contractors deliver against the agreed targets.

We do not believe new legislation on PPPs is necessary or even desirable. It is our view that the Commission's intention to provide clarification on PPPs should be broad and should consider the fact that PPPs and concessions are used in different ways in different Member States. We would consider useful an interpretative communication on Institutionalised PPPs and a legislative initiative on services concessions which should not be too prescriptive.

Focusing in particular on the recent Commission communication, we would like to make the following comments.

CONCESSIONS

We support the idea of the Commission to clarify a number of elements of the debate in as much as such clarification may help spread the practice of concessions. We believe that clarification should focus on services concessions and the contractual relationship therein between the public and the private sectors bearing in mind that services are operated in the long term. While the new procurement directives contain some definitions of what constitutes a concession[4], it remains a complex matter. Therefore it might be useful include clarification of the accumulated case law of the European Court of Justice (ECJ) on these matters.

A notion that underlies the concept of a concession is that it carries the risk of operation. It is for the concessionaire to mobilise the resources required to operate the concession successfully. This need to adapt whilst delivering is possibly the main

[4] Directive 2004/17/EC, Article 1, paragraph 3 and Directive 2004/18/EC, Article 1, paragraphs 3 and 4.

difference with public procurement of goods or services which focuses on a carefully defined performance at a point of delivery or on inputs going into services spread over a period of time.

Underlying the concept of concessions is an implication that where necessary the public authority will dedicate contractually the assets and/or systems linked to the service conceded, to the concessionaire that will deliver the service. By this we mean, for example, existing infrastructure necessary for correctly operating the concession.

Any concession will be based on a division of risk between the public authority and the concessionaire. The operator picks up the risk linked to its operation. Assignment of risk should be left to the parties involved. Likewise, it is for the negotiating parties to come to agreed terms of remuneration – in the context of a competitive environment.

LENGTH OF A CONTRACT

The nature of a concession is one of long term relationship between public and private partners. Where assets are procured through a concession contract, the lifetime of these assets can be an indicative guide to the duration of the contract. Where the concession does not contemplate procurement of a major asset, it is nevertheless predicated on the optimisation of existing assets or systems so that they are serviceable over their life-cycle. Indeed, it is the length of the contract that will allow operators to create value through different approaches to asset management. Short term approaches may generate short term efficiencies, but only a long term focus can deliver structural efficiencies on a sustainable basis.

EVOLUTION OF A CONTRACT

The concept of a concession implies that over the duration of the contract it will have to be adapted and amended. For example, changes in law, demographics, economics, technology, or in customer expectations etc. are to be expected. Changes have to be addressed in a manner that is fair to both parties. Rules restricting amendment of contracts should therefore not be considered, as this could hinder the ability of stakeholders to adapt to change.

PROCUREMENT

The Commission's November Communication describes two alternative processes to carry the selection of a third party for a concession: competitive dialogue or negotiation.

The competitive dialogue process has been devised in order to facilitate complex procurement when it proves impossible for the public authority to define the technical solution to its needs or to come up with a legal or financial approach tailored to its circumstances.

We are not convinced that the defining characteristic of a concession is its complexity. Rather its defining characteristic is the ability of two parties to agree on a modus operandi within well defined constraints, secure in the knowledge that the contractual relationship has sufficient flexibility to adapt to changing circumstances. It is a form of complexity that can be distinguished from the type of complex procurement targeted by the competitive dialogue mechanism.

It is our experience that qualitative consideration plays an important role in a public authority's decision in choosing a private partner. A public authority would typically be

interested in considerations such as quality control, asset management, professional training of workers, environmental certification, crisis management, as well as the partner's flexibility and ability to cope with change. Concession awards therefore cannot in our view be guided by a mechanistic quantitative analysis. On this basis we believe that any clarification of concessions should reaffirm the principles of the Treaty and provide guidelines of a general nature. It should leave it to public authorities to define evaluation criteria depending on specific situations and which allow enough leeway to develop tailored solutions with individual competitors.

Concessions may involve investment of assets in circumstances that justify the granting of EU funding. Any clarification on concessions should seek to shed light on the grey area that exists regarding EU grants, their compatibility with concessions and how they can be awarded to concessionaires in a way that is in compliance with the Treaty, EU procurement and State Aid rules

INSTITUTIONALISED PPPS

With regard to Institutionalised PPPs we believe that the problem of compliance with EU rules does not arise from the institutional nature of the operator delivering the service but from the manner in which this mixed capital operator has won the right to deliver the service.

It is an established EU rule that when a public authority transfers an economic activity to a private entity, it must be done on a competitive basis using applicable European rules and the principles of the Treaty. This principle has been upheld and clarified by several decisions of the ECJ. We would welcome Commission clarification (perhaps in the form of an interpretative Communication) of this.

If, upon entry of a private partner, a concession to operate the service has been granted competitively with due consideration taken of the private partner's ability to provide operating expertise and in compliance with relevant principles of the Treaty, then in our view that Institutional PPP abides by the rules of the Treaty.

If however, a public authority which initially delivered a service through a wholly-owned subsidiary subsequently decides to open the share capital to private parties without any form of competition linked to their expertise to operate such a service it can lead to highly unsatisfactory situations. Therefore thought needs to be given to how in-house companies can be prevented from profiting from such situations.

There are many publicly held companies which, though controlled by one public authority, appear to enjoy significant leeway in their management. There are several entities which do business outside of their original territory on terms which appear from a business point of view too attractive to be driven by arm's length competition and are thus in our view distorting competition. This requires more clarification in terms of transparency of cross-subsidisation by pubic authorities amongst other things. Such situations also need to be addressed.

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