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**GREEN PAPER**

**ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC  
CONTRACTS AND CONCESSIONS**

(presented by the Commission)

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## 1. DEVELOPMENT OF THE PUBLIC-PRIVATE PARTNERSHIP: FACTS AND CHALLENGES

### 1.1. The “public-private partnership” phenomenon

1. The term public-private partnership ("PPP") is not defined at Community level. In general, the term refers to forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service.
2. The following elements normally characterise PPPs:
  - The relatively long duration of the relationship, involving cooperation between the public partner and the private partner on different aspects of a planned project.
  - The method of funding the project, in part from the private sector, sometimes by means of complex arrangements between the various players. Nonetheless, public funds - in some cases rather substantial - may be added to the private funds.
  - The important role of the economic operator, who participates at different stages in the project (design, completion, implementation, funding). The public partner concentrates primarily on defining the objectives to be attained in terms of public interest, quality of services provided and pricing policy, and it takes responsibility for monitoring compliance with these objectives.
  - The distribution of risks between the public partner and the private partner, to whom the risks generally borne by the public sector are transferred. However, a PPP does not necessarily mean that the private partner assumes all the risks, or even the major share of the risks linked to the project. The precise distribution of risk is determined case by case, according to the respective ability of the parties concerned to assess, control and cope with this risk.
3. During the last decade, the PPP phenomenon developed in many fields falling within the scope of the public sector. Various factors explain the increased recourse to PPPs. In view of the budget constraints confronting Member States, it meets a need for private funding for the public sector. Another explanation is the desire to benefit more in public life from the know-how and working methods of the private sector. 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.
4. The public authorities of Member States often have recourse to PPP arrangements to undertake infrastructure projects, in particular in sectors such as transport, public health, education and national security. At European level, it was recognised that recourse to PPPs could help to put in place trans-European transport networks, which had fallen very much behind schedule, mainly owing to a lack of funding.<sup>1</sup> As part of the Initiative for Growth, the Council has approved a series of measures designed to

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<sup>1</sup> See Communication from the Commission of 23 April 2003 "Developing the trans-European transport network: innovative funding solutions - interoperability of electronic toll collection systems", COM (2003) 132, and the Report of the high-level group on the trans-European transport network of 27 June 2003.

increase investment in the infrastructure of the trans-European transport network and also in the fields of innovation, research and development, mainly through forms of PPPs.<sup>2</sup>

5. However, while it is true that cooperation between the public and private sectors can offer micro-economic benefits permitting execution of a project that provides value for money and meets public interest objectives, recourse to PPPs cannot be presented as a miracle solution for a public sector facing budget constraints.<sup>3</sup> Experience shows that, for each project, it is necessary to assess whether the partnership option offers real value added compared with other options, such as the conclusion of a more traditional contract.<sup>4</sup>
6. The Commission also notes with interest that some Member States and accession countries have created tools to coordinate and promote PPPs, aimed, *inter alia*, at disseminating “good practice” for PPPs at national or at European level. These tools aim to make related expertise mutually available (for example the Task forces in the United Kingdom or in Italy) and thus advise users about the different forms of PPP and their stages, such as initial conception, how to choose a private partner, the best allocation of risks, the choice of contractual clauses or even the integration of community financing.
7. Public authorities have also set up partnership structures with the private sector to administer public services, particularly at local level. Public services concerned with waste management or water or energy distribution are thus increasingly being entrusted to businesses, which can be public, private, or a combination thereof. The Green Paper on services of general interest points out in this context that when a public authority decides to award the management of a service to a third party, it is bound to comply with the rules on public contracts and concessions, even if this service is deemed to be of general interest.<sup>5</sup> The European Parliament also recognised that compliance with these rules can be “an effective instrument for preventing restrictions of competition, while at the same time permitting State authorities themselves to define and monitor the conditions regarding quality, availability and environmental requirements.”<sup>6</sup>

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<sup>2</sup> Conclusions of the Presidency, Brussels European Council, 12 December 2003.

<sup>3</sup> Eurostat, the Statistical Office of the European Communities, has on the 11th of February 2004 (cf. press release STAT/04/18) taken a decision on the accounting treatment in national accounts of contracts undertaken by government units in the framework of partnerships with non-government units. The decision specifies the impact on government deficit/surplus and debt. Eurostat recommends that the assets involved in a public-private partnership should be classified as non-government assets, and therefore recorded off balance sheet for government, if both of the following conditions are met: 1. the private partner bears the construction risk, and 2. the private partner bears at least one of either availability or demand risk.

<sup>4</sup> See Communication from the Commission to the Council and to the Parliament “Public finances in EMU 2003”, published in the European Economy No 3/2003 (COM (2003) 283 final).

<sup>5</sup> COM (2003)270 final. See, for the text of the Green Paper and the contributions, [http://europa.eu.int/comm.secretariat\\_general/services\\_general\\_interest](http://europa.eu.int/comm.secretariat_general/services_general_interest).

<sup>6</sup> Resolution of the European Parliament on the Green Paper on services of general interest, adopted on 14 January 2004.

## 1.2 The challenge for the Internal Market: to facilitate the development of PPPs under conditions of effective competition and legal clarity.

8. This Green Paper discusses the phenomenon of PPPs from the perspective of Community legislation on public contracts and concessions. Community law does not lay down any special rules covering the phenomenon of PPPs. 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)<sup>7</sup>, which encompass in particular the principles of transparency, equality of treatment, proportionality and mutual recognition.<sup>8</sup> Moreover, detailed provisions apply in the cases covered by the Directives relating to the coordination of procedures for the award of public contracts.<sup>9 10</sup> These Directives are thus “essentially aimed at protecting the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State and, to that end, to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body governed by public law may choose to be guided by considerations other than economic ones.”<sup>11</sup> However, the application of the detailed provisions of these Directives is circumscribed by certain assumptions and mainly concerns the award of contracts.
9. The rules applicable to the selection of a private partner derive firstly from the definition of the contractual relationship which that party enters into with a

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<sup>7</sup> The rules on the internal market, including the rules and principles governing public contracts and concessions, apply to any economic activity, i.e. any activity which consists in providing services, goods, or carrying out works in a market, even if these services, goods or works are intended to provide a "public service", as defined by a Member State.

<sup>8</sup> See Interpretive Communication of the Commission on concessions in Community law, OJ C 121, 29 April 2000.

<sup>9</sup> i.e. Directives 92/50/EEC, 93/36/EEC, 93/37/EEC, 93/38/EEC, relating to the coordination of procedures for the award respectively of public service contracts, public supply contracts, public works contracts, and contracts in the water, energy, transport and telecommunications sectors. These Directives will be replaced by Directive 2004/18/EC of the European Parliament and of Council of 31 March 2004 relating to the coordination of procedures for the award of public works, supply and services contracts, and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 relating to the coordination of procedures for the award of contracts in the water, energy, transport and postal services sectors, which will be published in the near future in the OJ. The [provisional] version of the new Directives may be consulted at the website [http://www.europarl.eu.int/code/concluded/default\\_2003\\_en.htm](http://www.europarl.eu.int/code/concluded/default_2003_en.htm).

<sup>10</sup> Moreover, in certain sectors, and particularly the transport sector, the organisation of a PPP may be subject to specific sectoral legislation. See Regulation (EEC) No 2408/92 of the Council on access of Community air carriers to intra-Community air routes, Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States, Council Regulation (EEC) No 1191/69 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, as amended by Regulation (EEC) No 1893/91, and the amended proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway (COM(2002) 107 final).

<sup>11</sup> Joint cases C-285/99 and C-286/99, *Impresa Lombardini v. ANAS*, Judgment of 27 November 2001, paragraph 36 and, to that effect case C-380/98, *University of Cambridge*, ECR I-8035 and case C-19/00, *SIAC construction*, ECR I-7725.

contracting body.<sup>12</sup> Under Community secondary legislation, any contract for pecuniary interest concluded in writing between a contracting body and an operator, which have as their object the execution of works, the execution of a work or provision of a service, is designated as a “public works or public services contract”. The concept of “concession” is defined as a contract of the same type as a public contract except for the fact that the consideration for the works to be carried out or the services to be provided consists either solely in the right to exploit the construction or service, or in this right together with payment.

10. The assessment of the elements in these definitions must, in the view of the Court, be made in such a way as to ensure that the Directive is not deprived of practical effect.<sup>13</sup> For example, the formalism attached to the concept of contract under national law cannot be advanced to deprive the Directives of their practical effect. Similarly, the pecuniary nature of the contract in question does not necessarily imply the direct payment of a price by the public partner, but may derive from any other form of economic consideration received by the private partner.
11. The contracts denoted as public works or public services contracts, defined as having priority,<sup>14</sup> are subject to the detailed provisions of Community Directives. The concessions of so-called “non-priority” works and public services contracts are governed only by some sparse provisions of secondary legislation. Lastly, some projects, and in particular services concessions, fall completely outside the scope of secondary legislation. The same is true of any assignment awarded in the form of a unilateral act.
12. The legislative framework governing the choice of private partner has thus been the subject of Community coordination at several levels and degrees of intensity, with a wide variety of approaches persisting at national level, even though any project involving the award of tasks to a third party is governed by a minimum base of principles deriving from Articles 43 to 49 of the EC Treaty.
13. The Commission has already taken initiatives under public procurement law to deal with the PPP phenomenon. In 2000 it published an Interpretive Communication on concessions and Community public procurement law,<sup>15</sup> in which it defined, on the basis of the rules and principles derived from the Treaty and applicable secondary legislation, the outlines of the concept of concession in Community law and the obligations incumbent on the public authorities when selecting the economic operators to whom the concessions are granted. In addition, the new Directives of the European Parliament and the Council designed to modernise and simplify the Community legislative framework, establish an innovative award procedure, designed principally to meet the specific features of the award of “particularly

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<sup>12</sup> In PPPs, the public partners are primarily national, regional or local authorities. They may also be public law bodies created to fulfil general interest tasks under State control, or certain network system operators. To simplify matters, the term “contracting body” will be used in this document to designate all of these agencies. Thus this term covers “contracting authorities” within the meaning of Directives 92/50/EEC, 93/36/EEC, 93/37/EEC and 2004/18/EC and the contracting entities of the type “public authorities” and “public undertakings” within the meaning of Directives 93/38/EEC and 2004/17/EC.

<sup>13</sup> Judgment of the Court of 12 July 2001, Case C-399/98, *Scala*, ECR I-5409, see in particular points 53 to 55.

<sup>14</sup> i.e. those listed in Annex IA of Directive 92/50/EEC or Annex XVIA of Directive 93/38/EEC.

<sup>15</sup> Interpretative Communication on concessions under Community law, OJ C 121, 29 April 2000.

complex contracts”, and thereby certain forms of PPPs. This new procedure, designated as “competitive dialogue”, allows the public authorities to hold discussions with the applicant businesses in order to identify the solutions best suited to their needs.

14. The fact remains that many representatives of interested groups consider that the Community rules applicable to the choice of businesses called on to cooperate with a public authority under of a PPP, and their impact on the contractual relationships governing the execution of the partnership, are insufficiently clear and lack homogeneity between the different Member States. Such a situation can create a degree of uncertainty for Community players that is likely to represent a genuine obstacle to the creation or success of PPPs, to the detriment of the financing of major infrastructure projects and the development of quality public services.
15. The European Parliament invited the Commission to examine the possibility of adopting a draft Directive aimed at introducing homogeneous rules for the sector of concessions and other forms of PPPs.<sup>16</sup> The Economic and Social Committee also considered that such a legislative initiative was called for.<sup>17</sup>
16. In the context of its Strategy for the internal market 2003-2006,<sup>18</sup> the Commission announced that it would publish a Green Paper on PPPs and Community law on public procurement and concessions, in order to launch a debate on the best way to ensure that PPPs can develop in a context of effective competition and legal clarity. The publication of a Green Paper is also one of the actions planned under the European Initiative for Growth.<sup>19</sup> Lastly, it responds to certain requests made in the course of the public consultation on the Green Paper on services of general interest.<sup>20</sup>

### **1.3. Specific aim and plan of this Green Paper**

17. 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.
18. Put more clearly, this Green Paper aims to show the extent to which Community rules apply to the phase of selection of the private partner and to the subsequent

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<sup>16</sup> Opinion of the European Parliament (first reading) on the proposal of the Commission, COM (2000) 275, 10.05.2002.

<sup>17</sup> Opinion, ESC, OJ C 14, 16.1.2001, rapporteur Mr Levaux, point 4.1.3 and Opinion, ESC, OJ C 193, 10.07.2001, rapporteur Mr Bo Green, point 3.5.

<sup>18</sup> Strategy for the internal market, Priorities 2003-2006, COM (2003) 238 final.

<sup>19</sup> Communication from the Commission "A European initiative for growth: Investing in networks and knowledge for growth and jobs", COM (2003) 690 final, 11 November 2003. This report was approved by the Brussels European Council on 12 December 2003.

<sup>20</sup> See Report on the results of the consultation on the Green Paper on general interest services. See above, footnote 5.

phase, with a view to identifying any uncertainties, and to analyse the extent to which the Community framework is suited to the imperatives and specific characteristics of PPPs. Avenues of consideration for possible Community intervention will be outlined. Since the aim of this Green Paper is to launch a consultation, no option for Community intervention has been decided on in advance. Indeed, a wide variety of instruments are available to make PPPs more open to competition in a transparent legal environment, i.e. legislative instruments, interpretative communications, actions to improve the coordination of national practice or the exchange of good practice between Member States.

19. Thus, while this Paper focuses on issues covered by the law on public contracts and concessions, it should be noted that the Commission has already adopted measures, in certain fields, designed to remove barriers to PPPs. Thus, there has already been clarification of the rules on the treatment in the national accounts of contracts entered into by public entities under partnerships with private entities.<sup>21</sup> Note also that the adoption of the statute for a European company will facilitate trans-European PPPs.<sup>22</sup>
20. As part of the analysis of this Green Paper, it is proposed to make a distinction between:
- PPPs of a purely contractual nature, in which the partnership between the public and the private sector is based solely on contractual links, and
  - PPPs of an institutional nature, involving cooperation between the public and the private sector within a distinct entity.

This distinction is based on the observation that the diversity of PPP practices encountered in the Member States can be traced to two major models. Each of these raise specific questions regarding the application of Community law on public contracts and concessions, and merit separate study, as undertaken in the following chapters.<sup>23</sup>

## **2. PURELY CONTRACTUAL PPPS AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS**

21. The term “purely contractual PPP” refers to a partnership based solely on contractual links between the different players. It covers a variety of set-ups where one or more tasks of a greater or lesser magnitude are assigned to the private partner, and which can include the design, funding, execution, renovation or exploitation of a work or service.

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<sup>21</sup> See above, footnote 3.

<sup>22</sup> Council Regulation (EC) No 2157/2001, 8 October 2001.

<sup>23</sup> The distinction thus made does not take account of the legal interpretations made under national law and in no way prejudices the interpretation in Community law of these types of set-ups or contracts. The sole purpose of the analysis which follows is to make a distinction between the set-ups generally termed PPPs, in order to decide, in a second phase, which rules of Community law on public contracts and concessions should apply to them.

22. In this context, one of the best-known models, often referred to as the “concessive model”,<sup>24</sup> is characterised by the direct link that exists between the private partner and the final user: the private partner provides a service to the public, “in place of”, though under the control of, the public partner. Another feature is the method of remuneration for the joint contractor, which consists of charges levied on the users of the service, if necessary supplemented by subsidies from the public authorities.
23. In other types of set-up, the private partner is called on to carry out and administer an infrastructure for the public authority (for example, a school, a hospital, a penitential centre, a transport infrastructure). The most typical example of this model is the PFI set-up.<sup>25</sup> In this model, the remuneration for the private partner does not take the form of charges paid by the users of the works or of the service, but of regular payments by the public partner. These payments may be fixed, but may also be calculated in a variable manner, on the basis, for example, of the availability of the works or the related services, or even the level of use of the works.<sup>26</sup>

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?

## 2.1. Phase of selection of the private partner

### 2.1.1. *Purely contractual partnership: act of award designated as a “public contract”*

24. The arrangements applicable to the award of public works contracts or public services contracts defined as having priority<sup>27</sup> result from the provisions of the Community Directives laying down detailed rules particularly relating to advertising and participation. When the public authority is a contracting authority acting under the “classical” Directives,<sup>28</sup> it must normally have recourse to the open or restricted procedure to choose its private partner. By way of exception, and under certain conditions, recourse to the negotiated procedure is sometimes possible. In this context, the Commission wishes to point out that the derogation under Article 7(2) of Directive 93/37/EEC, which provides for recourse to negotiated procedure in the case of a contract when “the nature of the works or the risks attaching thereto do not permit prior overall pricing”, is of limited scope. This derogation is to cover solely the exceptional situations in which there is uncertainty *a priori* regarding the nature or scope of the work to be carried out, but is not to cover situations in which the uncertainties result from other causes, such as the difficulty of prior pricing owing to the complexity of the legal and financial package put in place.<sup>29</sup>

<sup>24</sup> It should be noted that the interpretation given by national law or by the parties has no impact on the legal interpretation of these contracts for the purposes of the application of a Community law on public contracts and concessions.

<sup>25</sup> The term PFI refers to “Private Finance Initiative”, a programme of the British Government permitting the modernisation of the public infrastructure through recourse to private funding. The same model is used in other Member States, sometimes with major variants. For example, the PFI model inspired the development of the “Betreibermodell” in Germany.

<sup>26</sup> See the case of “virtual tolls”, used in the context of motorway projects, particularly in the United Kingdom, Portugal, Spain and Finland.

<sup>27</sup> i.e. those listed in Annex IA of Directive 92/50/EEC and Annex XVIA of Directive 93/38/EEC.

<sup>28</sup> i.e. Directives 93/37/EEC, 92/50/EEC and 2004/18/EC.

<sup>29</sup> For example, it may apply when the works are to be carried out in a geologically unstable or archaeological terrain and for this reason the extent of the necessary work is not known when launching

25. Since the adoption of Directive 2004/18/EC, a new procedure known as “competitive dialogue” may apply when awarding particularly complex contracts.<sup>30</sup> The competitive dialogue procedure is launched in cases where the contracting body is objectively unable to define the technical means that would best satisfy its needs and objectives, or in cases where it is objectively unable to define the legal and/or financial form of a project. This new procedure will allow the contracting bodies to open a dialogue with the candidates for the purpose of identifying solutions capable of meeting these needs. At the end of this dialogue, the candidates will be invited to submit their final tender on the basis of the solution or solutions identified in the course of the dialogue. These tenders must contain all the elements required and necessary for the performance of the project. The contracting authorities must assess the tenders on the basis of the pre-stated award criteria. The tenderer who has submitted the most economically advantageous tender may be asked to clarify aspects of it or confirm commitments featuring therein, provided this will not have the effect of altering fundamental elements in the tender or invitation to tender, of falsifying competition or of leading to discrimination.
26. The competitive dialogue procedure should provide the necessary flexibility in the discussions with the candidates on all aspects of the contract during the set-up phase, while ensuring that these discussions are conducted in compliance with the principles of transparency and equality of treatment, and do not endanger the rights which the Treaty confers on economic operators. It is underpinned by the belief that structured selection methods should be protected in all circumstances, as these contribute to the objectivity and integrity of the procedure leading to the selection of an operator. This in turn guarantees the sound use of public funds, reduces the risk of practices that lack transparency and strengthens the legal certainty necessary for such projects.
27. In addition, note that the new Directives emphasise the benefit to the contracting bodies of formulating the technical specifications in terms of either performance or functional requirements. New provisions will thus give the contracting bodies more scope to take account of innovative solutions during the award phase, irrespective of the procedure adopted.<sup>31</sup>

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?
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.

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the tender procedure. A similar derogation is provided for in Article 11(2) of Directive 92/50, and in Article 30(1)(b) of Directive 2004/18/EC.

<sup>30</sup> Article 29 of Directive 2004/18/EC.

<sup>31</sup> Article 23 of Directive 2004/18/EC and Article 34 of Directive 2004/17/EC.

2.1.2. *Purely contractual partnership: act of award designated as a “concession”*

28. There are few provisions of secondary legislation which coordinate the procedures for the award of contracts designated as concession contracts in Community law. In the case of works concessions, there are only certain advertising obligations, intended to ensure prior competition by interested operators, and an obligation regarding the minimum time-limit for the receipt of applications.<sup>32</sup> The contracting bodies are then free to decide how to select the private partner, although in so doing they must nonetheless guarantee full compliance with the principles and rules resulting from the Treaty.
29. For their part, the rules governing the award of services concessions apply only by reference to the principles resulting from Articles 43 and 49 of the Treaty, in particular the principles of transparency, equality of treatment, proportionality and mutual recognition.<sup>33</sup> In its *Telaustria* Judgment, the Court stated in this respect that “[the] obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential 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”.<sup>34</sup>
30. The Commission considers that the rules resulting from the relevant provisions of the Treaty can be summed up in the following obligations: fixing of the rules applicable to the selection of the private partner, adequate advertising of the intention to award a concession and of the rules governing the selection in order to be able to monitor impartiality throughout the procedure, introduction of genuine competition between operators with a potential interest and/or who can guarantee completion of the tasks in question, compliance with the principle of equality of treatment of all participants throughout the procedure, selection on the basis of objective, non-discriminatory criteria.
31. Thus the Community law applicable to the award of concessions is derived primarily from general obligations which involve no coordination of the legislation of Member States. In addition, and although the Member States are free to do so, very few have opted to adopt national laws to lay down general and detailed rules governing the award of works or services concessions.<sup>35</sup> Thus, the rules applicable to the selection of a concessionaire by a contracting body are, for the most part, drawn up on a case-by-case basis.
32. This situation may present problems for Community operators. The lack of coordination of national legislation could in fact be an obstacle to the genuine

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<sup>32</sup> See Article 3(1) of Directive 93/37/EEC, and Articles 56 to 59 of Directive 2004/18/EC.

<sup>33</sup> Although the Commission had proposed that services concessions be included in Directive 92/50/EEC, in the course of the legislative process the Council decided to exclude them from the scope of that Directive.

<sup>34</sup> Case C-324/98. See also ruling of 30 May 2002, Case C-358/00, *Deutsche Bibliothek*, ECR. I-4685. These principles are also applicable to other State acts entrusting an economic service to a third party, as for example the contracts excluded from the scope of the Directives owing to the fact that they have a value below the threshold values laid down in the secondary legislation (Order of the Court of 3 December 2001, Case C-59/00, *Vestergaard*, ECR. I-9505), or so-called non-priority services.

<sup>35</sup> Spain (law of 23 May 2003 on works concessions), Italy (Merloni law of 1994, as amended) and France (Sapin law of 1993) have nonetheless adopted such legislation.

opening up of such projects in the Community, particularly when they are organised at transnational level. The legal uncertainty linked to the absence of clear and coordinated rules might in addition lead to an increase in the costs of organising such projects.

33. Moreover, some persons have claimed that the objectives of the internal market might not be achieved in certain situations, owing to a lack of effective competition on the market. In this context the Commission wishes to recall that the “public contracts” Directives aim not only to ensure transparency of procedures and equality of treatment for economic operators, but also require that a minimum number of candidates be invited to participate in the procedures, whether these be open, restricted, negotiated, or competitive dialogue procedures.<sup>36</sup> There is a need to assess whether the effective application of these provisions is sufficient, or whether other measures are needed to facilitate the emergence of a more competitive environment.
34. The Commission has also observed, in the context of infringement procedures already investigated, that it is not always easy to determine from the outset if the contract which is the subject-matter of the procedure is a public contract or a concession. Indeed, in the case of contracts designated as concessions when the procedure is launched, the distribution of risks and benefits may be the subject of negotiations throughout the procedure. It may occur that, following these negotiations, the contract in question must in the end be redefined as a “public contract”, resulting often in a calling into question of the legality of the award procedure selected by the contracting body. According to the views expressed by the parties concerned, this situation creates a degree of legal uncertainty which is very damaging to the development of such projects.
35. In this context, the Commission could envisage proposing legislative action designed to coordinate the procedures for the award of concessions in the European Union, such new legislation being added to the existing texts on the award of public contracts. In that case it would be necessary to lay down the detailed provisions applicable to the award of concessions.
36. Also, there are grounds to examine if there are objective reasons for making the award of concessions and the award of other contractual PPPs subject to different sets of provisions. In this context, it should be noted that it is the criterion of the right of exploitation and its corollary, the transfer of the risks inherent in the exploitation, which distinguish public contracts from concessions. If it is confirmed that legal uncertainty, linked to the difficulty of identifying a priori the distribution of the risks of exploitation between the partners, arises frequently when awarding certain purely contractual PPPs, the Commission might consider making the award of all contractual PPPs, whether designated as public contracts or concessions, subject to identical award rules.

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<sup>36</sup> Article 19 of Directive 93/36/EEC, Article 22 of Directive 93/37/EEC, Article 27 of Directive 92/50/EEC and Article 31 of Directive 93/38/EEC. See also Article 44 of Directive 2004/18/EC and Article 54 of Directive 2004/17/EC.

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

## **2.2. Specific questions relating to the selection of an economic operator in the framework of a private initiative PPP**

37. Certain practices where the private sector has the opportunity to take the initiative in a PPP project have recently been developed in some Member States.<sup>37</sup> In arrangements of this type, the economic operators formulate a detailed proposal for a project, generally in the field of construction and infrastructure management, in some cases at the invitation of the public authority.
38. Such practices make it possible to sound out at an early stage the willingness of economic operators to invest in certain projects. They also encourage them to develop or apply innovative technical solutions, suited to the particular needs of the contracting body.
39. The fact that a public utility project originates in a private initiative does not change the nature of the contracts concluded between the contracting bodies and the economic operators. Where these contracts concern services covered by secondary legislation and are concluded for pecuniary interest, they must be designated either as a contract or a concession and adhere to the resulting award rules.
40. It is therefore necessary to ensure that the procedures applied in this context do not end up depriving European economic operators of the rights to which the Community legislation on public contracts and concessions entitles them. In particular, and at the very least, the Commission is of the view that all European operators must be guaranteed access to such projects, primarily through adequate advertising of the invitation to formulate a project. Subsequently, if the public authority wishes to implement a given project, it must organise a call for competition addressed to all the economic operators who are potentially interested in developing the selected project, providing full guarantees of the impartiality of the selection process.

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<sup>37</sup> In certain Member States, the private initiative is subject to specific supervision (see in Italy the Merloni law of 18 November 1998 and, in Spain, the regulation on local authority services of 1955 and the law 13/2003 on works concessions of 23 May 2003). In other Member States, the private initiative PPP is also emerging in practice.

41. To make the system attractive, the Member States have sometimes tried to provide certain incentives for first movers. The option of compensating the initiator of the project – for example, paying him for his initiative outside of the subsequent call for competition procedure – has been used. The possibility was also envisaged of awarding the first mover certain advantages in the context of the call for competition designed to develop the selected project. Such solutions merit close consideration, to ensure that these competitive advantages awarded to the project mover do not breach the equality of treatment of candidates.

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?
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?

### **2.3. The phase following the selection of the private partner**

42. Community secondary legislation on public contracts and concessions mainly concerns the phase of award of a contract. Secondary legislation does not cover comprehensively the phase following selection of the private partner. However, and the principle of equality of treatment and the principle of transparency resulting from the Treaty generally rule out any intervention of the public partner after selection of a private partner, in so far as any such intervention might call into question the principle of equality of treatment between economic operators.<sup>38</sup>
43. The often complex nature of the arrangements in question, the time which may elapse between the selection of the private partner and the signing of the contract, the relatively long duration of the projects and, lastly, the frequent recourse to sub-contracting mechanisms, sometimes complicate the application of these rules and principles. Two aspects are covered below: the contractual framework of the PPP and sub-contracting.

#### *2.3.1. The contractual framework of the project*

44. The contractual provisions governing the phase of implementation of the PPPs are primarily those of national law. However, contractual clauses must also comply with the relevant Community rules, and in particular the principles of equality of treatment and transparency. This implies in particular that the descriptive documents must formulate clearly the conditions and terms for performance of the contract so that the various candidates for the partnership can interpret them in the same manner and take them into account when preparing their tenders. In addition, these terms and conditions of performance must not have any direct or indirect discriminatory impact or serve as an unjustifiable barrier to the freedom to provide services or freedom of establishment.<sup>39</sup>

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<sup>38</sup> See Case C-87/94, *Commission v. Belgique (Bus Wallons)*, Judgment of 25 April 1994, point 54. See also Case C-243/89, *Commission v. Danemark (Bridge on the Storebaelt)*, Judgment of 22 June 1992.

<sup>39</sup> Case C-19/00, *SIAC Constructions*, Judgment of 18 October 2001, points 41-45; Case C-31/87, *Gebroeders Beentjes v. Pays-Bas*, Judgment of 20 September 1988, points 29-37. See also Article 26 of Directive 2000/18/EC and Article 38 of Directive 2000/17/EC.

45. The success of a PPP depends to a large extent on a comprehensive contractual framework for the project, and on the optimum definition of the elements which will govern its implementation. In this context, the appropriate assessment and optimum distribution of the risks between the public and the private sectors, according to their respective ability to assume these risks, is crucial. Also important are mechanisms to evaluate the performance of the titular holder of the PPP on a regular basis. In this context, the principle of transparency requires that the elements employed to assess and distribute the risks, and to evaluate the performance, be communicated in the descriptive documents, so that tenderers can take them into account when preparing their tenders.
46. In addition, the period during which the private partner will undertake the performance of a work or a service must be fixed in terms of the need to guarantee the economic and financial stability of a project. In particular, the duration of the partner relationship must be set so that it does not limit open competition beyond what is required to ensure that the investment is paid off and there is a reasonable return on invested capital. An excessive duration is likely to be censured on the basis of the principles governing the internal market<sup>40</sup> or the provisions of the Treaty governing competition.<sup>41</sup> Similarly, the principle of transparency requires that the elements employed to establish the duration be communicated in the descriptive documents so that tenderers can take them into account when preparing their tenders.
47. Since they concern a service spread out in time, PPP relationships must be able to evolve in line with changes in the macro-economic or technological environment, and in line with general interest requirements. In general, Community public contract law does not reject such a possibility, as long as this is done in compliance with the principles of equality of treatment and transparency. Thus, the descriptive documents transmitted to the tenderers or candidates during the selection procedure may provide for automatic adjustment clauses, such as price-indexing clauses, or stipulate the circumstances under which the rates charged may be revised. They can also stipulate review clauses on condition that these identify precisely the circumstances and conditions under which adjustments could be made to the contractual relationship. However, such clauses must always be sufficiently clear to allow the economic operators to interpret them in the same manner during the partner-selection phase.
48. In certain projects, the financial institutions reserve the right to replace the project manager, or to appoint a new manager, if the financial flows generated by the project fall below a certain level. The implementation of such clauses, which fall within the category of so-called "step-in" clauses, may result in changing the private partner of the contracting body without a call for competition. Consequently, to guarantee the compatibility of such projects with Community law on public contracts and concessions, special attention must be paid to this aspect.
49. In general, changes made in the course of the execution of a PPP, if not covered in the contract documents, usually have the effect of calling into question the principle of equality of treatment of economic operators.<sup>42</sup> Such unregulated modifications are

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<sup>40</sup> See Interpretative Communication on concessions, in particular point 3.1.3.

<sup>41</sup> Articles 81, 82 and 86 (2) of the EC Treaty.

<sup>42</sup> See Case C-337/98, *Commission v. France*, Judgment of 5 October 2000, points 44 ff. Community law also rejects any changes made during the phase of drawing up the contract, after the final selection of the successful tenderer. In this respect the new provisions governing competitive dialogue stipulate that

therefore acceptable only if they are made necessary by an unforeseen circumstance, or if they are justified on grounds of public policy, public security or public health.<sup>43</sup> In addition, any substantial modification relating to the actual subject-matter of the contract must be considered equivalent to the conclusion of a new contract, requiring a new competition.<sup>44</sup>

50. Lastly, it should be pointed out that secondary legislation lays down the exceptional situations in which additional works or services not included in the project initially considered or in the initial contract may be awarded directly, without a call for competition.<sup>45</sup> The interpretation of these exceptions must be restrictive. For example, they do not refer to the extension of the period of an already existing motorway concession, in order to cover the cost of works to complete a new section. Thus, the practice of combining "profitable" and "non-profitable" activities awarded to a single concessionaire must not lead to a situation where a new activity is awarded to an existing concessionaire without competition.

10. In contractual PPPs, what is your experience of the phase which follows the selection of the private partner?
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?
12. Are you aware of any practices or mechanisms for evaluating tenders which have a discriminatory effect?
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?
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?

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the successful tenderer may only "clarify aspects of the tender or confirm commitments contained in the tender, provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender or does not risk distorting competition or causing discrimination".

<sup>43</sup> Article 46 of the Treaty.

<sup>44</sup> Case C-337/98, *Commission v. France*, Judgment of 5 October 2000, points 44 ff. The Interpretative Communication on concessions states in this context that the extension of an existing concession beyond the period originally laid down must be considered equivalent to granting a new concession to the same concessionaire.

<sup>45</sup> See Article 11 (3)(e) of Directive 92/50/EEC, Article 7 (3)(d) of Directive 93/37/EEC and Article 20 (2)(f) of Directive 93/38/EEC. The new Directive 2004/18/EC provides for a similar exception for works concessions, see Article 61.

### 2.3.2. *Sub-contracting of certain tasks*

51. It is the Commission's experience that the application of subcontracting rules sometimes gives rise to uncertainties or queries in the context of PPP arrangements. Certain parties have claimed, for example, that the contractual relations between the project company, which becomes the holder of the contract or the concession, and its shareholders, raise a certain number of legal issues. In this respect, the Commission wishes to point out that when the project company is itself in the role of contracting body, it must conclude its contracts or concession contracts in the context of a competition, whether or not these are concluded with its own shareholders. The only case where this does not apply is when the services entrusted by a project company to its shareholders have already been the subject of a competition by the public partner prior to the formation of the company undertaking the project.<sup>46</sup> However, when this company is not in the role of contracting body, it is in principle free to conclude contracts with third parties, whether these be its own shareholders or not. By way of exception, when the project company is a "works concessionaire", certain publicity requirements apply to the award of works contracts exceeding a threshold of EUR 5 million, with the exception of contracts concluded with businesses that have formed a group in order to win the concession, or their affiliated companies.<sup>47</sup>
52. In principle, private partners are free to subcontract part or all of a public contract or a concession. However, it should be pointed out that, in the case of the award of public contracts, tenderers may be asked to indicate in their tenders the share of the contract which they intend to subcontract to third parties.<sup>48</sup> In the case of public works concessions where the value exceeds EUR 5 million, the contracting body may require the concessionaire to award contracts representing a minimum of 30% of the total value of the work for which the concession contract is to be awarded to third parties.<sup>49</sup>

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

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<sup>46</sup> Article 13 of Directive 93/38/EEC provides for a derogation when the sub-contracting contracts for services are awarded by a network systems operator acting as contracting entity to an affiliated enterprise. Article 23 of Directive 2004/17/EC extends this exception to sub-contracting contracts covering supplies or works.

<sup>47</sup> Article 3 (4) of Directive 93/37/EEC and Articles 63 to 65 of Directive 2004/18/EC. In the latter articles the above-mentioned threshold is fixed at EUR 6 242 000.

<sup>48</sup> Article 17 of Directive 93/36/EEC, Article 20 of Directive 93/37/EEC, Article 25 of Directive 92/50, Article 27 of Directive 93/38. See also Article 25 of Directive 2004/18/EC and Article 37 of Directive 2004/17/EC.

<sup>49</sup> Article 3(2) of Directive 93/37/EEC. See also Article 60 of Directive 2004/18/EC.

### 3. INSTITUTIONALISED PPPs AND THE COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

53. Within the meaning of this Green Paper, institutionalised PPPs involve the establishment of an entity held jointly by the public partner and the private partner.<sup>50</sup> The joint entity thus has the task of ensuring the delivery of a work or service for the benefit of the public. In the Member States, public authorities sometimes have recourse to such structures, in particular for to administer public services at local level (for example, for water supply services or waste collection services).
54. Direct cooperation between the public partner and the private partner in a forum with a legal personality allows the public partner, through its presence in the body of shareholders and in the decision-making bodies of the joint entity, to retain a relatively high degree of control over the development of the projects, which it can adapt over time in the light of circumstances. It also allows the public partner to develop its own experience of running the service in question, while having recourse to the support of a private partner.
55. An institutionalised PPP can be put in place, either by creating an entity held jointly by the public sector and the private sector (3.1), or by the private sector taking control of an existing public undertaking (3.2).
56. The discussion below focuses solely on issues concerning the law on public contracts and concessions applicable to institutionalised PPPs. For a more general discussion of the impact of this law when setting up and executing such PPPs, please refer to the preceding chapters.
- 3.1. Partnership involving the creation of an ad hoc entity held jointly by the public sector and the private sector.<sup>51</sup>**
57. The law on public contracts and concessions does not of itself apply to the transaction creating a mixed-capital entity. However, when such a transaction is accompanied by the award of tasks through an act which can be designated as a public contract, or even a concession, it is important that there be compliance with the rules and principles arising from this law (the general principles of the Treaty or, in certain cases, the provisions of the Directives).<sup>52</sup>
58. The selection of a private partner called on to undertake such tasks while functioning as part of a mixed entity can therefore not be based exclusively on the quality of its capital contribution or its experience, but should also take account of the

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<sup>50</sup> The Member States use different terminology and schemes in this context (for example, the Kooperationsmodell, joint PPPs, Joint Ventures).

<sup>51</sup> The question being dealt with here is the creation of *ex novo* entities in the context of a specific legal arrangement. However, the case of pre-existing mixed entities participating in the procedures for the award of public contracts or concessions will not be dealt with specifically, because this latter hypothesis does not give rise to much comment in terms of the applicable Community law. The mixed character of an entity participating in a tendering procedure does not in fact involve any derogation from the rules applicable to the award of a public contract or a concession. Only in the case where the entity in question meets the characteristics of an 'in house' entity, within the meaning of the *Teckal Case* Law of the Court of Justice, is the contracting authority entitled not to apply the usual rules.

<sup>52</sup> Note that the principles governing the law on public contracts and concessions apply also when a task is awarded in the form of a unilateral act (e.g. a legislative or regulatory act).

characteristics of its offer – the most economically advantageous – in terms of the specific services to be provided. Thus, in the absence of clear and objective criteria allowing the contracting authority to select the most economically advantageous offer, the capital transaction could constitute a breach of the law on public contracts and concessions.

59. In this context, the transaction involving the creation of such an entity does not generally present a problem in terms of the applicable Community law when it constitutes a means of executing the task entrusted under a contract to a private partner. However, the conditions governing the creation of the entity must be clearly laid down when issuing the call for competition for the tasks which one wishes to entrust to the private partner.<sup>53</sup>
60. However, the Commission has noted that, in certain Member States, national legislation allows the mixed entities, in which the participation by the public sector involves the contracting body, to participate in a procedure for the award of a public contract or concession even when these entities are only in the course of being incorporated. In this hypothesis, the entity will be definitively incorporated only after the contract has actually been awarded to it. In other Member States, a practice has developed which tends to confuse the phase of incorporating the entity and the phase of allocating the tasks. Thus the purpose of the procedure launched by the contracting authority is to create a mixed entity to which certain tasks are entrusted.
61. Such formulae do not appear to offer satisfactory solutions in terms of the provisions applicable to public contracts and concessions.<sup>54</sup> In the first case, there is a risk that the effective competition will be distorted by a privileged position of the company being incorporated, and consequently of the private partner participating in this company. In the second case, the specific procedure for selecting the private partner also poses many problems. The contracting authorities encounter certain difficulties in defining the subject-matter of the contract or concession in a sufficiently clear and precise manner in this context, as they are obliged to do. The Commission has frequently noted that the tasks entrusted to the partnership structure are not clearly defined and that, in certain cases, they even fall outside any contractual framework. This raises problems not only with regard to the principles of transparency and equality of treatment, but even risks prejudicing the general interest objectives which the public authority wishes to attain. It is also evident that the lifetime of the created entity does not generally coincide with the duration of the contract or concession awarded, and this appears to encourage the extension of the task entrusted to this entity without a true competition at the time of this renewal. Sometimes this results in a situation where the tasks are awarded *de facto* for an unlimited period.
62. In addition, it should be pointed out that the joint creation of such entities must respect the principle of non-discrimination in respect of nationality in general and the

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<sup>53</sup> Also, these conditions must not discriminate against or constitute an unjustified barrier to the freedom to provide services or to freedom of establishment, or be disproportionate to the desired objective.

<sup>54</sup> When planning and arranging such transactions, the test involving the use of the standard forms - which include the elements indispensable for a well-informed competition, - also demonstrate how difficult it can be to find an adequate form of advertising to award tasks falling within the scope of the law on public contracts or concessions.

free circulation of capital in particular.<sup>55</sup> Thus, for example, the public authorities cannot normally make their position as shareholder in such an entity contingent on excessive privileges which do not derive from a normal application of company law.<sup>56</sup>

63. The Commission also wishes to point out that the participation of the contracting body in the mixed entity, which becomes the joint holder of the contract at the end of the selection procedure, does not justify not applying the law on public contracts and concessions when selecting the private partner. The application of Community law on public contracts and concessions is not contingent on the public, private or mixed character of the joint contractor of the contracting body. As the Court of Justice confirmed in the *Teckal* case, this law is applicable when a contracting body decides to entrust a task to a third party, i.e. a person legally distinct from it. 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.<sup>57</sup> Only entities that fulfil these two conditions at the same time may be treated as equivalent to "in-house" entities in relation to the contracting body and have tasks entrusted to them without a competitive procedure.<sup>58</sup>
64. Lastly, it should be pointed out that if the mixed entity has the quality of a contracting body this quality also requires it to comply with the law applicable to public contracts and concessions when it is awarding tasks to the private partner which have not been the subject of a call for competition by the contracting authority ahead of the incorporation of the mixed entity. Thus, the private partner should not profit from its privileged position in the mixed entity to reserve for itself certain tasks without a prior call for competition.

### **3.2. Control of a public entity by a private operator**

65. The establishment of an institutionalised PPP may also lead to a change in the body of shareholders of a public entity. In this context, it should first be emphasised that the changeover of a company from the public sector to the private sector is an economic and political decision which, as such, falls within the sole competence of the Member States.<sup>59</sup>

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<sup>55</sup> Participation in a new undertaking with a view to establishing lasting economic links is covered by the provisions of Article 56 relating to the free movement of capital. See Annex I of Directive 88/361/EEC, adopted in the context of the former Article 67, which lists the types of operations which must be considered as movements of capital.

<sup>56</sup> See Judgments of the Court of 4 June 2002, Case C-367/98, *Commission v. Portugal*, ECR I-4731; Case C-483/99, *Commission v. France*, ECR I-4781; and Judgments of 13 May 2003, Case C-463/00, *Commission v. Spain*, ECR I-4581; Case C-98/01, *Commission v. United Kingdom*, Rec. I-4641. On the possible justifications in this framework, see Judgment of the Court of 4 June 2002, Case C-503/99, *Commission v. Belgium*, ECR I-4809.

<sup>57</sup> Case C-107/98, *Teckal*, Judgment of 18 November 1999, point 50.

<sup>58</sup> The Court of Justice has been asked to make three preliminary rulings (Cases C-26/03, C-231/03 and C-458/03) designed to obtain additional clarification on the scope of the criteria which can establish the existence of an "in house" type relationship.

<sup>59</sup> This follows from the neutrality principle of the Treaty in relation to ownership rules, recognised by Article 295 of the Treaty.

66. It should also be pointed out that Community law on public contracts is not as such intended to apply to transactions involving simple capital injections by an investor in an enterprise, whether this latter be in the public or the private sector. Such transactions fall under the scope of the provisions of the Treaty on the free movement of capital<sup>60</sup>, implying in particular that the national measures regulating them must not constitute barriers to investment from other Member States.<sup>61</sup>
67. On the other hand, the provisions on freedom of establishment within the meaning of Article 43 of the Treaty must be applied when a public authority decides, by means of a capital transaction, to cede to a third party a holding conferring a definite influence in a public entity providing economic services normally falling within the responsibility of the State.<sup>62</sup>
68. In particular, when the public authorities grant an economic operator a definite influence in a business under a transaction involving a capital transfer, and when this transaction has the effect of entrusting to this operator tasks falling within the scope of the law on public contracts which had been previously exercised, directly or indirectly, by the public authorities, the provisions on freedom of establishment require compliance with the principles of transparency and equality of treatment, in order to ensure that every potential operator has equal access to performing those activities which had hitherto been reserved.
69. In addition, good practice recommends ensuring that such a capital transaction does not in reality conceal the award to a private partner of contracts which might be termed public contracts, even concessions. This is the case in particular when, before the capital transaction, the entity in question is awarded, directly and without competition, specific tasks, with a view to making the capital transaction attractive.

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 ?
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?
- In general and independently of the questions raised in this document:
20. In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?
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.
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?

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<sup>60</sup> Article 56 ff. of the EC Treaty.

<sup>61</sup> See Communication of the Commission on certain legal aspects concerning intra-EU investment OJ No C 220, 19 July 1997, p.15.

<sup>62</sup> See, on these lines, the Judgment of the Court of 13 April 2000, Case C-251/98, *Baars*, ECR I-2787

4. **FINAL REMARKS**

70. The Commission invites all interested parties to send their comments on the questions set out in this Green Paper. The replies, comments and suggestions may be sent by mail to the following address:

European Commission  
Consultation “Green Paper on PPPs and the Community law on public contracts and concessions”  
C 100 2/005  
B-1049 Brussels

or by electronic mail to the following address:

[MARKT-D1-PPP@cec.eu.int](mailto:MARKT-D1-PPP@cec.eu.int)

Comments should reach the Commission by **30 July 2004** at the latest. For the information of interested parties, contributions received by electronic mail, with the name and address of the originators, will be posted at the site [http://europa.eu.int/comm/internal\\_market](http://europa.eu.int/comm/internal_market), provided that the authors in question have not expressly objected to such publication.

71. On the basis of the contributions received, *inter alia*, the Commission plans to draw conclusions and, where appropriate, to submit concrete follow-up initiatives.