BUSINESSEUROPE

COMMENTS

16 July 2007

PRELIMINARY COMMENTS… ON THE DRAFT COMMUNICATION ON IPPPS

BUSINESSEUROPE is supportive of the Commission current initiative on *Institutionalised Public Private Partnerships* (IPPP) and would encourage the Commission's attempts in interpreting the rules geared to competition and transparency.

Building on BUSINESSEUROPE's previous submissions[1] on the issue of *Public Private Partnerships* (PPP), *concessions* and *in-house procurement*, you are aware of how important business believes the development of PPPs to be to the European Union and the Internal Market. In the spirit of these earlier and still relevant contributions BUSINESSEUROPE would like to provide you with the following initial comments on the draft document on IPPPs we received.

As with earlier papers the views expressed in this document are provided with a view to supporting the current ongoing work on this issue. The views expressed here represent our views at this point in time, based on the information available to us and are not a definite and final expression of position. We reserve the right to amend these views as and when deemed appropriate and as the debate progresses.

…ON CLARIFICATION

BUSINESSEUROPE feels that the present wording of the draft document needs to be clarified somewhat. There is too much uncertainty in this current draft. For example, the word "State" is used several times to designate the public partner. We believe that using the term "public authority" might be more appropriate, in as much as the State organises the various public authorities which in turn may decide to contract economic missions out in the framework of a PPP (including IPPPs). States and public authorities are distinct entities and it is the latter that this document is intended for.

BUSINESSEUROPE feels that it would be useful at the outset of the communication to outline that whilst there is no EU legislation applying to PPP, there are indeed procurement rules applying to the award of the contracts at the core of a PPP. And, in that respect, an IPPP is only a specific case of PPP where an economic mission is awarded to a mixed public-private entity.

BUSINESSEUROPE agrees with the basic assertion of the paper, that if public bodies decide to involve third parties in economic activities, community law on public procurement (respectively concessions) must be complied with.

Our support of the application of the relevant EU law does not merely flow from the formal obligations to apply these rules. We would underline that the application of EU public procurement law in these cases is in the interest of industry across Europe, since these rules safeguard a fair and transparent procedure for selecting the private

[1] - BUSINESSEUROPE comments on In-House Procurement (April 2007);
- BUSINESSEUROPE comments on Concessions (April 2007);
- UNICE comments on the Commission Communication on Public Private Partnerships Public Procurement and Concessions (October 2006).

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partner and avoid a closing down of competitive structures.

We also support the clarification provided that any act by which a public entity transfers the execution of an economic activity to a third party has to be subject to community law.

However, in application of this principle, we believe that the text should be more specific about the procurement issue arising in IPPP situations.

When a public authority wants to involve the private sector in the delivery of an economic activity traditionally carried out by the public sector, it should put the activity to a tender between private parties. If the authority wants the activity to be run by a company in which it holds a stake, then the private party winning the competition will create a company with the public authority, and this company will sign a contract with the public authority to carry the mission on terms agreed between the parties.

Where the public authority has already awarded an economic mission to an in-house company and then wants the private sector to take a stake in the company, the said company ceases to be in-house, with the consequence that it is no longer complying with EU procurement law. Situations such as this are the subject of ample EU jurisprudence. In order to remain compliant with EU law, the authority would have to re-award the mission in a competitive process between private parties as outlined above. As before, the contract would be between the authority and the mixed capital company.

We believe that this communication has to be clear that this specific situation cannot be put right through a competition for the purchase of shares in the in-house company. The purchase of shares is not an activity regulated by the Treaty and is irrelevant to the central issue, i.e. what should happen to a public economic mission carried by an entity that had contracted for it without competing because it was “in-house” when this entity ceases to qualify as “in-house”.

However, the strict application of an obligation to re-award the mission for existing mixed capital companies that are not compliant might have dramatic consequences. So it is for the Commission at the time this communication is published to consider if such non-standard situations might be allowed to run to the end of the contractual term. BUSINESSEUROPE would take the view that following publication of the communication, there needs to be a point in time when further non-compliant situations cannot be created.

Since the core issue is one of compliance with EU procurement rules during the award of an economic mission to a mixed capital company, the motivation of the private partner is not, in our view, relevant. Motivations of private owners may be complex and may change in time, a process that cannot be tracked in any practical manner. We believe that it would be inappropriate to attempt to clarify the situation of IPPP by reference to the goals of the private parties involved.

…ON THE FOUNDING PROCESS

BUSINESSEUROPE support in principle the wording outlined in the draft interpretative document provided that it reflects the principles outlined above.

We believe however the wording of the draft communication would require tightening.

For example, in connection with the founding of a public-private company (the IPPP) and the assigning to it of its respective public task, it is said that "subsequently contracting authorities (including the one which is party to the IPPP) have to treat this undertaking like every other competitor in the market". To avoid misinterpretation you could perhaps say precisely that the contracting authority has to treat a mixed public-private company like every other competitor *in connection with contracts/concessions beyond that which is subject to the initial competitive award of a mission.*

…ON THE LEGAL BASIS

In the last sentence of this section it should be expressed clearly and underlined that clarification of the legal framework is subject to Commission's interpretation of EU law.

…ON INFORMATION ABOUT THE PROJECT

BUSINESSEUROPE is of the opinion that notification about a project has to be published and be sufficiently accessible to interested parties (both domestically and internationally) before the private partner is selected.

…ON THE SPECIFIC ELEMENTS OUTLINED IN POINT 1.3.4.

The draft text tends in our view to be somewhat over prescriptive on what should be included in articles of association and shareholder agreement. That is by and large a matter for the partners.

Any initiative at the European level should in our view concentrate on the terms of award of the contract for an economic activity. What is expected of the private partner in terms of the economic mission should be clearly and thoroughly advertised. It should also be clear that once a contract – as legitimately amended if necessary – has run its course, it would have to be re-awarded in an open, transparent and competitive new procedure. No prior arrangement should constitute an obstacle to this process.

…ON THE PROCUREMENT PROCEDURE

In trying to coach public authorities in the use of procurement procedures, this section may be to some extent misleading. Under current Procurement rules public authorities should be free to use the procurement process best suited to their needs and to the nature of the contract (services or concessions).

…ON THE RE-TENDERING OF A PUBLIC CONTRACT WHICH HAS ALREADY BEEN AWARDED TO AN IPPP

BUSINESSEUROPE support the reinforcement of the ECJ's *Stadt Halle* ruling outlined in this draft document. The document makes clear that involvement of a private partner in the capital of a public company means that the company no longer enjoys the advantage of being considered in-house to the contracting authority. Subsequent contracts cannot therefore be awarded to the mixed capital company without a full and transparent competition.

…ON THE THREE QUESTIONS

Question 1:

BE firmly believes that one should not try to distinguish between the motivations of

private parties to IPPP with a view to establishing different procedures of compliance with EU procurement rules, or, worse, to allow the award of contracts for economic activities to certain mixed-capital companies without due competition as if they were in-house companies.

The only issue with an IPPP is : “Has the mission of a mixed capital company to carry an economic activity been awarded in a competitive process complying with EU rules?”

The answer to that question can only be positive when such a competitive process has been organised for the award of this mission. The motivations of the private partners participating in the competition is not a relevant issue.

Question 2:

If the direct labour organization of a public authority has competed in open competition with other private parties in a transparent and fair manner compliant with EU rules and won the contract to carry out the economic mission, it can we believe then open its capital to financial or “strategic” partners without any problem. At the end of the contract however this mixed capital company will have to compete with others to win a new award.

Question 3:

We agree with the interpretation of ECJ jurisprudence underpinning this question. Our view is that there is no process of opening up capital – whatever the nature of the investors – that could fix the non-compliance with EC rules of a mixed capital company having obtained its economic mission without due competition. The only remedy is the re-award of the economic mission through a competitive process involving all interested parties.

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