

PUBLIC PRIVATE PARTNERSHIPS

A viable option to increase public investment and efficiency across Europe?

PUBLIC PRIVATE PARTNERSHIPS WHICH ESTABLISH BROAD COOPERATION AND SHARE THE FINANCIAL RISKS BETWEEN THE PUBLIC AND PRIVATE SECTORS CAN HELP LOCAL AUTHORITIES TO PROVIDE PUBLIC SERVICES BY INTRODUCING PRIVATE-SECTOR FINANCE AND SKILLS WHILE RETAINING PUBLIC CONTROL, SPEAKERS SAID AT A EUROPEAN POLICY CENTRE (EPC) DEBATE. HOWEVER, WHILE SOME FELT THAT FURTHER EU LEGISLATION IS NEEDED TO CLARIFY HOW THE RULES GOVERNING THEIR CREATION AND HOW THEY SHOULD OPERATE, OTHERS FEAR THAT MORE LEGISLATION COULD STIFLE INNOVATION.

GREEN PAPER

Matthias Petschke, Head of Unit for the Formulation and enforcement of public procurement law I, Directorate-General for the Internal Market, European Commission, said Public Private Partnerships (PPPs) and public procurement law are increasingly important, as local authorities strive to maintain services while making financial savings. This new emphasis

was reflected in a Green Paper published by the European Commission four years ago.

In this Paper the Commission set out the extent to which public procurement rules applied to PPPs, and how far current legislation could be used for all the different types of Institutionalised Public Private Partnerships (IPPPs). The Paper considered the possibility

of introducing new legislation, either across the board or for specific PPP set-ups such as concessions, which are not covered by the secondary procurement legislation.

While there are different types of PPPs, they all feature broad cooperation and a sharing of financial risks between the public and private sectors. A huge advantage for public authorities of using PPPs is that they bring in the private sector's ability to apply innovative solutions.

Matthias Petschke said that was no definition, nor specific rules governing the founding of an IPPP in Community law, but the Commission defines it as a form of cooperation between public and private parties established through a mixed-capital entity which performs public contracts or concessions. As



well as contributing capital and other assets, the private sector actively participates in managing and operating the contracts.

Under another form of IPPP, two municipal authorities decide to act together as a public-public corporation. Again, said Petschke, there needs to be further research on the legal implications of this, and the Commission is working closely with local authorities on this. In February this year, the Commission produced an **Interpretative Communication on the Application of Community law on Public Procurement and Concession to Institutionalised PPPs**. This was designed to invite discussion on whether to introduce legislation to regulate IPPPs in compliance with public procurement rules, and the response so far suggests that some stakeholders believe that any further legislation would starve innovation.

MIXED-CAPITAL ENTITY

Michael Burnet, Director, European PPP Forum, European Institute of Public Administration, said IPPPs occur once a public authority - as a service provider - decides to involve private partners through a mixed-capital entity (held jointly by the public authority and a private partner).

IPPPs are created either through setting up an entirely new mixed-capital entity, or by transferring part of the share capital of an existing public sector entity to the private sector. He stressed that they were not service contracts issued by the municipality to a private provider.

Burnet believed that IPPPs benefit local authorities by giving them a management - rather than just a regulatory - role in providing a service, and enable them to get value for money while maintaining their capacity to deliver. Given these advantages, IPPPs should form part of a balanced portfolio of service delivery at regional or national level.

Turning to the question of whether IPPPs are simply 'new wine in old bottles' (i.e. an old idea presented as an innovation), he said many local authorities have been using a form of IPPP for many years, after discovering that they could not always work effectively within the restrictive rules relating to municipal services. In such cases, they

Public Private Partnerships which establish broad cooperation and share the financial risks between the public and private sectors can help local authorities to provide public services by introducing private-sector finance and skills while retaining public control

had transferred entities from the public to the private sector, together with a service contract. However, Michael Burnet said he would welcome a clear statement from the Commission to clarify the situation now that IPPPs were used so frequently.

Considering whether the Commission Communication on IPPPs is 'fit for purpose', Burnet said it was useful in addressing the issue of how they are established and how to award further contracts. However, he would welcome:

- + more details about what happens if the contract changes;
- + details on what happens to the assets at the end of the initial contract;
- + an explanation of why it excludes 'simple capital injections', if a private partner wants to take a larger percentage or play a larger role;
- + more clarity on 'essential contract terms'.

TOO NARROW

Jeremy Smith, Secretary General, Council of European Municipalities and Regions, felt that the Commission Communication's focus on IPPPs was too narrow, as it concentrates on the legal rules and the impact on the market, while local authorities take a much more 'results-oriented approach' to improve services, deliver them more cheaply and get the best value.

Assessing the benefits of outsourcing services or keeping them in-house, Smith said that the latter enables public authorities to maintain democratic control and retain the flexibility to adapt the levels of services to changing conditions. However, the downside is that this often involves a higher cost base, and only allows public authorities limited access to private investment, and means that

they do not benefit from the private sector's management skills and flair.

As for outsourcing services, on the positive side this brings in new ideas and can release senior local authority staff from dealing

with day-to-day issues; however, the disadvantage is that this ties the local authority to a rigid contractual framework which cannot be changed during the contract.

On balance, Jeremy Smith felt that an IPPP was the best option, as it is a mix of public control and private sector skills. Within his organisation, some members want to outsource all their services, while others prefer to keep them in-house. It is a matter of maintaining a balance between fair competition and local democratic discretion, he said, and when the European Commission criticises local authorities for not abiding by EU regulations, it should remember that the Lisbon Treaty gives them greater discretion to direct their own activities.

There are many local authorities which resent undue interference 'from Brussels', he said, as they want to make their own choices about whether to bring in a private partner to boost investment in a particular service. At the same time, many want to exercise the same control on outside companies as they do on their own departments, and do not believe that bringing in private companies should negate this.

His members want a 'fair rule' which acknowledges that IPPPs are very useful, and that the private sector should be used in a much wider way than is currently permitted. For example, at present it is unclear what happens if a local authority wants to change the terms of a contract in mid-stream.

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