

Brussels, 18 February 2008

Public procurement: Commission issues guidance on setting up Institutionalised Public-Private Partnerships – Frequently Asked Questions

(see [IP/08/252](#))

What are Institutionalised Public-Private Partnerships (IPPP)?

There is no legal definition of IPPP in Community law. The Commission understands IPPP as a co-operation between public and private parties involving the establishment of a mixed capital entity which performs public contracts or concessions. The private input to the IPPP consists – apart from the contribution of capital or other assets – in the active participation in the operation of the contracts awarded to the public-private entity and/or the management of the public-private entity.

What prompted the Commission to issue the Interpretative Communication on IPPP?

Public authorities at all levels are increasingly interested in co-operating with the private sector when ensuring the provision of an infrastructure or a service. The interest in private capital for public undertakings and the transfer of know-how from the private to the public sector are drivers for public bodies to found IPPP.

The public consultation launched by the PPP Green Paper ([IP/04/593](#)) showed that there was considerable need for clarification on the application of the Community rules on Public Procurement and Concessions applying to the setting up and operation of IPPP (see also [IP/05/1440](#)). The Interpretative Communication on IPPP aims at enhancing legal certainty in this area and at giving full effect to EC public procurement rules. This in turn should enable all interested economic operators to tender for IPPP on a fair and transparent basis in the spirit of the European internal market, thereby enhancing the quality of such projects and cutting their costs by means of increased competition.

Both the European Parliament (see Resolution on PPP of 26 October 2006) and a number of Member States asked the Commission to come forward with guidance on the issue of IPPP.

What is the nature of an Interpretative Communication of the Commission?

An Interpretative Communication of the Commission is an autonomous act of this institution, meaning that the validity of it does not depend on decisions of the European Parliament, the Council or any other institution. This also means that these acts are only committing the Commission itself, in particular when it comes to infringement procedures against Member States for not complying with EC law (Article 226 EC Treaty). The binding interpretation of Community law is ultimately the role of the European Court of Justice.

How does Community law on public procurement and concessions apply to the choice of private partners for IPPP?

At Community level there are no specific rules governing the founding of IPPP.

Community law on public contracts and concessions requires a contracting entity to follow a fair and transparent procedure, either when selecting the private partner, who supplies goods, works or services through his participation in the IPPP, or when granting a public contract or a concession to the public-private entity.

Conversely, the Commission does not consider a double tendering procedure — one for selecting the private partner to the IPPP and another one for awarding public contracts or concessions to the public-private entity — to be practical.

If the task assigned to the public-private entity is a public contract fully covered by the Public Procurement Directives, the procedure for selecting the private partner is determined by these Directives. If the task is a works concession or a public contract that is only partially covered by the Directives, the fundamental principles derived from the EC Treaty apply in addition to the relevant provisions of the Directives. Finally, if it is a service concession or a public contract not covered by the Directives, the selection of the private partner has to comply with the principles of the EC Treaty.

Does the Interpretative Communication on IPPP aim to liberalise or privatise services of general economic interest?

No, the Interpretative Communication on IPPP does not aim to liberalise or privatise services of general economic interest. It remains the competence of national authorities to decide whether private parties are entrusted with the performance of services of general economic interest or not.

However, 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.

The Interpretative Communication on IPPP follows the Commission's commitment to provide legal guidance in the area of services of general interest as expressed in the "Communication on services of general interest, including social services of general interest" of 20 November 2007.

Will the definition of in-house relations be modified by the Interpretative Communication on IPPP?

EU law on public contracts and concessions applies when a contracting body entrusts a task to a third party, unless the relation between the two is so close that the latter is equivalent to an 'in-house' entity

Today, the in-house definition is determined by case law of the European Court of Justice (ECJ). According to the *Stadt Halle* jurisprudence of the ECJ (C-26/03) the Public Procurement Directives apply whenever a contracting authority intends to conclude a contract with a company, the capital of which is at least partly held by private undertakings.

There is no compelling evidence at present to suggest that the quality of public services could be improved or prices be reduced, if private or public-private undertakings obtain public service missions without a preceding competitive award procedure. Thus, the Commission does not intend to change the “in-house” concept as understood by the ECJ. The Interpretative Communication on IPPP demonstrates that this jurisprudence does not constitute any obstacles to the setting up of IPPP.

Are co-operations between municipalities covered by the Interpretative Communication on IPPP?

No, the Interpretative Communication on IPPP focuses on partnerships between public and private entities only.