



**EUREAU**

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## CONTRIBUTION TO THE GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIP AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS – COM(2004) 327

Eureau is the federation of national associations of drinking water suppliers and waste water services. It brings together the views of water operators across twenty EU countries, the three EFTA countries, and three candidate countries, which collectively provide sustainable water services to around 400 millions European citizens<sup>1</sup>.

Eureau's members reflect the very diverse way in which the European water sector has been organised. Some operators are departments of local government, and some are joint-stock or private companies whose shares are being traded on the stock-exchange. Some are water boards, that combine the operation of waste water treatment with the granting and suspending of the licenses to discharge, and some are holding a fixed-term concession to operate the water assets of local governments. Some are serving an area in which only some hundred people live, others serve millions.

PPPs have a long tradition in the European water industry. More recently we have seen the introduction of new types of PPP like the DBFO-schemes. PPPs can be instrumental in obtaining a good solution when insufficient knowledge or institutional capacity is available to meet local necessities through usual public procurement. PPPs, however, can also create complex situations of assignments of tasks and responsibilities between multiple parties and setting up a PPP often requires extensive legal, technical and financial expertise. It is the task of the local or regional authority responsible for water services to meet the local needs in an optimal way, both in the short run (building infrastructure) and in the long run (operation and maintenance). Eureau fully agrees with the Green Paper that a miracle solution does not exist and welcomes the debate about the application of EU law to this domain in order to increase legal certainty.

Due to the variety of "models" of PPP for water services throughout Europe, some of the questions of the Green Paper cannot be answered at Eureau level. National associations of water operators are better placed to answer them.

1. *What types of purely contractual PPP sets up do you know ? Are these sets-up subject to specific supervision (legislative or other) in your country ?*

The diversity of situations in the member States corresponds to history, to legal tradition, and to local and technical aspects of water organisation. Water is a local resource and competence<sup>2</sup> for organising the service is entrusted, in nearly all EU countries to municipal/ inter-municipal, or to regional bodies.

See also the annexed table (page 9) on the individual situation of Member States

<sup>1</sup> More information is available on the website [www.eureau.org](http://www.eureau.org)

<sup>2</sup> *Aqualibrium* Report, Study on European Water management published in 2003 by the European Commission

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 ?*

First of all, this question includes a risk of confusion between public procurement and PPP. Competitive dialogue is a procedure described in the Public Procurement Directive. In the following paragraph we only give a point of view on the question whether this procedure is suitable for public procurements issues - not for PPP issues, since the Public Procurement Directives do not cover PPPs, which considerably differ from public procurements.

Eureau members think that this competitive dialogue procedure - for public procurements - can favour the search for appropriate solutions to complex issues - e.g. strategy for continuous provision of drinking water under difficult circumstances (water scarcity, polluted resources, technical failures etc). The competitive dialogue as it is described in the Directive 2004/17/EC seems to take into consideration the necessary principles such as flexibility of discussions and transparency of the results of the discussions, and also protection of innovation which has to be taken into consideration. These objectives can be met with the competitive dialogue procedure provided that further negotiations be possible, in other words the competitive dialogue should not be considered as the preliminary step for a "formal" tender. Referring to some recent cases where the transposition of the competitive dialogue in national law (e.g. France) resulted in procedures which were neither flexible nor stimulated innovation, Eureau wants to express its concerns about the way this procedure may be transposed under national law.

Eureau considers, in this perspective, that the competitive dialogue procedure may be a suitable solution for situations where contracting authorities need to identify and define the most appropriate technical solutions that would best satisfy their needs (provided that confidentiality and protection of innovation are respected) for contracts of purchase of goods, works or services.

A PPP is much larger than a public procurement (contract of purchase of goods, works or services). Eureau members stress that the competitive dialogue procedure is not necessarily adapted to encompass all elements that characterise PPPs, particularly in the case of concessions. Indeed, this procedure gives no answer to the necessity to define the precise content of the missions - and responsibilities - entrusted to each of the parties. This procedure appears also insufficient to cover situations where some complex and long-term missions need to be optimised over time so that they continue to respond to the needs of the contracting authority and of the populations.

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.*

Awarding a PPP and awarding a Public procurement must not be the same procedures. Management of water services is more complex, the responsibilities are broader and on a longer term, than providing a service in the sense of Public procurement of services. However, general principles behind Public Procurement rules – such as transparency, non-discrimination, equality of treatment, free circulation of capital – also apply to PPPs.

After the award of the contract, rules that govern the implementation of the contract must also be appropriate for PPP : sub-contracting (question 16), adaptation of the contract in case of major change or difficulty, duration of the contract (water management issues and water network issues rely on mid/long term time scale, not only on the investments life time).

Formalism must be avoided in order to allow adaptation in the course of time, under the responsibility of the selected operator. Water services must be continuously adapted to evolving circumstances : development of EU legislation (enforcement of the water Framework Directive, revision of the Drinking Water and Bathing Water Directives), degradation of water resource, technological progress, change in the economic context, or more simply for necessity of upgrading/ renewing the installations and infrastructures.

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?*

See the annexed table (page 9) on the individual situation of Member States

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?*

Due to the variety of national situations, the national associations of water operators are better placed to answer this question.

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

Eureau thinks that any answer to this question would be premature as far as the water sector is concerned. Eureau suggests the Commission to have further reflection on the desirability and/or necessity of a Community legislative initiative after analysing the national legislations on concessions and other forms of PPP.

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?*

We would like to emphasize that awarding PPP should not be subject to identical arrangement as awarding public contracts other than PPP, since PPP and public procurement are very different - considering criteria such as shared responsibilities, risks, investments, complexity of the tasks, duration of the contract, obligation of result. All these elements explain the difference between PPP and “simple” contracts of purchase of services. Any further work to clarify the definition of PPP, regarding their differences from public procurement (in the sense of purchasing of goods or services), is to be encouraged.

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?*

Eureau knows very few private initiatives in water sector which would not end with a public selection procedure. This question would be better addressed at the level of public authorities.

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 covered below: the contractual framework of the PPP and sub-contracting.*

Projects in water services are mostly public-driven. As a matter of fact the public authorities are almost always the owners of the drinking water/waste water infrastructures (exceptions are England and Wales, and, in the acceding countries, the city of Tallinn). Public authorities are always very much involved in monitoring/protecting quality of raw water, and monitoring/controlling quality of drinking water and effluents. When discussing PPP, it is important to distinguish these regulatory functions from operating and infrastructure development activities, for which, generally, PPP initiatives could be well suited. The confusion between these functions makes it more difficult for private sector to launch real "initiatives". There are a few exceptions. It happens that waste water plants for the treatment of industrial process water offer part of their capacity to treat municipal waste water. Eureau welcomes these private initiative PPP's, provided they help to find the optimal technical and economic solution for a particular situation when there is insufficient knowledge or institutional capacity to meet local necessity (not only in new member States).

Having said that, how could "private initiative PPP" be promoted ? How can the one that brings the idea/efforts and takes the risk, get the advantage of developing it ?

Firstly, Eureau's members highlight that there should be at least no discrimination, no restrictive rules applying to public/European funding of PPP (given the fact that water prices paid by households are in some countries not able to finance the entire cost of investments for water and waste water infrastructure.

Secondly, there should be a positive counterpart offered to the private party which takes risks and assumes costs in developing proposals of solutions on its own initiative. There seems indeed to be a real contradiction between the ideas of promoting private initiative PPP by granting some advantage (easier access to European Funds, even refunding of preliminary studies? Easier awarding rules, such as right of preselection or right of first refusal ? less formalism for sub-contracting ?) and, at the same time, with some formal rules that EC law imposes on public contracts/European funding.

To be able to propose answers to this major question, which deserves in-depth sector by sector reflection, Eureau's members suggest to give support to the proposal made in question 22.

10. *In contractual PPPs, what is your experience of the phase which follows the selection of the private partner?*

Eureau has no direct experience. According to the general feeling among its members, PPPs are characterised, before and after the selection, by the consolidation of the partnership between the public authority and the private operator. Considering the needs for mid/long term PPP, possibilities must be left to adapt the contract to new situations (evolution of the needs of population, "force majeure") which might arise, after the selection of the private partner. As the operator is responsible for the execution of the contract, he needs flexible procedures in the choice of sub-contractors, due to the complexity of the tasks and to the transfer of responsibility to 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?*

Eureau has no direct experience.

12. *Are you aware of any practices or mechanisms for evaluating tenders which have a discriminatory effect?*

Eureau has no direct experience.

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?*

"Step in" arrangements may be necessary to organise solutions in case of economic difficulties, only in exceptional circumstances - it does not mean substitution of a water operator by a bank - and does not harm competition. They are in principle covered from the beginning by provisions in the contract. It is important to avoid discontinuity or economic bankruptcy in a water services contract.

Eureau supports the idea that conditions of stepping in or taking over from the failing operator must be - and in fact, are - subject to clear and transparent provisions, formally agreed by the partners and with the authorisation of public authorities - but stresses that in practice "step-in" arrangements do not lead to non-competitive succession of water operators.

Other "standard clauses" which endow an external actor (e.g. not signatory of the contract) with significant rights to control or to give an opinion are often more problematic than pure step-in arrangements. It can be the case when an international or European funding authority interferes with decisions agreed between the operator and the public authority responsible for water services.

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?*

Eureau welcomes the recognition of a general need for clarification of definitions as well as the criteria that are mentioned for PPPs in the Green paper. However, Eureau would like to point out that there is an additional criterion which deserves attention : obligation of result. We also underline the necessity to distinguish PPP and Public Procurement - definitions and procedures. More generally, PPP in the water sector highlight the different tasks of public authorities. They either produce and control the legal rules applicable to water services (e.g. national or more local administrations, regulators, jurisdictions), or they have the responsibility to organise water services at local level (e.g. municipalities, or other local authorities). PPP are in principle concluded with these last authorities. Eureau is in favour that European authorities take up responsibility for further clarification on these responsibilities reflecting diversity of situations and missions of authorities for assuring a good governance of PPP.

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

We again plead in favour of flexibility in the choice of sub-contractors and adaptation to complexity of the tasks devoted to PPP.

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?*

Eureau's members think that detailed/new rules for subcontracting are not required.

No additional rules should be requested for subcontracting in particular if PPPs are awarded after transparent/competitive procedures. Two levels of competition (upstream and downstream the main PPP contract) are not justified.

Too much formalism does not necessarily allow to choose subcontractors in due time, with the exact skills : not only complex tasks are transferred to the private partner, but also the responsibility for proper management of the service.

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?*

No need for additional rules (same answer question 16) than the existing ones.

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 ?*

See the annexed table (page 9) on the individual situation of Member States

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?*

The general principles behind Public Procurement rules – for instance on transparency, non-discrimination, equality of treatment, free circulation of capital – must apply to institutional PPPs. However, the Public Procurement rules themselves cannot be directly applied to PPPs.

Public Procurement law is not adapted to govern constitution of public-private bodies. The major question is the link between the mixed body and the act that entrusts to operate the service. It is important to match the duration of the mixed-parties body and the right to operate the service.

Both the constitution of such bodies and the awarding of the right to operate the service should respect Treaty principles.

20. *In your view which measures or practices act as barriers to the introduction of PPPs within the European Union?*

The procedures and administrative practices that govern eligibility of projects for European funding - ISPA, Cohesion Fund, Regional Fund - (for the benefit of public authorities partners of a PPP) can be incentive /deterrent to PPP. Undue reluctance from the European Commission to fund public water equipments being then operated by private sector, which has been observed in the past, can lead to a lack of projects. Eureau thinks that this Green Paper should be completed by a review of European funding rules when PPPs are involved.

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.*

European water operators are and have been involved in water operations all over the world already from the 19th century. In our experience it is very important to adapt to the local conditions, there is no single solution that could serve as a model for the European Union.

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?*

Yes, Eureau is in favour of building such an exchange network on best practices.

For any further information on this paper, please contact:

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	Question 1		Question 4		Question 18
	A	B	A	B	
	What type of purely contractual PPP set ups do you know in your country?	Are these set-ups subject to specific supervision (legislative or other) in your country?	Have your members already participated in a procedure for the award of a PPP in your country	Have your members already participated in a procedure for the award of a PPP in an other EU country	Do “institutional PPP” exist in your country?

Austria		- up to now no experiences available	No	No	Yes	No
BE	Flanders	- water services for industry	Yes <sup>i</sup>	No	No	Yes
	Brussels	- B.O.O.T	Yes	No	No	No
	Wallonia	- /	Yes	No	No	No
Cyprus		- B.O.O.T. (e.g. desalination plants)	Yes	Yes	No	No
Estonia		- Sales of shares in municipal water company (Tallinn) - Operating contract	Yes	Yes	No	
Finland		- DBFO <sup>ii</sup>	No <sup>iii</sup>	No	No	No
France		- Concession - Affermage - Affermage à îlots - Régie intéressée (in certain cases) - Gérance (in certain cases)	Yes	Yes	Yes	Yes

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Germany	<ul style="list-style-type: none"> <li>- Betreibemodell</li> <li>- Betriebsführungsmodell</li> <li>- Concession</li> <li>- Kooperationsmodell</li> </ul>	Yes	Yes	Yes	Yes
Greece	<ul style="list-style-type: none"> <li>- B.O.T.</li> <li>- Joint Venture Companies</li> </ul>	Yes	No	No	Yes
Hungary	<ul style="list-style-type: none"> <li>- Management contract and lease (typical at small systems),</li> <li>- Share in operating company and lease (eg.Szeged, Pécs, Dunaujváros),</li> <li>- Share in company owning the system (eg. Budapes),</li> <li>- Full concession (Szolnok)</li> </ul>	Yes	Yes	No	Yes
Ireland	<ul style="list-style-type: none"> <li>- Design – Build</li> <li>- Design, Build, Operate</li> <li>- Design, Build, Operate, Finance</li> </ul>	Yes	Yes	No	No
Italy		Yes <sup>iv</sup>			Yes <sup>v</sup>
Luxembourg	<ul style="list-style-type: none"> <li>- Operating of public owned car parks by private contractors;</li> <li>- operating of public owned power plants by private contractors;</li> <li>- operating of public owned waste-to-energy plant by a private contractor;</li> <li>- operating of public communication routes by private carriers</li> </ul>	no	no	no	no <sup>vi</sup>

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Netherlands	- Concessions (DFBM/DFBO/BOT) - Joint development	No	yes	No	yes
Spain	- Mixed economy company - Concession <sup>vii</sup>	Yes	Yes	No	Yes
Switzerland	- None	-	No	No	No
UK	England	- None	No	Yes <sup>5</sup>	Yes
	Wales	- None	No	Yes <sup>5</sup>	Yes
	Scotland	- Water & Waste Water Projects	Yes	Yes	No
	Northern Ireland	- Water & Waste Water Projects	N	Yes	No

<sup>i</sup> Legislation on intercommunal collaboration

<sup>ii</sup> They are however not largely used in water and waste water services

<sup>iii</sup> Local Government Act and the legislation on public procurement have to be taken into account in governmental decision making

<sup>iv</sup> On this subject, an interesting example is the Italian law on Project Financing, concerning the realization of public works through public authority's initiatives. There were huge expectations about the effects of this legislation (called Merloni Law), but the final results we have obtained are disappointing, due to the very limited use of these instruments by operators. The main reason is related to a "crowding out normative effect", consisting of the great attention that the Merloni Law has on the respect of public contracts' legislation that has lead to neglect the financial complications.

<sup>v</sup> Our more relevant experience is the Italian Reform approved by the end of 2003. The fundamental idea of the reform is to allow to public authorities a range of solutions with respect to the organization of SGIs: the public procurement procedure (PP); the establishment of a mixed ownership enterprise (MOE) in which the private partner has to be selected through competitive bidding procedures, assuring the complete and rigorous respect of national and community legislations; the establishment of a completely public enterprise in which public authorities exercise over it a control which is similar to that which they exercise over their own departments and, at the same time, that enterprise carries out the essential part of its activities with the controlling authorities (in house providing, IHP).

<sup>vi</sup> There are some private companies having the Luxembourg state as one of the shareholders or even as the only shareholder

<sup>vii</sup> According to the Royal Decree 2/2000, of 16<sup>th</sup> June, there are two other contractual forms: "**gestión interesada**" and "**concierto**". Moreover, in Spain still exist different types of "**leasing contracts**" between private companies and local councils.