Public-Private Partnerships in Europe: A New Growth Dynamic
In Europe, Public-Private Partnerships are ill-defined but necessary. In Europe, the term PPP represents different contractual situations and suffers from this lack of common legal definition. The confusion about what this acronym includes - which notably prevents the existence of exhaustive economic statistics - probably plays a role in the contrasting relationship between these three letters and public opinion.

In reality, there are several forms of partnerships between public authorities and the private sector in service management or works construction requiring the observance of high standards in fields as numerous and varied as transport, waste management, education, security, water and energy or even public health.

These partnerships are necessary in order to allow local authorities to carry out the missions for which they are responsible (but not necessarily hold the technical expertise) while stimulating the development of innovation. Depending on the forms that the partnerships take (PFI, public contracts, clusters, delegation of public service, BOT, partnership contracts, etc.), the public authority maintains control while attracting private investment and is able to fix any contractual clauses affecting the deadline for the delivery of the work, performance targets of any kind (environmental, economic, social) through to fixing the price of the service for the user if the partnership is in the form of a concession within the meaning of the for European law.

The future of PPPs in Europe can thus be viewed from three angles:
- The award and execution of PPP contracts; it is the basis of the public procurement package (including a new concessions directive) currently being particularly discussed at European Parliament and Council level.
- The long-term financing of infrastructure of the European economy;
- The importance that Europe stays up front in terms of Research.

However, these partnerships, particularly in the form of concessions, are not subject to a specific and uniform legal framework within the European Union; a fact which has already been highlighted by the green paper published by the European Commission in 2004.

This incomplete legal framework not only puts the brakes on the development of an internal public procurement market by hampering effective and undistorted competition, it is also partly responsible for the lack of transparency necessary for any form of economic partnership, particularly when it involves the public purse. The optimisation of public spending is even more essential in the current of scarce public resources. This edition of The European Files therefore focuses on various elements of the draft new directive on concessions.

In a more sector-specific view of public-private partnerships, Research and Innovation are also highlighted in this edition. The importance of SMEs as engines for private growth and research in Europe and the necessity to ensure their access to public procurement will be emphasised in particular.

This edition of The European Files provides various contributors with the opportunity to share their perspectives on the current situation and their expectations of appropriate developments at EU level.
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Philippe DE FONTAINE VIVE, Vice-President of the EIB, the European Union’s Financial Institution Honorary President of the French Union of General Directors

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Laurent RICHER, Professor Emeritus at the University of Paris I (Panthéon-Sorbonne), Member of the Paris Bar, Chairman of the Legal Committee of the IGD

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Public-Private Partnerships and Local Governance
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PPPs – an Effective Means of Promoting Business and Employment in Europe
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PPPs in Innovation

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How to Promote the Emergence of a Real European Market for Concession Contracts

Michel BARNIER
European Commissioner for Internal Market and Services

Europeans want to drink clean and tasty water, have their waste removed regularly and on time and enjoy well developed and reliable public transport. And they want to have it all at reasonable prices. The quality of public services is important for overall quality of life.

However, in order to maintain or improve the quality and accessibility of these services especially those referred to as Services of General Economic Interest, as well as to provide new services – especially those related to network industries, substantial investment in these services and related infrastructure is needed. This is not always easy for local or even central administrations as, particularly in the current economic climate, public resources are scarce. In many cases, the only way to remedy this shortage is to pool the resources of the public sector and private operators.

This is why we need Public-Private Partnerships.

The Commission recognises the potential of PPPs to play a major role in financing services and infrastructure. It has worked to facilitate PPPs by gradually removing the financial, organisational and legal barriers to their development.

It is estimated that 60% of all PPPs are concessions. Thus, adoption of the new rules is crucial to ensuring transparency so that both public authorities and economic operators are encouraged to participate in such partnerships.

Today, unlike for public contracts, the award of services concessions is not subject to any secondary law provisions. They are covered by the Treaty principles of equal treatment and transparency, but the actual obligations for contracting authorities resulting from these principles have never been made clear and explicit by the Court of Justice of the European Union. As a consequence, concessions are often awarded in violation of the Treaty (more than one-third of those who replied to a consultation by the European Commission were aware of such violations), whereas the contracting authorities operate in conditions of legal uncertainty. This situation is not without negative impact on the quality, accessibility and prices of public services.

In December 2011 the Commission put forward a proposal for a Directive on the award of concession contracts, with the aim of establishing clear, simple and flexible rules for the award of concessions contracts, which constitute an important share of PPPs. These new rules would guarantee access to such contracts for all European undertakings.

Our proposed Directive would put in place a cornerstone: freedom of choice for public authorities in the organisation of the services they provide. It would not lead to forced privatisation or outsourcing of public services. On the contrary, we want local authorities, under European law, to be legally secure in their choice, whatever that choice is. But, when a public authority decides itself to outsource a service to an economic operator, then we want minimum requirements of transparency, non-discrimination and equal treatment to be ensured throughout Europe. That is the European Commission’s role. I believe this will prevent favouritism and guarantee that taxpayers’ money is well spent.

We believe that these requirements for contracting authorities can be provided with clear, simple and flexible rules based on sound principles.

As with all Commission proposals, they can naturally be improved. Discussions on the draft legislation are progressing well in the European Parliament and the Council of Ministers and I hope that the new Directive will be adopted very soon.

Businesses and Public - Private Partnerships as Engines of Growth

Antonio TAJANI
European Commissioner in charge of Industry and Entrepreneurship

The idea of public and private funding partnerships was the basis of one of the most successful innovative financial instruments helping to boost SMEs, as part of the Competitiveness and Innovation Framework Programme (CIP) 2007-13. Under CIP, €1.1 billion was allocated to the financial instruments managed by the European Investment Fund (EIF), designed to facilitate SMEs’ access to loans and equity finance.

This programme is based on partnerships with financial intermediaries institutions such as banks, leasing providers, mutual guarantee associations and venture capital funds that provide SMEs with funds at national or local levels – and has had significant achievements.

The programme has benefited over 190,000 SMEs so far, and is expected to reach about 315,000 companies in total. It also helped to mobilise a considerable amount of private funds in form of equity and loans.

In particular, by providing loan guarantees, the CIP SME guarantee facility has encouraged banks to make more debt and microcredit finance available to SMEs. To that end SMEG offers co-, counter- and direct guarantees to financial intermediaries. It has also been used to enhance securitization of SME loans. In parallel, the high growth and innovative SME facility (GIF) provides risk capital for innovative and fast growing SMEs that are in early or expansion phases. This is achieved through joint investments by the EIF and private investors into venture capital funds.

Innovative financial instruments available under the CIP programme have created a significant leverage effect through guarantees and risk sharing schemes. As a result each euro spent has made on average €50bn available to SMEs by financial institutions. Through leverage effects, public-private partnerships on which CIP financial instruments are based have therefore not only proven their efficiency but have also ensured the more efficient use of limited EU budgetary resources.

The concept of pooling private funds with public resources through the establishment of public-private partnerships should not be limited to key infrastructure projects and effective delivery of public services. Using innovative financial instruments, PPPs can also boost the small-scale but highly innovative projects that can have a great impact on our future. PPPs enable the mobilisation of the private resources for the sake of the real economy and will be given an important role to play within the next Multiannual Financial Framework.

Innovation-based industries and entrepreneurship are key to the EU’s economic recovery and growth. Without them we cannot imagine the smart, sustainable growth and job creation envisaged by Europe 2020 objectives. We need to invest in new technologies and give Europe a competitive lead in the new industrial revolution. This is one of the main pillars of the Commission’s Industrial Policy and the only way to keep pace with the rest of the world. But how can we foster innovation, creativity and internationalisation while capital – a precondition for investment – remains difficult to obtain? European enterprises, in particular small and medium sized enterprises (SMEs), depend to a large extent on external financing, notably on bank credit.

Lack of access to credit hampers the growth of the European economy, together with lending conditions which have constantly deteriorated since the beginning of the debt crisis.

Specific public-private partnerships (PPPs) developed by the EU to increase the lending capabilities of financial institutions or to facilitate access to equity can play an important role in helping start-ups, businesses in early growth phases, innovative firms and those expanding internationally. The role of public-private partnerships in providing such innovative financing was highlighted in the Europe 2020 strategy. The Commission’s proposal for the next Multiannual Financial Framework (2014-2020) also stresses that ‘innovative financial instruments could provide an important new financing stream for strategic investments, supporting long-term, sustainable investment at a time of fiscal constraint’.

However, it is worth noting that financial instruments have been part of EU enterprise policy for over a decade and that during this time they have supported many businesses whose finance needs could not be met by market solutions. Innovative financial instruments are vital, especially for innovative businesses that creditors and investors usually perceive as having high risks and transaction costs.

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The European Files

Promoting Access to Public Procurement Contracts for SMEs

Brian HAYES
T.D., Irish Minister of State at the Department of Public Expenditure & Reform with special responsibility for Public Service Reform and the Office of Public Works

SMEs are acknowledged as the backbone of the European economy. Their job creation and growth generation potential is central to social and economic recovery and renewal in Europe. A recent Study by the Irish Department of Finance found that Small and Medium sized businesses make up over 99% of businesses in Ireland and account for almost 70% of people employed in the State. And despite Ireland’s reputation as one of the world’s most globalised economies, 64% of private sector workers are employed by indigenous non-exporting firms, with 50% working for indigenous, non-exporting SMEs. It is also acknowledged that the SME sector has been hardest hit in the current downturn. In the period 2008 to 2010 employment by Irish SMEs fell by almost a fifth to 854,500. Similarly difficult circumstances apply, to varying degrees, to SMEs across the EU.

Against this backdrop is the fact that each year public authorities across the EU spend 18% of GDP or approximately €2 trillion on goods, services and works. In Ireland alone the State currently spends €9 billion on supplier goods and services, approximately €6.9 billion of which can be classed as being ‘Addressable’ by Procurement. These figures highlight the potential for greater flexibility and access for public purchasers.

Ireland has worked closely with our European partners in developing a suite of provisions that take account of the administrative burden on SMEs by procurement procedures. Modernised procedures have been designed to allow Member States to give public purchasers more choice over which procedure to use. Similarly, shortened procedural time limits allow for quicker and more streamlined procurement.

Six specific techniques have been improved and clarified to facilitate e-procurement. These include framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, central purchasing bodies and joint procurement. These procedures and techniques benefit suppliers in terms of addressing the need to have greater awareness of potential procurement opportunities.

Another area of public procurement aimed at promoting SME access is that of Public-Private Partnerships. While generally complex long-term contractual arrangements, i.e. with a capital value in excess of €50 million, there are significant opportunities for SMEs. An indicator of this is the spurt-over effect from large PPP projects, where for every five jobs directly created by a project an additional two jobs are created usually in SMEs, and usually to the benefit of the local economy.

The new act does not impose the subject of partnership, thanks to which the catalog of potential ventures carried out in the form of PPP has greatly increased. Those may be projects in the healthcare sector, communal services, sports facilities, parking lots, airports, ring roads etc. The act has narrowed down the need to receive acceptance from the Ministry of Finance to fund the projects from public funds only to the largest ventures and has allowed the freedom to administer the capital component once the agreement ends. The act also allowed the partners to choose the means of carrying out the venture either in the form of an agreement or in the form of a specially created company.

The law allows the possibility to finance the public-private partnership projects with the use of European funds, thanks to which PPP should have a wide use in different segments of our economy.

Entrepreneurs together with local authorities most often cooperate in building roads and parking lots, sports venues, healthcare institutions, public facilities – for example concerning energy production and entertainment facilities such as swimming pools and water parks.

There are still some obstacles in carrying out projects in this formula. They arise from the relatively small experience in cooperation between the public entities and private partners. We do not yet have the vast experience on how to carry out such projects. Which is why we are actively engaged in increasing the trust in PPP both in the private and public sectors. Even though over the past two years we have made great progress in this regard, there still remains the necessity to popularize this formula of partnership in our country.

T he evolving situation in the world markets puts Europe against new challenges. The European Union needs an effective and long-term strategy for increasing the quality of public services in order to provide the highest standard of living for its citizens. For many countries a good way of facing this task is public-private cooperation in the PPP formula. Thanks to this the public entity and the private partner carry out a joint project while sharing the tasks and risks. They also use the experience of the private sector and the crucial institutional and political support, which increases the chances of success.

Public-private partnership is constantly evolving. At first the private sector was participating in the development of public infra-structure and its day to day operations. With time this gave the basis to create more complex mechanisms of providing public services by the private partner. Currently the PPP concept is used differently in different countries and is gaining broad acceptance.

Poland also views this formula as a chance for attracting investments and increasing economic growth. The success of public-private partnership ventures around the world has been a stimulus resulting in greater interest with this form of carrying out public investments. This is proven by the increase in projects planned by the local authorities in the PPP formula.

I am confident that the legislative changes have resulted in the increase in interest with public private partnership. The current regulations are more favourable, accessible and easier to implement. We have decided to forego many earlier obligations and the partners have now the opportunity to shape their cooperation based on the freedom of agreements.

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Bringing SMEs into the PPP process is a win-win for both the private and public sectors. Enabling SMEs to achieve their potential is central to social and economic recovery and renewal in Europe. We need to ensure that the SMEs who are the backbone of the European economy are acknowledged as the backbone of the European economy. Their job creation and growth generation potential is central to social and economic recovery and renewal in Europe. SMEs.

Enabling SMEs to achieve their potential is a central piece of the Irish Presidency. During our Presidency we will work, on behalf of the Council, to secure agreement with the European Parliament on the three proposals that comprise the procurement package.

This package originates in the EU Commission communication ‘The Single Market Act: Twelve levers to boost growth and confidence’. This communication included, as one of its twelve key priority actions, the modernisation of the public procurement legislative framework.

Following extensive consultation the EU Commission published the reform proposals in December 2011. While the proposed reforms cover a broad range of complex and technical issues, the measures included in the package are designed to simplify the procurement rules and provide greater flexibility for public purchasers.

Ireland’s National Development Finance Agency (NDF), which advises State Authorities on the optimal financing of priority public investment projects, is working closely with Enterprise Ireland – the State organisation responsible for the development and growth of Irish enterprises. This joint-agency approach aims to raise awareness of the opportunities available to SMEs as prospective suppliers and sub-contractors. Key to giving greater visibility to these opportunities will be a series of ‘Meet-the-Buyer’-type events.

I am confident that such outreach initiatives, together with a modernised European level legislative framework, provide the means to harness SMEs’ potential to contribute to returning the European economy to a sustainable path.

PPP as a Chance for Economic Growth and Investments

Janusz PIECHOŃSKI
Polish Deputy Prime Minister and Minister of Economy

The European Files
Boosting Industrial Competitiveness through Public-Private Partnerships in the Field of Research and Innovation

Robert-Jan SMITS
General Director, DG Research and Innovation, European Commission

Europe is currently faced with a series of crucial issues: low growth, insufficient innovation and a series of environmental and social challenges. Finding solutions to these challenges will require new approaches and ways of thinking and working, as the EU has recognised in the development of the Europe 2020 Strategy and the Innovation Union Flagship. There is a need to use existing public and private resources for research and innovation in a smart way, to optimise the contribution of both public and private players in achieving sustainable growth. This is true at EU-level, where there is a potentially huge added value in combining EU funding with other public and private sources of funding to achieve the critical mass needed to tackle our biggest global challenges.

Indeed, Europe cannot refrain from these combined activities if we want to promote a research intensive and innovative Europe. A highly globalised world poses many challenges, with competition from established G20 countries and a host of smaller, rapidly-developing economies. European research needs to achieve scale. But European companies individually can struggle to make the costly investments needed to achieve technological breakthroughs. We need to pool our efforts. With this kind of cooperation, technological breakthroughs. We need to achieve the scale of technological and economic objectives. The idea is to boost European industry by providing a clear investment by European, national and regional actors, as well as private R&D investment in the technological fields concerned and to improve the impact of this investment through concentrating efforts and resources, and avoiding fragmentation.

The five JTIs are:
1. the Innovative Medicines Initiative, a €2 billion partnership between the European Commission and the European pharmaceutical industry which has worked to deliver safer and better medicines for patients in areas such as the development of new antibiotics and other drugs in areas such as asthma, chronic pain and schizophrenia;
2. the European aerospace industry’s ‘Clean Sky’ initiative, an aeronautical programme which is developing break-through technologies to significantly increase the environmental performances of aeroplanes and air transport, resulting in less noisy and more fuel-efficient aircraft;
3. the ‘Artemis’ and (4) ‘ENIAC’ initiatives in embedded computing systems, both enablers of new solutions in areas such as clean energy, transport, affordable healthcare and communication and digital life-style; and
4. (5) Hydrogen and Fuel Cells which is working to reduce the time to market for hydrogen and fuel cell technologies, leading to faster impacts on improving energy efficiency, security of supply and reducing greenhouse gases and pollution.

In addition, as part of the 2008 European Economic Recovery Plan, the Commissioner established a further series of Public-Private Partnerships, under FP7, based on a contractual relationship between public and private actors, to tackle the consequences of the global economic downturn. The aim of the three PPPs was to fund research and innovation in three key industrial sectors – manufacturing (‘Factories of the Future’), construction (‘Energy Efficient Buildings’) and automotive (‘Green Cars’) – in order to boost competitiveness and support employment, while at the same time significantly contribute towards a more green and sustainable economy. These three PPPs were subsequently joined by the ‘Future Internet’ PPP which aims to support the emergence of Future Internet enhanced applications of public and social relevance.

The positive experiences of the JTIs and contractual PPPs to date, has underlined the ‘win-win’ situation for both the public and private sectors in the model. The utility of the partnership approach in supporting research, development and demonstration activities has been amply demonstrated; the PPPs have provided a ‘neutral’ forum for competing industries in a sector to discuss common problems and find proactive solutions. This has led to a leverage effect on research and innovation investments and, in so doing, has helped to strengthen European industrial leadership. Indeed, this is why, Horizon 2020, the Commission’s proposed new programme to finance research and innovation at EU-level, foresees the continuation of the PPP model. This means that the PPPs launched under FP7 may be continued, where they have demonstrated significant progress, using more appropriate, or fit-for-purpose, solutions.

Work is currently underway to prepare the successors of the FP7 JTIs: proposals from the Commission are expected in mid-2013. The Commission will ensure transparency and openness in the selection process, clarifying the commitment of industry and the leverage effects of the PPPs. Using tax-payers’ money to achieve greater scale by leveraging private sector research capacity clearly makes sense at a time when public budgets everywhere are tight. However, the Commission is confident that using public money to leverage private funding through PPPs will continue to be an excellent mechanism to mobilise significant public and private resources, increase innovation, stimulate new economic growth and tackle key global environmental and societal challenges.
Directive on the Award of Concession Contracts: Let’s Put an End to False Debates!

Philippe JUVIN
MEP, European People’s Party
European Parliament Rapporteur on the Concessions Directive

Published on 20th December 2011, the proposal for a directive on the award of concession contracts can be praised, in spite of its weaknesses, for having highlighted the lack of an adequate, European legislative framework. Indeed, the term ‘concession’ covers a variety of different situations across Member States. Although public procurement makes up a large portion of economic activity within the EU, concessions, which represent a non-negligible part of public procurement, do not benefit from a clear legislative framework, unlike public contracts. They are only subject to the general principles of the Treaty on the Functioning of the EU, and, as far as works concessions are concerned, to some limited provisions of existing directives on Public Procurement. The lack of uniform application of Treaty principles, the emergence of a patchwork of national legislations and the almost systematic use of EUJEC case law have given rise to true legal insecurity among those involved.

Although the added value of a European legislative initiative in this field is genuine (legal clarification and stability; possibility for public authorities to use additional means of developing and modernising public services; stimulation of competition within the EU – when public authorities choose concessions – and strengthening of the fight against fraud and favouritism particularly during the awarding procedure), the debate has been polluted from the beginning by numerous misunderstandings and sometimes overly loud misinformation campaigns in certain countries. It is high time to make an end of those false debates.

Main argument claimed to reject the directive: the fear of privatisation of public services. These allegations are deceitful, both in form and content. My draft report clearly defines the concession as a form of management based on the delegation of a mission by a public authority to an economic operator (execution of works, operation of a service) characterised by the transfer to the concessionaire of an economic risk in exploiting the work or services being the object of the contract.

It is also important to highlight that public authorities are free to decide how best to manage their missions, and that the contract is limited in time. Throughout the whole duration of a concession, the public authority keeps control over the smooth running of the contract by the concessionaire. Privatisation, on the contrary, is based on the definitive sale of an activity by the public authority, without possible change or capacity to influence the choices of the new owner. The debate is therefore purely artificial and it is typical to say, when Europe is criticized for legislating on any issue, that there is a desire to ‘privatise’, the usual bogeyman of all populisms (see the “Polish plumber”).

Second false debate, which is linked to the previous one: the fear of a questioning of public authorities’ freedom of choice regarding the organisation of their public service missions. Again, these allegations are based on a mistaken appraisal of the directive. The latter does not, in any case, preempt public authorities’ choices regarding the way their missions are to be managed. Even better, I added an article that solemnly acknowledges public authorities’ freedom to decide how best to manage, the execution of the works or the provision of the services concerned, by delegating them to an economic operator or by performing them with their own resources. Nonetheless, the directive provides for a set of rules that must be respected when the public authority decides to award a concession in order to ensure respect for the principles of transparency, non-discrimination and fair treatment.

Last false debate: raising the spectre of “administrative burden”. The directive has been greatly simplified in this regard, on the basis of a “light” approach which is respectful of the very nature of the concession. Indeed, the latter is similar to the economic concept of “incomplete contract” (characterized by the complexity of the contract, rather long duration, frequent renegotiations, uncertainties related to the notion of operating risk, etc.) and requires the introduction of a certain degree of flexibility. Several provisions considered to be too burdensome have been deleted (weighting of criteria, intermediary thresholds for social services concessions, compulsory publication of all stages of the negotiation process, etc.). Flexibility and transparency must be at the heart of the award procedure.

The directive has launched a true reflection on the setting up of an appropriate legislative framework for concessions at EU level. My draft report has thoroughly revised, simplified and lightened the directive in order to allow for the emergence of a clear, efficient and pragmatic legislative framework. Strengthening public authorities’ powers, simplifying procedures and ensuring transparency and fairness between candidates were also the goals of this text. The report adopted by the IMCO committee on 24th January 2013 shows this substantive work. Overcoming false debates and acknowledging the true added value of this legislative initiative is essential for the upcoming discussions.
The Directive on the Award of Concession Contracts:

Complementing the Legal Framework for European Public Procurement

Joanna SZYCHOWSKA
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Social and Environmental Aspects in the Concession Directive

Pier Antonio PANZERI
MEP, Progressive Alliance of Socialists and Democrats, European Parliament
Member of the Committee on the Internal Market and Consumer Protection (IMCO)
Shadow Rapporteur

The proposal for a Directive on the award of concession contracts now being discussed by the European Parliament and the Council is not the first attempt to devise a more precise legal framework for concessions. Provisions on the award of works concessions were first adopted in 1989 and the first complete proposal was submitted in 1992; it was almost another 20 years before the new proposal for a Directive was adopted by the Commission in December 2011. Work on the proposal is not easy, as the debate is still dogged by misunderstandings and misrepresentations of the Directive’s objectives and scope, but unrelenting efforts to explain and clarify the aim of the rules have started to bear fruit.

The initiative on concessions is to be seen, in the first place, as one measure to help ensure more efficient allocation of public money by creating the conditions for competitive award of this type of contract. In the current climate of severe budgetary constraints and economic difficulties in many EU Member States, efficient allocation of public funds is a matter of special concern, in accordance with the legislative arrangements and the methods which they judge to be the most effective.

The current gaps in the law – a lack of basic clarity as to how to award concessions – result in irregularities and economic inefficiency in the market and an uneven playing field for economic operators, and therefore prevent public authorities from obtaining the best value for public money. To illustrate this, in extensive consultations carried out by the Commission 41% of respondents thought the lack of a clear legal framework for the award of concessions was a barrier to market entry; almost 37% were aware of concessions contracts being awarded without any transparency or competition. Moreover, 44% were aware of direct awards of such contracts.

The Commission’s intention was to provide a stable, simple and flexible framework which would offer legal certainty to both public authorities and economic operators across the European Union. The proposed rules clarify and codify the Treaty principles and the relevant case law of the Court of Justice – which is often ambiguous and incomplete – and establish the minimum common denominator with regard to the award procedure. They aim to give companies, and especially SMEs, relevant information and effective access to the market; to allow for a more important, they respect local authorities’ freedom to organise the provision of services in the way that best suits them, in terms of choice of provider and quality standards.

In order to safeguard flexibility and avoid burdening public authorities, the proposal does not prescribe any procedure for the award of concessions, but leaves it design in the hands of the procurers. They are only limited by the Treaty principles of equal treatment, non-discrimination and transparency.

But, for the first time in relation to public procurement, all aggrieved bidders, including holders of service concessions, will have legal protection in the form of a right of appeal to the courts.

The proposal lays down rules applicable to the award of concessions right across the board, regardless of sector.

One final but very important point: the proposed Directive will not lead to forced privatisation of any services. Concessions and privatisation are two different things. In a concession, the infrastructure for providing a service (e.g. the energy or water distribution network) remains owned by the public authorities. Only the provision of the service is entrusted, for a limited period of time, to an economic operator who has to comply with strict contractual obligations such as quality and price.

The proposal for a directive on concessions is exclusively about transparency and fair treatment of companies conducting business in other Member States, fully recognising and supporting local authorities’ autonomy in the way they provide and organise all services of general interest. Public authorities are and will remain free to decide whether to use their own resources – direct provision – or outsource the task to external operators. To suggest otherwise is to distort the sense and objectives of this legal act.

The text has been reviewed by both the European Parliament and the Council, which in many instances introduced helpful clarifications and streamlined the original proposal, preserving the main underlying principles but, more importantly, recognising the merit of the proposal and the need for it.

I n December 2011 the Commission put forward a package of relevant legislative proposals concerning Public Procurements – the revision of the two directives dealing with the general Public Procurements (PP) contracts and the one relating to Utilities (PP by entities operating in the water, energy, transport and postal services sectors) – and a new directive dealing with Concessions as announced in the Single Market Act I.

The award of works concessions is presently subject to basic rules of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the general directive on PP) while the award of services concessions with a cross-border interest is subject to the principles of the Treaty, and in particular the principle of free movement of goods, freedom of establishment and freedom to provide services.

With a view to remedy to legal uncertainty, to take into consideration the numerous EU rules, guarantee transparency and avoid abuse, the Commission has decided to put forward a proposal for a directive dealing with both Concessions of work and services encompassing the sectors of water, energy, transport and postal services by taking inspiration from the driving principles put at the basis of the revision of the PP package which should also encompass the objective of the EU 2020 strategy.

Following this proposal as S&D Shadow rapporteur from the European Parliament, I worked to reinforce or better define some fundamental principles:

Principle of free administration by public authorities

This means the possibility for the public authorities to decide how to manage the execution of works or the provision of services, in accordance with the legislative arrangements and the methods which they judge to be the most effective.

Taking this proposal as the starting point for the revision of the two directives dealing with works and services as set out in the Legal Framework of Procurement, all aggrieved bidders, including holders of service concessions, will have legal protection in the form of a right of appeal to the courts.

Protection of the SGEI (Services of General Economic Interest)

The concession directive must not affect the freedom of Member States to define what they consider to be services of general economic interest, how these services should be organised and financed. This is an important step to insure the protection of economic activities that would not be produced by market forces alone or at least not in the form of an affordable service available indiscriminately to all. SGEI are carried out in the public interest under conditions defined by the State, who imposes a public service obligation on one or more providers.

Clause of safeguard of social, labour law, employment conditions and subcontracting

Concessions constitute a relevant field of investments done by MS and local authorities in order to provide for works and services necessary for the society and the economy. For the S&D group it is of paramount importance to guarantee that the new legislation contains adequate provisions for both mandatory and voluntary reference to – and respect of – environmental, social and labour law criteria defined by international agreement, EU and national legislation as well as collective agreements applying in the place where the works, services and supplies are carried out.

In conclusion I strongly think that the new concession directive will respond to the pressing demands for efficient spending of public money, in establishing a clear European legislative framework allowing for delivery of works and services under conditions of sound financial management. The new rules will facilitate the conclusion of concessions, promoting a quicker return to sustainable economic growth and contributing to innovation and long-term structural development of infrastructures and services.

The European Files
Ensuring Competition in the Award of Concession Contracts

Cristian BUSOI
MEP, Alliance of Liberals and Democrats for Europe, European Parliament Shadow Rapporteur

Together with the proposed directives on public procurement, the Commission’s proposed Directive on the award of concession contracts is a key piece of legislation which will contribute to the completion of the Single Market. A lot of controversies surrounded this proposal, as practices in the Member States vary a lot, from those Member States who have more or less extensive legislation on concessions to those whose rules are in place. I see no objection reason why works concessions should be governed by specific rules ensuring effective competition between economic operators wishing to perform such works, whereas services concessions would only be governed by the rules of the Treaty, which, as we know, have not been interpreted in a consistent manner. This directive is a much needed tool to ensure a higher level of transparency, access for economic operators to concession contracts, as well as the equal treatment of the candidates and tenderers.

I am of those who believe that competitive procedures bring better value for money for our tax payers who expect a sound management of public finances, especially in the current economic context. If we want this directive to attain its objectives and live up to our expectations, we have to be extremely cautious with regard to a certain number of aspects which may distort competition.

First and foremost, we must resist pressures to water down the proposal of the Commission by narrowing its scope through the exclusion from the application of the rules of entire economic sectors where concessions are used very often. This is not to say that the provision of public services needs to be privatised. Public authorities should remain entirely free to decide whether they want to provide the service themselves or to entrust a private company with it. This is precisely why we have included in the text a reference to the principle of free administration of public authorities. Nevertheless, it seems sensible to me that when a public authority decides to award a concession, it should do it in a transparent manner and offer the possibility for economic operators to compete for the contract. This is a point that was very difficult to understand for some colleagues in the European Parliament and in some Member States where the public opinion has been misinformed, willingly or not. We need to make a pedagogy effort and take time to explain to our citizens the real situation, instead of oversimplifying, which very often has damaging consequences.

The thresholds above which the rules apply are the second aspect of great importance from a competition perspective. Setting too high a threshold would artificially exclude from competition a significant amount of contracts, which would otherwise be subject to the rules. This is the reason why I think raising from 5 to 8 million euros would be a mistake.

Last but not least, there is a real risk that loose rules on public-public cooperation will distort competition. I do not put into question the very existence of the in-house exemption; this is well justified, but it has to be narrowly construed so that it does not depart from its initial objective. The way in which the text has been modified over the last weeks is, in my view, damageable to competition. In order to safeguard fair competition, the possibility to award contracts without a competitive procedure should be limited to those contracts awarded to an entity which is controlled by the contracting authority or entity and which generates its turnover exclusively through activities carried out for that contracting authority or entity. Otherwise undertakings that are directly awarded concession contracts would be able to also compete on the free market with private operators who don’t benefit from such a privilege. Setting a percentage to match the ECJ’s reference to the “essential part” of the activities is not an easy task and would most probably be arbitrary and easy to circumvent.

The very fact that the Commission has proposed rules on the award of concession contracts is certainly an important step towards more competition. However, we should make sure that these rules are fair and that they don’t artificially distort competition themselves. Competitive procedures allow public authorities to award concession contracts to those companies who can propose the best services at the best price. And this is ultimately what our citizens expect; a high level of quality for the public services they pay for through the taxes. It is only if the exceptions to the application of the rules governing the award of concession contracts are strictly limited to what is justified that the legal framework will contribute to this objective.

Promoting PPPs in Order to Improve the Competitiveness of SMEs in Europe

Malcolm HARBOUR
MEP, European Conservatives and Reformists Group, European Parliament Chair of the Committee on the Internal Market and Consumer Protection (IMCO)

Public-private partnerships (PPPs) have traditionally been relied on to deliver large scale public infrastructure projects. Although PPPs are clearly not the most obvious channel for improving SME participation in the opportunities offered by the public sector, the problem comes from project scale and not from PPPs as a vehicle. One advantage in setting up a PPP with a large enterprise as the private partner, is that they have generally been better than government ministries at handling project integration and subcontractor risk. When it comes to PPPs, the involvement of SME subcontractors is still limited, even if they can benefit from the resources provided for by a large main contractor. In practice, SMEs will be in the supplier mix mainly because they are highly specialised or cutting edge subcontractors, and it is generally unlikely that SMEs can handle the whole spectrum of requirements on a major PPP project alone.

However, with particular regard to the Connecting Europe Agenda and its digital and energy aspects, PPPs are at the same time, at least in principle, the natural innovative way to work in practice. They will ideally need to have working models and legal certainty on those models provided by the European Commission.

Setbacks will still remain because of financing, and here, there is no reason why contracting authorities shouldn’t sort out the financing upstream. They could for example convince the banks of financing smaller amounts than usual in exchange for allowing them to take part in the selection process. This would certainly help provide the necessary impetus to invest in smaller innovative PPP projects established through this new model. “Stapel finance”, which is about raising the finance first and only then running the bidding process, could also play a role here. This practice would no doubt significantly bring down the value of the initial investment required for the financier’s risk to be worthwhile. And there is a further attraction in the potential to generate high returns linked to the innovations delivered through the project itself.

It is clear that the European Commission will now have to ensure that they take an active interest in promoting Innovation Partnerships in conjunction with Member State authorities, particularly contracting authorities in the Regions. The national innovative procurement agencies which are already active on the ground should also be involved, such as Tekes in Finland, Consip in Italy, the Swedish VINNOVA or the UK’s Technology Strategy Board to name but a few. The Internal Market Committee will, under my Chairmanship, take a special interest in the implementation of this proposal as we regard it as a crucial enabler of jobs and growth.

Interested SMEs can already do a number of things such as monitoring the prior information notices published in tenders electronic daily (TED) or on national procurement portals. They should also look at contract award notices to see who is winning the business, follow public sector priorities in their activity sector, and also consider joining forces with other SMEs. The forthcoming modernised EU procurement framework will certainly provide such a boost to SMEs. Under the European Parliament’s proposals, SMEs will be able to put together joint bids, clubbing together to secure larger projects such as a typical infrastructure PPP.

However, it is still true that in today’s economic climate, we need to find ways to use PPPs for public projects more effectively, while boosting the competitiveness of a much broader range of SMEs, including those providing services. We need to foster smaller scale PPPs, which can be set up more quickly and which can be used for a broader range of projects, while aiming at the same time for project scales which are more in tune with the capacities and reach of SMEs, and delivery outcomes which are adapted to more regional or local needs.

For this, the new EU rules will include an entirely new chapter dedicated to how to set up Innovation Partnerships. This will be particularly relevant to emerging market players and innovative SMEs with a good idea for delivering a public sector requirement. My Committee called for this a long time ago and expanded the Commissions’ proposal into a formal procedure which must be transposed into Member State legislation.

But despite our efforts, legal certainty remains the deciding factor. Once in force, Contracting Authorities will inevitably hesitate to use this entirely new procedure, namely because it has always been difficult to reward staged innovation with more open competition further down the line. So the risk is that this new procedure may be ignored simply because public sector lawyers are more familiar with the more commonly used procedures for setting up a PPP. So they will need clear guidance about how innovation partnerships are going to work in practice. They will ideally need to have working models and legal certainty on those models provided by the European Commission.

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After the earthquake of 2008, the aftershocks of the following years, the doubts about the sustainability of the single currency and speeches about decline, Europe is now entering its fifth year of crisis. However, it just takes a glance to see that Europe, where humanism and solidarity are the primary acknowledged and shared values, is probably the world’s most favoured region for its level of democracy and quality of life and education.

The current pessimism of many Europeans is based in part on nostalgia for the “trente glorieuses” during which Europe rebuilt a comforting world after the war based on solid, job-creating industry and a protective and very envied social model. This model is now under attack from globalisation: the gradual concentration of manufacturing production in emerging countries and a concurrent decrease in production in Europe. This is clearly not a passing crisis, but rather a profound transformation of our economic and social environment.

Rejection of decline and commitment to a renewed affirmation of Europe depend on two conditions:

- New European institutions. The recent progress made in this respect, particularly within the euro zone (the Banking Union) are a forerunner. The road to European governance within the euro zone (the Banking Union) are a forerunner. The road to European governance is based in part on nostalgia for the “trente glorieuses” during which Europe rebuilt a comforting world after the war based on solid, job-creating industry and a protective and very envied social model. This model is now under attack from globalisation: the gradual concentration of manufacturing production in emerging countries and a concurrent decrease in production in Europe. This is clearly not a passing crisis, but rather a profound transformation of our economic and social environment.

Who, other than companies, can provide innovation and create new business? The mission of the Union and of its Member States is to define a regulatory framework in which companies (of all sizes) can grow their business, produce, export and create employment. This concept, which industry appears to accept as self-evident, is strangely ignored in fields that are at the very heart of our economic future: infrastructure and services. Can we believe that local public entities are really able to innovate and export know-how and services within the Union and globally?

Contracts of concessions and other forms of public-prive partnerships (PPP) will be called upon to play a decisive role, whether in current proven forms or in new configurations still to be invented. On condition that:

- The modes of governance and regulation of the implemented forms of contracts are improved where necessary. The European Commission has formulated positive proposals in this respect over the past years in its Communication on PPPs of 2009 and in the Single Market Act of 2011. The OECD’s draft recommendation on the principles applicable to the public governance of PPPs of 23 April 2012 is another interesting example of this. The proposals for a new directive on the award of concessions contracts, currently under study, such as those for public procurement contracts, provide an opportunity to make the additions and corrections required by the Union’s current legislative framework on condition that we avoid that unnecessary constraints delay or block the initiatives Europe sorely needs and that the desire to protect public entities does not suffocate the development of entrepreneurs.

- As many projects as possible are initiated, and the appropriate frameworks are built to objectively examine the relevance from an economic, social and environmental standpoint without making ideological assumptions, and to, thereby, ensure that priority is given to those who create the most competition and employment, thanks to the mobilisation of companies’ competences and abilities for innovation as quickly as possible.

- Links are created between transport, energy and digital services networks.

- Mechanisms are created to enable the financing of the projects selected objectively, soundly and realistically. Channels to process and direct available savings must be defined so that they can be invested in these projects and guarantee security and fair remuneration to investors who agree to commit for the long-term. What parts will the EIB and the traditional banks play and what new financial instruments need to be created (Euro bonds or other)?

- Public entities are able to choose operators in a transparent, competitive and non-discriminatory environment, not based on their financing resources (which are necessarily limited) but rather on their ability to guarantee successful project completion, quality services, and the effectiveness and profitability of the funds invested.

- While maintaining the principle of regional and local resource administration, public authorities be allowed to build contractual partnerships with the selected operators that meet and implement the goals, in order to ensure compliance with forecasted costs, deadlines and completed project quality both when building new infrastructure and when providing services, over the whole life of the contract (operation, maintenance and infrastructure renewal) and in order to guarantee the reversibility of management methods at the end of the agreements.

- This ambitious policy for the creation of public goods is fully promoted in the social arena: that means new and sustainable job creation, training of young people and greater social and territorial cohesion.

In addition to the many existing operators, new ones are ready to start. Contractual tools are in place and new partnerships can be invented and experimented with. It would not be difficult to improve the institutional framework to ensure that trust is shared by those involved. Actions have been initiated and it is high time that the Union and the Member States complete them in order to provide those involved with the financing instruments they need. This is the precondition for economic recovery, a return to balanced public finances and the effective and rapid construction of an intelligent, sustainable and inclusive Europe for all.

Europe is Not Sustainable Without Services

Jean Pierre TARDIEU
E3PO Chairman

The European Files
The Procurement Package: a View From the Parliament
Chances and Challenges related to the Procurement and Concession Directives

Barabara WEILER
MEP, Progressive Alliance of Socialists and Democrats, European Parliament

Better access to public procurement tends for small and medium sized enterprises (SMEs) through a simplification of the regulation, legal certainty for contracting authorities and bidders and more efficient as well as strategic spending of public money. Those were the overarching goals of the proposals published by the European Commission in December 2011. More than a year of negotiations has passed and the Internal Market Committee voted on the dossiers in late 2012 and early 2013. Where are we now?

Social, sustainable, flexible, efficient - adjectives to describe the "new public procurement"

"12 levers to boost economic growth" – an ambitious agenda was announced by the European Commission in April 2011. Amongst it, the modernisation of public procurement rules. As public procurement makes up about 18% of GDP in the European Union, it is important to optimise the legal basis outlining and defining all the different practical instruments. Thus the Commission published the Directives COM(2011) 896 and 895 on procurement and on procurement by entities operating in the water, energy, transport and postal services sectors modernising two laws from 2004.

During the public consultations many stakeholders asked for a more flexible approach. Contracting authorities should be able to include social and environmental criteria in tenders actively contributing to the "Europe 2020" targets of creating a sustainable and innovative European economy. This makes good sense. Nevertheless, it took an intensive and constant effort of persuasion by the S&D group facing conservative and liberal colleagues in the Parliament as well as government representatives in the Council to adjust and improve the Commission proposal in this regard. What have we achieved are improvements in different fields:

- the complete chain of subcontractors needs to be made transparent by the tenderer and all participating firms have to respect social and environmental criteria
- if economic operators do not comply with the determined requirements, they can be excluded from a public tender
- support of gender-equality
- integration of disadvantaged people
- introduction of a new partnership procedure where the contracting authority shall cooperate with a company – selected in a regular competitive tender procedure – to develop an innovative product

To give an example: the province of North Holland in the Netherlands wanted to purchase fair trade coffee marked with a fair trade label. That led to an infringement procedure that had to be solved by the European Court of Justice (C-368/10). The revised directive now gives more legal certainty on the applicable procedure.

But there is more to the directive than benefits to public authorities. SMEs will largely profit from a simplified procedure. In the future e-procurement will be strengthened which limits bureaucratic costs. In addition to that, only the winning bidder will be obliged to hand in all necessary documents, which speeds up the process and will be of advantage to SMEs. The European Small Business Alliance especially welcomed that Member States are required to formulate initiatives to increase SMEs’ involvement in public procurement when their rate of successful bids for tenders gets lower than 50%.

Concessions – light regime and full freedom of choice for public authorities

Accompanying the public procurement directives the European Commission also published a directive on concessions at the end of 2011. The two key characteristics of a concession differentiating it from a public contract are:

a) a contracting authority or entity assigns a task (carrying out works or running a service), and in so doing transfers the responsibility for performing it, to an outside economic operator and
b) there is an economic risk entailed in the operation of the works or services, and that has to be assumed by the concessionaire.

The proposal was put forward to remedy to legal uncertainty taking into consideration the numerous ECJ rulings, to guarantee transparency and to avoid corruption.

In the course of the negotiations in the European Parliament the members of the Internal Market Committee succeeded in simplifying the Commission proposal strictly following the idea of creating a light legislative framework. Especially having in mind German worries I want to highlight two important aspects:

1. The adoption of the directive on concessions does not promote privatisation. The principle of free administration applies. There is always the possibility to provide works and services publicly without a call for tenders – of course also in cooperation with other public authorities.

2. Until the end of committee negotiations different views existed on how to revise articles 11 and 15 on affiliated undertakings and on in-house exemptions and public-public cooperation. We fought hard to achieve a solution which allows maintaining the well functioning and high-quality system of German Stadtwerke, which operate mainly in the sector of water but not exclusively.

Where are we now?

The adoption of the directive on concessions does not promote privatisation. For several years there have been well-proven national concession laws in eleven Member States, which did not lead to a rise in privatisations. That is why a majority of members of the Internal Market Committee of the European Parliament voted in favour of the directive.

Conclusion

However, let me add some self-criticism related to both parts of the package: of course, directives which are even more practicable and clearer would have been better. Having in mind the different views of six political groups and thousands of amendments, we achieved quite a good and valuable result.

Now we are going to take the next step, which is finding common ground with the EU ministers in the Council, who have powers of co-decision with the European Parliament.
The Success of PPPs Relies on Adequate Project Selection and Evaluation

Thomas SCHLEICHER
FIEC President

From the origins of the discussion about a directive specifically dedicated to the award of concessions contracts, FIEC questioned the necessity of this legal approach on a number of concerns, including the rotation approach and the cooperation of the operators with the respective authorities. The idea that such an objective could be achieved with the least possible approach, suited to the interests of the various parties in the contract: the parties to be considered are: the contracting party, the public economic operator involved, as well as the general public, which is the third party to be taken into account in such private-public partnership.

Of course, such tight approach needs to respect the fundamental principles of transparency, fair competition, and equal treatment of the operators – including 4a-4b entities – while preserving technical and/or trade secrets, especially in the course of the negotiation process.

In this respect, a series of provisions initially included in the Commission’s proposal – and which were basically copied and pasted from the public procurement directives – were as such completely inappropriate to take full advantage of the flexibility of concessions contracts. For instance rigid definitions (risk, substantial modifications), or accurate technical specifications would impede the optimisation of the engineering process, which is the main aim of PPP contracts.

The rapporteur in the European Parliament operated a huge work of simplification of the initial proposal made by the Commission. At this stage of the procedure, a number of concerns pointed out by FIEC have also been taken into account, namely regarding the duration of the contract which now takes both initial and further investments into account, and the modification of the concessions contract during its term (where the value thereof is below 10% of the updated value of the original contract (instead of 5%).

However, FIEC remains concerned about the definitions, in particular those involving the consideration of the operating risks, which should be treated as defined by EUROSTAT in its decision of 2004. A major concern also stands in the flexibility from public to public-private cooperation (both for “in house” and horizontal cooperation), whose scope becomes much broader than what has been interpreted so far by the ECJ. This introduces a risk of unfair competition between private economic operators.

Finally, this directive should not elude the broader perspective of the role of PPPs, not only as an alternative financing solution for project financing, but mostly as a global cheaper solution for carrying out EU’s infrastructure projects from the design phase to the end of the project and, in this way, participating in the economic recovery efforts.

Many criticisms have been raised against PPPs over the past years, regarding their cost for the public finances or the exclusion of SMEs from promising markets for instance, but the mistake would be to consider a PPP from a legal perspective only or as a financial instrument solely. The economic approach of PPPs must not be forgotten, as it is their main objective.

FIEC believes that a case by case socio-economic evaluation of the projects is not only legal or financial needs to be undertaken in order to ensure the success of such complex contract schemes.

Our experience shows that there are 5 cumulative conditions for success, to be followed step by step:

- Choosing the relevant projects;
- Choosing the appropriate funding/risk sharing;
- Choosing the appropriate procurement procedure;
- Choosing the relevant financial structure;
- Managing the contract over life, with the necessary flexibility.

Decision makers must choose projects which are desirable from a socio-economic point of view, that is, which correspond to a real demand and real needs and which will have a high Internal Rate of Return (IRR) from the socio-economic point of view. Hence, only sustainable projects should be launched. This would also make the payment of a tax or a toll politically more acceptable.

It should then be decided who bears the demand risk, that is: either the private operator or the end users pay or the public authority/entity if the taxpayers pay. The outcomes of the chosen solution need to be carefully assessed.

PPPs are complex contract schemes which require that many aspects, other than the bid submission price, be considered over the procurement procedure. The procurement procedure should be adapted to the kind of project in order to prevent opportunistic behaviour and favour a strict pre-qualification and a range of award criteria. In this sense, “classical” procurement procedures – with the price criterion only – fit well simple contracts, whereas negotiated procedures based on a transparent set of award criteria – better fit complex contracts.

Last but not least, PPPs are long term contracts which necessarily evolve and need to be renegotiated. Renegotiation clauses should therefore be included in the initial contracts. Such renegotiation should be undertaken in the common interests of 3 parties: the public authority/entity, the private operator and the end users, in order to safeguard reputation, trust, healthy public finances, private legitimate profits, jobs and growth.

Guaranteeing Better Access to PPPs for SMEs

Paul RÜBIG
MEP, European People’s Party, European Parliament

Overall, quite little is known about the participation of SMEs in PPPs. According to the European Commission, enterprises with 250 employees or less represent more than 99% of all businesses in Europe, being responsible for nearly 60% of the total production value. However, SMEs only win 60% of the public procurement tenders which represent only a third of the total value. Moreover, above the threshold of 300,000 Euros the participation of PPPs starts to decline. In public procurements above 5 Mio Euros only medium size enterprises compete. A German study from 2008 confirms these findings and suggests that they apply for PPPs alike. Not a single stand-alone SME won a PPP with a value above 15 Mio Euros. SMEs participate, however, substantially at the subcontractor level. At this level, they contributed on average 85% to the value of the PPP. On the subcontractor level a strong regional focus of the PPPs could be observed.

The reasons for the low rate of participation of SMEs in PPPs are rather straightforward. The significant contract size of many PPPs and the need for pre-financing prevents many SMEs from applying as private partner. The risk of bidding too much of their resources to a single project, even more if public entities have bad payment morale, is much higher for smaller enterprises. Too little information about projects in general and complicated procedures combined with high transaction costs are further obstacles. On the subcontractor level SMEs are excluded from project design due to long term revenues and hence fear that the PPP contractor skims a large part of the generated benefits.

Why should SMEs participation in PPPs nevertheless be enhanced? SMEs might have unique know-how due to their high degree of specialisation and qualification in a certain field of activity. Additionally, the cooperation with regional SMEs is important for the public entities to sustain economic growth and create jobs in the region of the projects. In order to facilitate better access to PPPs for SMEs, manifold measures should be taken. The administrative burden for the bidders needs to be reduced, avoiding unnecessary technical and financial requirements, which are frequently an obstacle for SME’s access to PPPs. By promoting the use of electronic bidding procedures (e-procurement) competition could be enhanced, giving SMEs a fair chance in the bidding procedure. If economically justifiable, large PPPs could be split up into smaller lots in order to guarantee the competitiveness of SMEs.

As far as the financing is concerned, improved financial instruments for SMEs will eventually also make it easier for them to finance bigger projects and compete in PPPs. Late payment can be disastrous for the liquidity of SMEs due to their lack of own resources, especially when depending on one or few debtors. The prevention of late payment by the public authority could therefore reduce the risk for SMEs in bigger projects.

The latest legislative proposal on public procurement at EU-level aims at addressing these issues. First of all, simplification and flexibility of procurement procedures are proposed. SMEs will benefit in particular, as they are suffering most from excessive administrative burdens. Second, contracting authorities will be invited to divide public contracts into lots to make them more accessible for SMEs. Turnover requirements are proposed to be explicitly limited to three times the estimated contract value. Third, Member States can provide for direct payment by the contracting authority to the SME acting as subcontractor, limiting the risk of late payment for the SME.

Especially in times of tight budgets, private sector investment is crucial for economic recovery in Europe. Against this background, barriers for SMEs concerning public procurement need to be overcome and the development of new instruments encouraging public-private cooperation should be further considered.

2. RICHTLINIE DES EUROPÄISCHEN PARLAMENTS UND DES RATES über die öffentliche Auftragsvergabe (KOM(2011) 898)
Aiming at “Flexi-Security” for High Standard Public Services in Europe

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PP and concession contracts are much more than a way to externalise waste management, water distribution, or heating networks management. Concession contracts are a form of Public-Private Partnership providing municipalities with a possibility to choose a private partner and to design innovative and tailor-made solutions that meet their expectations, as well as their environmental, social and economic challenges.

1. Why does the EU need PPPs and concessions?

A political project for the EU

The development of PPP’s can succeed only if it is understood as part of a political project for Europe. PPPs should not be restricted to a technical dimension. PPPs and concessions do pursue four objectives:

a) Contribute to the completion of the internal market and the optimisation of public expenditures;
b) Establish a tool for long term investments with a possibility to choose a private partner and to design innovative and tailor-made solutions that meet their expectations, as well as their environmental, social and economic challenges;
c) Strengthen a technical dimension. PPPs and concessions need a distinct legal framework to be efficiently managed and to design innovative and tailor-made solutions that meet their expectations, as well as their environmental, social and economic challenges.
d) Facilitate the emergence of European networks of excellence, gaining credentials within the European market and able to answer the needs of emerging global markets.

d) Strengthen a high standard European public service model in which management through a service concession constitutes an alternative to both in-house management and to privatisation.

To allay misunderstandings amongst stakeholders, a critical step is to understand that the competent authority remains, in every situation, free to outsource or not the performance of the public missions (including water services) for which it is responsible. For this “pro-choice” principle is referred to in article 1a of the consolidated Juvin report. This clarification to this article “reaffirms the principle of free administration by public authorities freely choosing the means of administration for the missions for which they are responsible (implementation of missions or delegation to a third party)”,

In the light of this statement, fears surrounding the effects of a concession directive on the water sector sound like a false debate. According to EUREAU data, public operators manage drinking water services for 60% of the population and wastewater services for 70% of the population. The vast majority of the concerned population is served “in house” without competitive bidding, and without resort to concession. This situation is not going to change unless public authorities decide otherwise.

The “pro choice” principle certainly means that local authorities should have a full range of options between providing the service themselves and outsourcing management, their “toolbox” should include in-house management, public contracts and concessions. These tools should be equally available to local authorities together with the possibility to switch from one tool to another.

2. How to develop PPPs in Europe?

The need for legal certainty

As concessions differ from public contracts, concession contracts need a distinct legal regime. The on-going legislative process should result in the adoption of a stand-alone directive that would make this tool available to public authorities, including in Member States that currently lack a national legislation on concessions.

A EU “flexi-security” regime for concessions should conced the ability to negotiate between parties and a strict respect of fundamental principles of transparency and non-discrimination.

To bring legal certainty, appropriate rules on duration and on modification of concession contracts are needed.

If concession contracts have to be limited in time, the duration of a concession contract cannot be set solely by the level of investment of the concessionaire; the duration must also take into account the time necessary to achieve the performance objectives established by the public authority. The interaction between contract duration and performance objectives is instrumental in the transition to the green economy. When environmental and energy performance objectives are at stake, technical innovation and contractual innovation support each other. For instance, performance related contracts are a driver for energy efficiency contracts.

This matters to investment in human capital too. In France, where the median duration of contracts in the water sector is 12 years, companies invest every year 3.4% of their wage bill in training. This is three times more than in the sector of services to individuals which is based on short-term contracts.

Thus, a significant improvement to the Commission’s proposal can be achieved through the amendment adopted by the European Parliament that opens the possibility to make the duration of the concession contract dependant on performance criteria.

Legal certainty on the modification of concession contracts during their term is much welcomed to adjust the contract to the evolving needs defined by the local authority and related to public service missions. The Commission’s proposal is of interest in bringing a legal basis for securing the modifications made by the grantors, provided that the threshold is simplified.

The need for blended projects to finance public infrastructure

Legal certainty expected from the concession directive should also facilitate public funding of PPP contracts. The allocation of EU grants to PPP projects can be economically justified by the existence of positive externalities:

a) In the field of environment, blended projects are necessary for the deployment of general interest investments that Member States benefit from to comply with transnational environmental and energy performance objectives.

b) Blended projects for the financing of general interest investments also contribute to the social cohesion of the EU. European citizens ought to have access to key public services such as drinking water, wastewater treatment or district heating, even if they cannot afford the full cost recovery of the investments needed to upgrade the infrastructure. In some Central Europe countries, for example, heating cost are already so high that some households are disconnecting from heating district networks and cannot afford the cost of renovating these outdated district networks. Therefore, public funds, within a PPP project, can help fine-tuning the allocation of costs between transfers and tariffs, and financing the modernisation of general interest infrastructure.

c) PPPs are likely to improve public expenditures efficiency and reinforce the leveraging effect of Structural Funds on the other hand, and the eligibility rules to Structural Funds on the other hand, have to be designed and implemented by both EU and national authorities with this aim in mind.

3. How to clarify situations subject to and exempt from the internal market rules?

The debates on the public procurement package have made public a strong demand for the codification of the so-called “public-public cooperation” ECJ case law. To put it in other words, many stakeholders want a strict clarification of the services that should be subject to or exempt from internal market rules. There is no point in contesting the legitimacy of this objective.

Codification of the “public-public cooperation” without clarification

The snag is that the way the codification is currently taking place is likely to have adverse effects on the very existence of the scope of the internal market.

First, the codification under way is extensive instead of being restrictive with regards to the Telkä jurisprudence defining the “in-house” derogation.

Furthermore, derogations to public procurement rules that were experienced in the past by contracting entities acting as historical operators, in fields not open to competition have been given a new life by the Commission’s proposal. The so-called “affiliated undertakings” derogation will allow a private entity under the dominant influence of the contracting authority to be directly awarded a concession contract without any competitive process. As far as public procurement rules do not apply to public-private entities covered by the extension of the “affiliated undertakings” derogation, the concession directive may result in distorting rather than regulating competition in Europe.

These derogations to the basic EU public procurement rules may fuel the belief among contracting authorities that, at the end of the day, it would be easier, legally and politically speaking, to use an “in-house” service provider or to create an “affiliated undertaking” rather than embark on a EU compliant transparent and competitive bid. To this extent, the codification of the “public-public cooperation”, as it takes place, is likely to create more confusion than clarification.

The need to clarify the distinction between organising authority and service provider

Indeed, the current discussions on the EU public procurement legislative package have missed the opportunity to clarify the distinction between the authority responsible for organising the service and the operator in charge of providing this service. This distinction has been made explicit in the public transport sector since the PSO regulation; the same logic has been applied to drinking water and waste water treatment services, where ISO norms distinguish the responsible body (in charge of fixing objectives, choosing a service provider, establishing performance criteria…) from the operator (which can be either an in-house entity or a third party) performing day-to-day activities necessary to the provision of the service.

The distinction between organizing authority and service provider is of the essence since it paves the way for introducing “incentives for the efficient provision of SGEI of a high standard”, for both in-house and PPP contracts as advocated by the rules governing State aid to Services of General Economic Interest.

1. According to EPEC - EU Funds in PPPs, Project Stocktake and Case Studies, June 2012
3. According to EPEC - EU Funds in PPPs, Project Stocktake and Case Studies, June 2012
4. C-105/98, 18 November 1999
5. Regulation (EC) no 1107/2003
7. EUREAU is the European Federation of National Associations of Water and Wastewater Services, gathering 10 000 (both public and private) water & waste water utilities & operators across Europe.
8. According to EPEC - EU Funds in PPPs, Project Stocktake and Case Studies, June 2012

The European Files

2014

The European Files

2014
The EIB Encourages the Use of PPPs to Maintain a High Level of Public Investment in Europe

Over the next two decades the European economy is expected to devote nearly €2000bn to financing its public utilities, i.e. infrastructure that increases services provided to people, makes the Union more attractive from the economic point of view and addresses the challenges facing the Union: job creation, growing urbanisation and mobility, energy transition and efficiency, and human capital strengthening.

This amount seems enormous, although not in terms of the annual GDP of our 27 Member States (around €13,200bn). However, like most of the highly developed Western nations, with their aging populations and excessive debt, the countries of the European Union are finding it increasingly difficult to maintain this effort with budgetary resources.

In certain circumstances the concession-based model and, more generally, public-private partnerships (PPPs) can therefore provide a solution, as they mobilise the resources and know-how of the private sector, enable the investment to be defined in terms of the service to be provided to the community (and not only in terms of the public resources that are available), impose an economic discipline in the management of projects and enable the public financial investment to be phased over a period of time. In some cases they also enable the cost of the investment to be borne by the user and not by the community.

It is therefore not surprising that since the early 1990s, the European Union and its financial arm, the European Investment Bank, have been very much involved in defining the normative framework and specific instruments for facilitating the modernisation of the public decision to invest using PPPs. For there is a lot at stake. It is about maintaining at a high level the volume of key structural investments for the benefit of the community in strategic sectors of the European economy such as transport, the environment, energy efficiency, education and health, while ensuring that the conditions under which the market mechanism is used are transparent for the firms in question.

Creating the conditions for balanced PPP policies

In addition to the volume of its financing addressed to PPP projects, which by the end of the last decade, already averaged €2.5bn/year (see box), the EIB first endeavoured to create the conditions for specific expertise and policy frameworks in its Member States. Thus, with the support of the Commission, the Bank established on the one hand, the technical assistance platform JASPERS for central European countries to help them make optimum use of the resources of structural funds and EIB loans and, on the other, its European PPP Expertise Centre (EPEC), whose role is to strengthen the capacity of public authorities to define and implement PPP policies and sectoral programmes to promote them.

The ultimate objective of a well-designed PPP policy is to attract enough investors and private companies operating alongside the public sector to ensure that the economy develops over the long term. As experience in the United Kingdom and France has shown, a number of pilot projects serve to demonstrate the validity of the partnership model, then encourages new private sector players to become involved (bringing technical expertise and providing funds), which increases competition and ultimately improves the terms offered to public authorities for planning infrastructure. However, in order to apply such a policy to a wide range of sectors on a large scale, there are three complex conditions that must be satisfied beforehand:

First, the Government (and its authorities) must demonstrate the political will to use the PPP model by defining in a clear and sustainable manner its economic and social strategies, and the forms and limits of its involvement. In addition to the normative aspects, the policy stance adopted is essential here, as President François Hollande recently pointed out in the speech he gave in Bordeaux, on 10 January, on France’s 2020 investment strategy.

At the same time the acquisition – and dissemination – of expertise by public and private players at the local level is the second crucial factor, as this will enable a balanced public-private dialogue and risk sharing. We have seen the EIB contribute to this development, not only in the European Union and Candidate Countries but also more recently in the Mediterranean countries, with the launch, in May 2011, of a technical assistance initiative for the Barcelona Partnership countries, which now enjoy access to EPEC and to EIB finance for projects arranged on a concession basis or as PPPs.

Thirdly, it should be noted that an efficient banking and financial sector and specific financial products are essential in order to channel – and transform – private savings towards the long term and the risks associated with this type of projects. In this connection, we should keep in mind three lessons we have learnt from recent crisis years: (i) the private investor should be encouraged to finance the real economy, particularly projects that are in the interest of the community, given that, of the €16.000bn or so in savings currently under management in the EU-27, only 1% is devoted to financing infrastructure; (ii) at this time of crisis our economic actors are paralysed by regulatory uncertainty, whether prudential (Basel III or Solvency II), which deters both banks and insurance companies from providing long-term finance for the economy, or fiscal, which inhibits the willingness of firms to invest and so take on new staff; and (iii) at a time when public resources are constrained, funds that are available should serve as a catalyst to attract and not crowd out the private investor.

A range of financial products specifically intended for PPPs

It was on the basis of these three factors that, in addition to our traditional loans, we developed a range of risk-sharing instruments for the EIB to support PPP projects:

- We grant subordinated debt, which restructures the commercial banks that will be repaid as a matter of priority by the borrower;
- We provide equity injections – via initiatives such as the Marguerite Fund, which was provided with €1.5bn by the EIB and the network of European long-term investors, which includes Caisse des dépôts et consignations (France), Cassa Depositi e Prestiti (Italy) and KfW (Germany);
- We offer guarantees – such as the LGTT, which covers the initial operating period (or “ramp-up” phase) of trans-European transport, energy and telecommunications network projects;
- We have established credit enhancement mechanisms for bonds issued by special purpose vehicles that take on infrastructure projects – the famous “project bonds”.

Over the past five years the EIB has also favoured concerted action with public authorities, to build on the combined expertise of key players in the public sector – who, because they know what people need and because of their dynamism, come up with qualitative projects which companies in the private sector may often be entrusted with implementing – and of the EIB, which, as an EU policy arm and a financial engineer, is able to mobilise the private banking sector and financial markets to help them attract more capital for purposes that are socially and economically useful for the community.

As the EIB is involved in more than 150 PPP projects in Europe and neighbouring countries, there are numerous examples of EIB-financed projects. Those in the transport sector – such as the new high-speed railway lines in France (Tours-Bordeaux, Nîmes-Montpellier and Bretagne-Pays de Loire), the London Underground and the capital’s new port, “London Gateway”, motorways in Portugal, France, Finland and Germany, and the iconic “Eurasia tunnel”, linking the two shores of the Bosporus – account for two thirds of EIB-financed PPPs. But EIB support for PPPs also involves other sectors, such as social housing or schools in Ireland and the United Kingdom, hospitals in Italy, Spain, Sweden and France, and energy efficiency in buildings in numerous EU countries.

In accordance with the undertaking given by EIB President Werner Hoyer to the Bank’s Governors, the Finance Ministers of the EU’s 27 Member States, the European Growth Initiative will receive very strong support from the EIB, which will increase its lending to the European economy by 30%, starting in 2013. Europe’s proactive approach to dealing with the crisis is thus being implemented on the ground by the EIB, whose financial engineering will favour the optimised deployment of limited budgetary funds and private sector resources by PPP-type or similar projects. Thus a new boost will be given to investment in facilities for the community so that we can better live together in Europe.

EIB funding for PPP projects in the European Union and Candidate Countries (€bn)

Since 1990 the EIB has progressively broadened the geographical and sectoral scope of its PPP lending. The Bank is now the major single funding source for PPP schemes in Europe, with a portfolio of about 150 projects and investment totalling over €32bn. Annual signatures averaging in excess of €2.5bn since 2000 and over €3.5bn since 2008 demonstrate the key role played by the EIB in providing medium and long-term debt to the EIBPP market in the face of global crisis. In 2011 signatures reached €3.6bn, of which €2.7bn in the transport sector.
The Concessions Directive: A Political Process

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W hen concessions are concerned, the European Commission has long hesitated between several options: keeping the written EU law as is, allowing case-law to develop, adopting one or more non-normative texts (of communication type), launching a legislative initiative on either the public-private partnership, or on the most appropriate form of this partnership, which is the concession.

In the end, a legislative proposal on the allocation of concessions was drafted by the DGMARKT.

The choice of a directive instead of another text with an ill-defined scope and the choice of dealing with the concessions are based on concerns over legal certainty.

A directive allows certainty to be introduced by imposing a harmonisation of national rules, which, for the time being, are extremely heterogeneous and it also provides the opportunity to stabilise the EU law which, in this field, is largely based on case-law and therefore evolving and at times imprecise.

A directive on concessions seemed preferable to a directive that would have covered the public-private partnership, or on the most non-normative texts (of communication type), launching a legislative initiative that characterised the original assimilationist approach that characterised the original assimilationist approach that characterised the original assimilationist approach that characterised the original assimilationist approach that characterised the original assimilationist approach that characterised the original assimilationist approach that characterised the original assimilationist approach.

The exceptions allowed by the Court of Justice, whose law-creating role need not be recalled, are included in the proposal for the directive (in-house, public-public cooperation), but the proposal goes far beyond a mere codification of the case-law; it extends the scope of the exceptions, which seems questionable in light of the principles of the Treaty. In addition to what was said above, it is also applicable to the concessions, the exception for “related enterprises” contained in Directive 2004/17, the exception on the selection procedure of adjudicating entities, which will result, for example, in exempting from competitive tendering, the concessions granted in France to local semi-public companies (SPE) in the areas of water, energy and transport, whereas up until recently the SPEs have been made to compete.

Hence the perverse effects.

Regardless, it is suggested that the Directive may only be adopted subject to such restrictions, which are the price to pay for the principle oppositions to be lifted.

Managing PPP to Secure Value for Money

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V alue for money in a PPP contract is not merely the process of securing value for money during the procurement process but also ensuring that it is realised in the way that PPP contracts are managed during the contract execution phase.

Because PPP procurement processes are often lengthy and resource intensive for a public authority and conducted to deadlines, it is very easy for the pressures of the procurement process and sense of achievement at selecting a partner to lead to neglect of the contract management process.

Good planning and selection can thus be undermined by lack of attention to contract management.

So what are the main challenges for Contracting Authorities in managing the execution phase of PPP contracts to realise value for money?

Effective contract management starts during the planning and procurement phase, in which the Contracting Authority needs to ensure that:

- The contract specifies clearly what the private partner should deliver and by when, and how it will be both paid for achieving the contract objectives and penalised for failing to do so
- The contract reflects the intended (optimal) balance of risk allocation between the public and private parties
- There are sufficiently robust change protocols for planned and unforeseen change
- There is sufficiently robust performance management regime which allows the Contracting Authority to determine if the contract objectives are being met
- There are appropriate benchmarks to judge how value for money continues to be realised in the execution phase

How can a Contracting Authority then ensure that the contract management regime is working effectively?

Value for money is typically defined – using the UK Finance Ministry’s (H.M. Treasury) definition – as the “the optimum combination of whole-life cost and quality (or fitness for purpose) to meet the user’s requirement”. So the key tests for effective contract management are usually that:

- The private partner is actually delivering what it is contractually committed to on time and for the price agreed
- The performance management regime is being applied consistently and necessary actions arising from performance failures are being initiated and followed up
- Change protocols for planned and unforeseen change are being applied as envisaged in the contract terms
- There is periodic review of the private partner’s actual rate of return compared to the base case rate of return in the financial model submitted by the private partner at the time of contract award to:
  - Reconcile changes between the projected base case rate of return and the actual rate of return arising
  - Confirm that there has been no increase in base case rate of return beyond limits set by the Contracting Authority at the time of contract award
  - Ensuring that contract changes do not have the de jure effect of awarding a new contract, which would require a new procurement procedure
- Public bodies are usually very experienced in contract management. And the commercial logic of PPP contracts should mean that private partners – who are normally paid anything by the Contracting Authority until the end of the contract – are incentivised to deliver on time and on budget.

So what can go wrong? In our experience Contracting Authorities commonly make three mistakes.

Firstly, failure to ensure that there is sufficient knowledge transfer from the procurement team to the contract management team about the objectives of the contract and how they are to be realised. Continuity of at least some personnel is desirable, at least for a transitional period.

Secondly, failure to appropriately staff the contract management team. It needs to be appropriately skilled, resourced and empowered to manage the contract. The public authority will invariably be at a disadvantage to the private partner because it will have much less experience of contracting. Inappropriate staffing sends the wrong signals both to the private sector partner and to the contract management staff i.e. that the public authority does not regard contract management as being of high importance.

Thirdly, loss of corporate memory – staff change over time on both the public sector and private sector. So Contracting Authorities need to not just a full initial record of the private partner’s obligations under the contract but also procedures to ensure that contract documentation is kept up to date for changes over time.

None of this of course will be easy. But it is important – PPP contracts are usually long term and commit the Contracting Authority well beyond period in office of the current generation of politicians and public officials. Putting in place good contract management arrangements ensures that the legacy to future generations realises the planned intentions and that procured value for money becomes delivered value for money.
Public-Private Partnerships (PPPs), whether they are concession or availability contracts, have been increasingly used to provide public infrastructure and associated services. Because they allow time savings, incentives for service innovation, respect of cost envelopes, sound risk allocation and because they force to take into account the whole life cycle of infrastructure, PPPs allow to reach an optimized productive efficiency.

Moreover, their macroeconomic impact on employment, territorial attractiveness and national prosperity is huge. For instance, the ten biggest companies involved in PPPs in France generated 1.1 million jobs (among which 800 thousand are direct jobs).

However, some abuse and misuse were observed internationally. To avoid this, institutional and legal mechanisms have been set up and implemented in several European countries, promoting transparency, fair competition, and commitment of the contracting parties. Commitment is indeed a crucial issue, but should not be confused with contract rigidity.

Renegotiations\(^1\) of contracts have been mostly analysed in a univocal way, as a sign of lack of commitment. They would reveal opportunism analysed in a univocal way, as a sign of lack of renegotiations.

Yet, a recent academic work\(^2\) has shown that this under-investigated issue of renegotiation is not so clear-cut. This first econometric study on the topic explores the impact of renegotiation on surplus. Surplus can be defined as the benefit generated by a situation, be it quantitative or qualitative; but it is hard to measure.

For this reason, the following assumption is made: if surplus decreases during the contract lifespan in general, and during renegotiations in particular, parties will not be prone to renew their contracts together once expired. Contract renewals\(^3\) are thus used as a quantitative and indirect way to measure surplus. This assumption makes sense in frameworks where (i) public authorities are allowed to take past experience into account to select their partner; and (ii) when competition is high enough so that the public authorities have outside options than renewing the incumbent. The econometric analysis described hereafter thus investigates the impact of renegotiations on contract renewals, and it is based on the French car park sector.

The French framework allows not to select the lowest bid, so as to avoid aggressive and opportunistic bids, and thus, it suits well condition (i). The car park sector is also relevant because concession contracts are widespread, and competition is fierce. Contrary to other sectors with poor ex ante competition\(^4\), the car park sector is characterized by an increase in the number of competitors. Condition (ii) is also fulfilled. As a consequence, using the French car park sector to investigate the link between renegotiations and renewals, as an indirect indicator of surplus evolution, is stringent to understanding the suitability or not of renegotiations.

Based on an original dataset made of several hundreds of car park concession contracts, the results are striking, and do not suit the dominant vision on renegotiations in PPPs. Indeed, econometric treatments show that there is an optimal frequency of renegotiations. This suggests that contracts are governance mechanisms that should be rigid enough to reflect real commitment from contracting parties but that also should be flexible enough to permit adaptation as environment evolves. The fact that contracts are then renewed indicates that renegotiations were balanced to accommodate the needs of all parties involved.

The celerity of the first renegotiation after contract signature however, is negatively and significantly correlated with contract renewals, implying that renegotiating shortly after the award may be interpreted as a sign of aggressive bid, which has a bad impact on surplus. It is thus punished by a lower probability of contract renewal.

Results also show that contracting parties who do not always renegotiate on the same aspect of the contract are more likely to renew their contract together, because this would always favour the same party. This suits the story according to which parties would prefer to contract again together when the previous contract was a win-win game, rather than a zero-sum game. The higher probability to be renewed when previous contract went well is thus an incentive for private partners to adapt correctly to the changing environment and to shape renegotiations so as to increase the overall surplus. There is evidence that parties with a long term vision know how to reach such win-win agreements\(^5\).

Hence, giving public authorities the possibility to use their discretionary power to take previous experience into account when they select their partner is efficient to ensure that win-win solutions are constantly sought.

As applied to the currently discussed Directive proposal, this article suggests two important recommendations. First, it is essential that public authorities have multiple criteria to select their private partner, and that the criterion of price is not the major one. Second, the conditions to renegotiate contracts should be simplified so as to enable correct adaptations to a changing environment. As soon as they have perspective for future contracts if they act cooperatively, or threat not to get other contracts if they are opportunistic, private partners’ behaviour is disciplined. And in fine, they act in a way that maximizes public interest. It is indeed in this sense that the Triloga thinking shall be devoted.

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1. The terms “renegotiation” and “amendment” are here used indifferently.
3. Contract renewals occur after an open call for tenders. These are not direct adjudications without prior publication.
4. For instance, the average number of bidders in the French urban public transport sector is 1.4, and in 65% of cases, there is only one bidder (SMART 2009).
5. There should be no confusion between these win-win games and corruption effects. In the article summarized here, all the clues make it possible to make a distinction.
Public-Private Partnerships and Local Governance

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In view of the fact that local governance provides the initiative behind more than 65% of public investment in Europe, it is essential that Local and Regional Authorities adhere to the contractual fields of PPPs, in order to allow the development of this legal framework and the establishment of its place amongst public procurement tools as a whole.

In France, the United Kingdom and Spain, numerous local authorities have disregarded the fundamental debate that opposes those in Europe who hold that public investments should be implemented and financed from public funds, by public sector employees, and the upholders of an approach that is open to outsourcing to private partners.

The local authorities involved view PPPs as a real lever for public investment, which combines numerous advantages:

- The financial advantages constitute the decisive factor. A legal innovation that consists of rapid completion of investments, while separating their completion from their financial cost, cannot but be of interest to local authorities who consider that their knowledge of the realities and constraints of local public-sector corporate culture.
- That being said, with experience, it should be possible to improve this new legal tool in order to ensure its permanence, alongside the other tools of public procurement.

Channels of progress

The implementation of PPPs remains complex for local authorities and most of them still consider that their knowledge of the subject is inadequate.

Channels of progress for PPPs at the level of local executives require advances in three directions:

Aid for raising major financial resources

The context of economic crisis, public debt and growing shortage of public funds calls for drastic measures, in order to restrict local authorities’ expenditure. This makes it more and more difficult for them to engage in major investments, which call upon their long-term financial resources.

This situation is currently compounded by fears of scarcity of bank credit and increase in the cost of borrowing. New, innovative financing solutions therefore need to be considered.

New sources of financing are thus emerging: the creation of foundations, making it possible to secure additional funds, the use of "naming" (advertising resources), provision of guarantees by States for the securcement of loans and - in France in 2012 - the putting in place of a Common Securitization Fund (Fonds commun de titrisations / FCT) for alternative financing, in order to reduce banks’ long-term commitments, making it possible to replace bank financing with bond financing, open to pension funds and life insurance companies.

At the European level, in awareness of these financial constraints, in 2010 the European Commission proposed the “design of new financing instruments, in collaboration with the EIB and the EIF in particular”.

In this regard, the Commission is considering an extension of the field of application of European financial tools.

This is a major issue for local authorities and especially so since this financial problem is a fundamental parameter for their adoption of this new mode of financing their investments.

A consolidated legal framework

The development of PPPs in municipalities also requires legal stability and simplification.

The great diversity of partnership models in European countries does not make progress towards sensible harmonisation of the legal frameworks involved any easier at the European level.

However, because Europe is promoting public-private collaboration as a major objective, in order to conduct cohesion and innovation policies within the framework of the Europe 2020 strategy, the European Commission, in particular, took the initiative of making a proposal for a directive at the end of 2011, in order to provide concession contracts, which comprise a major part of public-private partnerships, with a suitable legal framework. Nevertheless, considerable work remains to be done.

Expertise and training for local authorities

Consolidation of specific training within the local public sector will facilitate expansion of the use of partnership contracts and, more generally, the opening up of local administrations to the organisational culture involved in partnerships with the private sector. Moreover, the European Parliament specifically recommended this approach in its resolution of 18th May 2010.

Finally, in order to ensure the expansion of support for PPPs amongst local authorities, which are the public decision-makers in their areas, the challenge is to convince them that this legal framework for public procurement can be an especially favourable tool for the promotion of growth and public policies and that, not only is it a lever for investment, but also an especially favourable lever for bringing about cultural change in approaches to public action for the promotion of growth.
PPP – an Effective Means of Promoting Business and Employment in Europe

Guy LECLERC
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As Europe is experiencing one of the gloomiest periods it has witnessed since the aftermath of the Second World War, finding a solution to spur the economy has become crucial. We all know that there is no magic formula for boosting growth, but with a little common sense, we can find the energy and capital required to meet Europe’s critical need for infrastructure and equipment. Forging a balanced partnership between the public sector and the private sector is undoubtedly one way to achieve this.

The term “Public-Private Partnership” (PPP) has been commonly associated with this concept for the past 20 years, even though in reality the related legal implications differ from one country to the next. For the purposes of this article, PPP shall be used to refer to any long-term contractual agreement between a public and a private partner with the aim of building, renovating, managing, operating or financing infrastructure, equipment and/or buildings.

Past obstacles

Over the past few years, we have seen that EU funding through programmes such as the ISPA (Instrument for Structural Policies for Pre-Accession) and the current Structural Funds and Cohesion Funds have failed to develop PPPs. On the contrary, the stance adopted by the European Union has seriously impeded the progress of PPPs due to fears nurtured by the EU (whether founded or not) that private-sector companies would use EU subsidies to increase their internal profitability rates. Consequently, the creation of in-house rules for example, which were enacted in Romania following the launch of EU financing in 2007, made it particularly complicated for private parties to become involved in the management of new projects, particularly in the water sector.

In addition to this, there is an ideological barrier based on the belief shared by some that public service functions cannot be entrusted to the private sector. Naturally this is a matter to be decided by the State in question. The same goes for the sectors to which the State wishes to extend PPPs, from traditional large infrastructures (water, gas, electricity, rail, road, river transport, ports and airports, telecommunications) to new services (e.g., cleaning, education, health, sport and leisure, law enforcement infrastructures and congress centres). There is always room for flexibility to take into account sensitive national issues.

Desirable changes

If a PPP system meets obvious ideological opposition, it should not be imposed. On the contrary, it is best to steer clear of unproductive, biased disputes. Politics aside, it is important that the public and consumers support this approach, which can be achieved if they notice an improvement in services, without prices becoming prohibitive. This implies striking the right balance between efficient management of investments, sound use of public funds and reasonably priced services. This brings us back to the notion of “value for money” or value creation, i.e., the chance to make sure that each euro of public money invested will help to create more wealth if it is invested in a PPP, rather than in another vehicle, particularly a traditional public contract. In practice, this means that EU Member States must set up control and regulatory bodies capable of ensuring that public money is spent in the best conditions.

This last point, which has sparked reservations at EU level in the past in relation to PPPs, also raises the issue of fair remuneration for private operators. Indeed, this type of operation cannot and must not turn into an opportunity to transfer large amounts of public money to the shareholders of banks or private operators through excessive remuneration. On the contrary, it should be a means of harnessing public savings under secure remuneration conditions, which requires the existence of a genuine governance system to ensure public transparency of the transactions carried out. EU Member States wishing to go down this route must therefore take the necessary measures to promote collective support for PPPs.

However, there are also various technical challenges to be overcome: those relating to sovereign debt which has deteriorated since 2011 and to the liquidity of the market due to the worsening of prudential ratios. In addition to this, interest rate differentials are much more favourable to the public debt of countries with good financial credibility than to “project” debt. The impact of this differential on the cost and price of services can only be negative. This is why it is necessary to create innovative measures which can be used in some cases to separate construction/financing contracts and the use/reimbursement of the loan, but also to attach specific guarantees to these contracts to provide the tender greater assurance and to provide incentives to improve contractual performances and hence secure better-quality service.

The EIB is particularly well-placed in the European Union for supporting the development of PPPs by contributing 20% to 25% of private financing for projects in order to leverage subordinated debt tranches eligible for the same guarantees. This naturally leads to project bonds which can help mobilise public savings to finance projects of public interest. This is the cornerstone of the system from a financial standpoint: to be able to redirect part of the EU’s savings to directly finance large projects under balanced guarantee and remuneration conditions. In addition, we need to create simpler mechanisms, both at national and EU level, to support smaller projects in order to extend the scope of application of PPPs and to make them more fluid.

PPP can clearly be a great way of kick-starting the economy by financing projects of public interest in the European Union, but also at national and regional level. This involves combining the efficiency of private enterprise, which generates savings, with a mixture of joint public and private financing, when necessary, comprised of EU and national subsidies. Such action will require clearly-defined rules in relation to control and governance instruments as well as financial arrangements to generate confidence among market players and the public, who are also the savers. Several hundreds of billions of euros could be thus invested in environmental, transport and sustainable management projects over the next 20 years. In addition to the business this would generate, PPPs can also be a means of upgrading jobs and ensuring they continue after the construction phase. This approach must be at the centre of discussions in Europe, not only to make the most of the economic, financial and environmental benefits, but also the benefits for the job market as the specifications of PPPs can include issues such as mobility and professional versatility which are essential for maintaining long-term employment.
Europe 2020 is the strategy developed by the European Union to overcome the economic crisis and promote growth and new conditions for economic development. This new model is based on different specific objectives: more effective investments in education, research and innovation (with the scope of reducing early school leave, increasing third level education and bringing research investment to 3% of EU GDP), improvement of energy efficiency and environmental sustainability (reducing greenhouse gas emissions by 20%), increasing of industrial competitiveness and solidarity, promotion of employment and reduction of poverty.

In order to achieve such a result the rationale underlying Europe 2020 strategy is the interrelation between its objectives, as well as the coordination and cooperation among all stakeholders, at all levels: European, national and local.

Europe 2020 and PPPs

Only combining and coordinating the efforts we will produce an effective impact on growth and employment. This is an essential and implicit feature of the model Public-Private Partnerships (PPPs). Commonly they are perceived as positive “forms of cooperation between public authorities and businesses whose scope should be the implementation of infrastructure projects, or providing services for the public”. PPPs are well fit for the fulfilment of Europe 2020 horizontal objectives, especially for research and innovation, industrial development, climate change, transport, energy, healthcare and cohesion policies.

Over the past years PPPs have already proven to be a very effective model at delivering high-class results. They have been implemented throughout EU in several ways, such as various cross-border projects under TEN-T programme. The Structural Funds for the period 2007-2013 also offered important opportunities to Member States to implement operational programmes through PPPs organised with the EIB, banks and the private sector. Under Framework Programme 7, Joint Technology Initiatives (JTIs), implemented through a number of Joint Undertakings (JUs) and a set of flagship initiatives (such as “Factories of the Future”, “Green Cars” “Energy-Efficient Buildings”, “Future Internet”), have realised innovative partnerships for research at European level. PPPs also became a priority of the European Economic Recovery Plan where they were conceived as a mean to build “a functioning co-operation framework between public and private sectors, to allow information exchange and networking activities”.

All those experiences show that with the right outset and execution PPPs can be an excellent way of leverage to successfully attain long-term objectives associated with multi-annual plans and/or competitive stakeholders. Public-private partnerships can therefore be managed to bring together private and public funds to share infrastructural financing costs and improving and speeding up the delivery of projects. They can also allow industry to associate in innovative approaches. On the other side, in the participation of public authorities in PPPs lays an important safeguard for private funders, as pre-defined budget ensures continuity of long term cash-flows, and can incorporate important social or environmental benefits into a project.

How can PPPs help Europe promote growth and innovation?

Europe urgently needs a strategy to overcome the economic crisis and to promote growth and jobs. A real European industrial policy together with a fostering in research and innovation commitments are central pillars of this strategy. In this perspective, the new research programme Horizon 2020 as element of the above mentioned strategy will set the framework for EU research and innovation efforts from 2014 to 2020. Although many aspects of Horizon 2020 are still under discussion, I firmly believe that PPPs should be part of the picture. The PPPs launched under FP7 have managed to fund projects that have delivered important scientific outcomes and promoted new approaches to research and development activities characterised by open collaborations.

At a time when public sector budgets are under pressure, PPPs can leverage significant research investments from the private sector and create large numbers of new jobs. The existing PPPs are the best example that can be used to explain the success that this model can have. I could mention all of them, but I have had the opportunity to deepen my knowledge about the Innovative Medicines Initiative (IMI) this year. This partnership between the European Union and pharmaceutical industry is now recognised worldwide as a model to stimulate the development of the novel therapies needed to address the alarming public health threats that we are currently facing. I mention IMI as an example, but all the PPPs (from Clean Sky to the Hydrogen and Fuel Cells one) have successfully fostered across Europe large scale collaborative networks, that have already delivered ground-breaking results with the potential for radical transformation of the European landscape. Other PPPs have been proposed in crucial areas and they must be financed through the new Horizon 2020 programme. The existing ones have to be continued if we don’t want to lose the added value created in the last programming period. The overall agreement on the MFF budget will be key for giving them new life. And we know how much this is under threat. We cannot sacrifice our future.

I am convinced that public-private partnerships are one of the most effective tools to create innovation in Europe and policymakers would be wise to ensure the sustainability of a model that have the potential to touch the lives of so many people.
The Innovative Medicines Initiative (IMI) was launched in 2008 with a €2 billion budget and the goal of speeding up the development of safer and more effective medicines through a public-private partnership (PPP). Today, IMI has established itself as a pioneer of open collaboration, a novel way of working that is radically changing the shape of the pharmaceutical research and development (R&D) landscape. The benefits of open collaboration are evident from the many significant results generated by IMI’s consortia, which gather together the key stakeholders in healthcare. Meanwhile, new projects on issues such as antimicrobial resistance demonstrate the value of the PPP model in tackling major public health challenges.

Due to various bottlenecks in the drug development process, it currently costs over €1 billion and takes more than a decade to bring a new drug to the market, and many diseases and conditions still lack effective treatments. IMI was set up because addressing these bottlenecks requires large-scale projects involving all players in the drug R&D process across Europe. Launched jointly by the European Union and the European Federation of Pharmaceutical Industries and Associations (EFPIA), IMI is currently the largest PPP in life sciences worldwide.

IMI’s 40 projects launched to date represent a community of 4,000 researchers drawn from academic teams, pharmaceutical companies, small and medium-sized enterprises (SMEs), patient organisations and regulators.

The projects are delivering concrete results to enhance research productivity in the sector. Indeed, novel tools are badly needed, as large amounts of time and money can be spent on a potential drug before issues with toxicity and/or efficacy are identified. For example, the eTOX project is developing a computer-based tool called eTOXsys that can predict if a potential drug will be harmful to the heart on the basis of simple, readily available information such as the structure of the compound.

Elsewhere, projects are adding to our understanding of the underlying biology and causes of many hard-to-treat diseases. One of the most recent achievements in this area was illustrated on the front cover of the prestigious journal Nature, when the EU-ENMS consortium demonstrated how a father’s age could influence the risk of his offspring developing autism.

Other projects are improving the design of clinical trials to make them more efficient. In the NEWMEDS project on schizophrenia and depression, a number of pharmaceutical companies pooled data from 23,401 anonymized patients from 67 clinical trials in over 25 countries to create the largest single database of clinical trial data ever amassed in psychiatric research. Analyses of this immense database have revealed that clinical trials could be reduced from 6 weeks to 4, and an immense database have revealed that clinical trials could be reduced from 6 weeks to 4, and many diseases and conditions still lack effective treatments. IMI was set up because addressing these bottlenecks requires large-scale projects involving all players in the drug R&D process across Europe. Launched jointly by the European Union and the European Federation of Pharmaceutical Industries and Associations (EFPIA), IMI is currently the largest PPP in life sciences worldwide.

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Networks of Innovation and New Modes of PPP: the Case of KIC InnoEnergy

Elena BOU  
KIC Innovation Director, KIC InnoEnergy

In 2008, the European Parliament approved the European Institute of Innovation and Technology (EIT) in order to foster the integration of the knowledge triangle – higher education, research and innovation – across the European Union. The EIT would primarily operate through excellence-driven, autonomous partnerships of higher education institutions, research organizations, companies and other stakeholders in the form of sustainable and long-term self-supporting strategic networks in the innovation process, the so-called Knowledge and Innovation Communities (KICs).

KIC InnoEnergy is one of the three KICs (together with EIT ICT labs and Climate-KIC) created under the leadership of the EIT. KIC InnoEnergy aims to be the leading engine of sustainable and long-term self-supporting strategic networks in the innovation process, the so-called Knowledge and Innovation Communities (KICs).

KIC InnoEnergy is a commercial company, incorporated as Societas Europea, with 29 shareholders, all of them key players in the energy field, with top rank industries, research centers and universities (see figure 1). It is profit oriented, but has a “not for dividend” policy since all the profits are reinvested in their activities.

KICs are a new concept in the innovation scenario and though many notions have been used to describe them, few have analyzed them as a public-private partnership (PPP). Indeed, the official requirements to be a KIC do not emphasize the need of a partnership where public partners should cooperate with private ones.

A PPP can be defined as “a cooperation between public and private partners, of a lasting nature, in which the partners work together to develop products and/or services, and where the risks, costs, and benefits are shared”. KIC InnoEnergy can be considered a PPP because of its typology of partners (public and private), its long term duration (there is no expiration day but a commitment for long term) and the fact that partners share costs, risks and benefits when developing new products, services and new businesses. Even more, by the way the collaboration has been structured, implying the creation of a new organization and existing symmetric power among all the partners, we could say that we are in front of an Institutionalized public-private partnership. And it is precisely this last aspect, the organizational one, what is also innovative in the case of KIC InnoEnergy.

Innovation as an end, and as a means: the governance model

One of the main challenges the partners faced when designing the partnership was to decide the governance model. Previous initiatives like the Networks of Excellence or recent collaborations based on the Triple Helix Model had proved to be ineffective for different reasons: unclear role of the partners, misalignment of objectives, complexity to manage relations and different motivations, difficulties to integrate knowledge, etc.

After conducting an study where more than sixty networks of energy were considered and after applying an organizational model that took into account some characteristics of the partnership like its large size, the high level of diversity of their partners, the existence of many different motivations, the moderate level of trust, the financial model and the need to develop collective competences in order to achieve its objectives, the partnership decided to establish a Network Administrative Organization (NAO). This governance model implied the creation of an independent organization, the existence of a CEO and the recruitment of a professional and independent management team that would centralize the organizational decision process.

In this way, partners go on with their business as usual and delegate part of their power to a parallel independent organization with clear objectives, and with distinctive features like stability, leanness and highly result oriented. Partners are represented in the General Assembly and Supervisory board where they set objectives, strategic goals and supervise the executive team, but they are not involved in the management of the organization.

Despite the fact that this governance model has also several challenges and the complexity is high in managerial terms, we can conclude that for the time being, it was an appropriate decision. Not only has it provided a common collaboration framework with a common set of rules to a complex diverse partnership, but it also has overcome some of the traditional challenges that a PPP faces: it is a governance structure with formal boundaries, there is a clear alignment of objectives (KIC and partner level, public and private), the legal framework provides security and sustainability and, as any company, all the objectives are translated in Key Performance Indicators, allowing performance monitoring and evaluation. All these aspects have allowed KIC InnoEnergy to have relevant achievements in its first fifteen months of operations.

No model fits all type of collaborations but new forms of governance and management are now emerging in Europe and these may be an opportunity to offer new insights to traditional challenges. It is not only innovation as output but innovation on how we manage it.
Clean Sky 2: a Public-Private Ambition for Technology and the Environment

Eric DAUTRIAT
Executive Director of the Clean Sky Joint Undertaking

Launched in 2008, Clean Sky is a “Joint Technology Initiative” (JTI), a new type of structure created under the Seventh Framework Programme to foster research and innovation. Clean Sky aims at lowering CO2 emissions by integrating breakthrough technologies in full scale demonstrators: engines, wings, embedded systems... Based on an original management system, the Private-Public Partnership principles, Clean Sky is chaired by a Governing Board, formed of representatives from the European Commission and industrial leaders. The Joint Undertaking is in charge of the technical and budget management of the programme.

Based on a top-down approach, Clean Sky successfully answers the challenges it faces: we oriented the technological ambitions of our projects towards our environmental targets. Our programme is not just another public policy: we have been efficiently managing European public funding dedicated to an innovative industrial policy. We had to implement a new system of governance – which has proved to be efficient and let us aim for the best concerning Clean Sky 2, the continuation of the programme under Horizon 2020. We are confident Clean Sky 2 will make the next major strides towards environmental sustainability while finishing the job with respect to the full achievement of the ACARE 2020 goals1 and paving the way for a new wave of breakthroughs heading to ACARE Flightpath 2050. Clean Sky 2’s objectives are however more than environmental as – in line with Horizon 2020 – they address societal needs while enhancing mobility and achieve global competitiveness while strengthening European industrial leadership in aeronautics in Europe – in terms of innovation as well as employment. 2,000 highly-skilled people are currently working on projects financed thanks to Clean Sky. In total, approximately 10,000 “full-time equivalent” will have been involved in the global implementation of Clean Sky.

Indeed, despite the economic downturn, global demand in all aviation segments shows resilient growth of more than 4% per annum. The European Aeronautics Industry today accounts for 40% of the global civil aircraft market, and it must maintain its competitiveness to benefit from the global need for 40,000 new aircraft in the next 20 years.

Scientific research copes with a challenging environment – and now has to face new risks. New entrants (China, Russia...) are enhancing international competition, which forces us to always perform better and be more competitive. Clean Sky – and especially Clean Sky 2 – allows us to support innovation towards the next generation of aircraft by integrating the technologies and mastering the risks. The Commission’s action reduces the fragmentation of research efforts through the EU and supports large-scale investments in a strategic research area. In this joint public-private scheme, the industry adds a truly enterprising approach, more flexible than a “traditional” European programme. This mind-set induces innovation, as does the diversity of stakeholders in the programme.

Clean Sky has participation from a large fraction of the European aeronautical research and innovation capacity. The programme gathers more than 500 participants spread out in 24 countries. Clean Sky manages to engage the private sector as well: SMEs win up to 40% of our Calls for Proposals. We are also quite proud that, from the launch of the programme, 50% of our partners are newcomers to the European funded research. We plan to build on those successes and to open Clean Sky 2 to participation even more: 60% of the total funding will be allocated competitively, through a variety of open calls.

Clean Sky’s members work together all over Europe. SMEs, RTOs, Universities and industries from different States share their know-how and expertise to answer our Calls for Proposals. By doing so, they also discuss the way they work and perform. The industry – with its great mind-set in terms of project management and vision on how to move around the value chain – benefits from Academia’s knowledge. Consequently, these exchanges and transfers enable a more concerted – so more consistent – approach that will pave the way for tomorrow’s research in Europe.

Clean Sky 2: a Public-Private Ambition for Technology and the Environment

Visit us at Paris Air Show/Le Bourget
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1. Advisory Council for Aviation Research and Innovation in Europe. ACARE 2020 goals are a 50% reduction of CO2 emissions and noise perceived, and a 60% reduction of NOx emissions.
Focus on the brain

Brain disorders affect 1 in 3 Europeans and cost the economy € 798 bn per year
There are few effective treatments in this area

Developing new drugs to treat brain disorders takes longer and costs more than for other diseases
IMI projects are tackling these issues

13 May - Brussels, Belgium
Joining forces for new therapies

On the agenda:
Brain research in IMI - Latest news on IMI Calls - Public-private partnerships under Horizon 2020

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