



European Federation of Public Service Unions

Initial response to the Green Paper on PPPs and Community law on public contracts and concessions

The European Federation of Public Service Unions (EPSU) is a federation of the European Trade Union Confederation. It represents 8 million public service workers in 193 trade unions in Europe.

European Federation of Public Service Unions
45 rue Royale
Brussels 1000
Tel: 32 2 250 1080
Fax:32 2 250 1099
email: epsu@epsu.org
www.epsu.org

The Green Paper: A tunnel-vision approach to PPPs

1. EPSU's initial response draws principally on the points raised in the attached PSIRU paper "*PPPs: A critique of the Green Paper*".
2. EPSU regrets the fact that the Green Paper does not seek to develop a coherent EU policy on PPPs. It follows a rigorous tunnel vision approach and is concerned only with competition policy and extending the Internal Market in public services. The Green Paper misses the more fundamental questions: How can the social and economic impact of the risks and future liabilities created by PPPs be evaluated?¹ Why and on what criteria should PPPs be preferred to public sector investment and operation of services? How can democratic control and transparency be assured? To answer these questions a wide range of public interest concerns and policies need to be taken account, including the need for quality public services, employment, sustainable development, cohesion.... Only in this way will public authorities be in a position to assess whether PPPs do provide the best option for investment and the best option for operating services.
3. Despite some helpful suggestions in relation to tendering of concessions (paras 31 – 38) this is not the Green Paper on PPPs that Europe needs. The Commission should produce a report which addresses:
 - The risks and problems experienced with PPPs
 - The dangers for public authorities in entering into long-term deals with the private sector
 - The need to protect public services, their workers, and citizens from erosion of quality by commercial opportunism
 - The economic and social case for public sector investment and provision of services.
4. The Green Paper turns a blind-eye to the risks and future liabilities that are being created by PPPs. This is astonishing when in many countries arguments about public debt and consequent liabilities for future generations are being used to make cuts in public services. The Paper does not take account of remarks by DG Economic and Financial Affairs² about the dangers of PPPs, especially when used to avoid fiscal restraints. Indeed, it seems that it is encouraging them for exactly this purpose. Nor does the Green Paper integrate the experiences of DG Regio regarding how PPPs can be put together in the central and eastern Europe³ and still be eligible for cohesion funds.
5. The Green Paper claims that it does not make any "*value judgment*" on the decision whether or not to externalise services (para 17), and that the rules it is concerned

¹ The European Parliament in its resolution on the Internal Market Strategy - Priorities 2003-2006 also called on the Commission to evaluate the impact of Private/Public Partnerships on the democratic accountability of public authorities in providing public services, and the long-term viability of PPPs, to assess the social consequences for workers and users and to consult with relevant societal organisations, including the social partners, through the inter-sectoral and sectoral social dialogue structures.

² See Public Finances in EMU 2003 report "*there is the risk that the recourse to PPPs is increasingly motivated instead by the purpose of putting capital spending outside government budgets, in order to bypass budgetary constraints. If this is the case, then it may happen that PPPs are carried out even when they are more costly than purely public investment.*" (summary of part III, p.102)

http://europa.eu.int/comm/economy_finance/publications/european_economy/2003/ee303en.pdf

³ See for example "*Resource Book of PPP Case Studies*" published in June 2004

http://europa.eu.int/comm/regional_policy/sources/docgener/guides/PPPResourceBook.htm

with apply “*downstream of the economic and organisational choice made by a local or national authority*” on whether to use the private sector. However, encouraging PPPs by removing obstacles to them and by offering guarantees to entice private contractors, clearly implies discouraging the use of alternatives, namely the public sector. It also implies a preference for private ownership. The asset financed by a PPP needs to be classified as a private asset, off the public sector balance sheet, and so escaping the curbs on government debt. Encouraging PPPs entails encouraging the formation of privately owned assets over the alternative of publicly owned assets. This seems, in principle, to be a breach of the Treaty’s neutrality on public or private ownership (Article 295 of the Treaty).

6. The Commission argues that it is only facilitating the development of PPPs “*under conditions of effective competition and legal clarity*” (1.2). However, while it is a matter of public policy for the European Union to aim for effective competition (and of course legal clarity), there is no public policy objective to facilitate the development of PPPs. Effective competition can exist irrespective of the number of PPPs. There is no public interest in increasing the number of PPPs for their own sake. The Green Paper however acts as though this was the case, and this is reflected in the language: e.g., “*obstacles*” to PPPs, “*develop*” PPPs, “*remove barriers*” to PPPs (paras 14,16, 19).
7. Furthermore, the Green Paper strays beyond the issue of PPPs by including comments on the *Teckel* judgment⁴ (para 63). The Commission concludes that work should be submitted to compulsory tendering before it can be assigned to arms-length public entities. However this would seriously distort the choices available to public authorities. It is highly contentious and has no place in a Green Paper that is supposed to be concerned with PPPs.

Beyond the Green Paper: evaluating PPPs against the public interest

8. The two elements of a PPP are normally (1) financing a public sector capital investment project through a private company and (2) a contract for services, usually operating the capital assets financed under (1). The two central questions on PPPs, for public authorities, are therefore:
 - Is the PPP a better way of financing the capital investment involved than alternatives?
 - Is the PPP a better way of operating the service than alternatives?
9. The key choice is between public sector provision and a PPP, or other variants on these options. The Green Paper acknowledges that “*recourse to PPPs cannot be presented as a miracle solution for a public sector facing budget constraints. Experience shows that, for each project, it is necessary to assess whether the partnership option offers real value added compared with other options...*” (para 5). However, it fails to discuss these other options, and does not elaborate at any point on how this assessment should be carried out, or on what principles such an evaluation should be made.
10. This weakness can be seen in the discussion of risk. The question that should be addressed is whether the PPP option carries more risks (and benefits) than the alternatives of public sector provision (or other forms of contracting). In the context of this choice it is important that PPPs are not made too easy or attractive, e.g. by offering exemption from fiscal restraint, or from procurement disciplines, or providing state-backed guarantees which are not properly costed. These inducements can

⁴ Case C-107/98 on the definition of “in-house”. Several other cases on the same point are currently before the European Court of Justice.

distort any evaluation between a PPP and a public sector provision. Thus the Eurostat ruling, which is noted by the Green Paper as helping make PPPs more attractive, should in fact be criticised for making PPPs too easy⁵.

11. Rather, if the fiscal rules of the EU are preventing enough public investment from being made, or preventing it being made in the most efficient way, then the rules themselves need to be reviewed and changed. Evading the rules by using PPPs, when they may be a more costly, more risky, less equitable and less effective option than public provision, does not solve the problem: it makes it worse.

Long-term effects on provision of services

12. The Green Paper takes the view that *“The success of a PPP depends to a large extent on a comprehensive contractual framework for the project, and on the optimum definition of the elements which will govern its implementation. In this context, the appropriate assessment and optimum distribution of the risks between the public and the private sectors, according to their respective ability to assume these risks, is crucial.”* (para 45)
13. There are two great weaknesses in this position. Firstly, it ignores the key ‘top-level’ choice between public provision or PPPs – the key question is not allocation of risk within PPPs, but the riskiness of PPPs compared with the alternative of public sector provision. Secondly, in reality it is impossible to specify everything in a contract, because unforeseen circumstances will arise. This is especially important in the case of public services, because the State can never transfer responsibility for assuring the public interest to a private operator. Entering into long-term PPP contracts limits the ability of public authorities to respond to future changes in the public interest.
14. The Green Paper’s belief in complete contracts is repeated when it addresses the question of contract revisions (para 49). This need for constant renegotiation is often seen as an opportunity for the private partner to improve the terms of their contract, but for the public partner it is normally disadvantageous, partly because the greater knowledge and legal expertise of the private companies leads to contract revisions more favourable to the contractor. In any case the real problem is the need for a comparative evaluation of PPP proposals with other public sector options: the risk to the public authority of this kind of future deterioration in the terms of the contract has to be quantified.

Damage to staff: working conditions, morale and public service ethos

15. The Green Paper makes no reference to the employment effects of PPPs, yet public services are responsible for generating high levels of employment. EU policies need to take this more into account if the Lisbon targets are to be met.
16. The quality of employment is also intrinsically inked to the quality of services provided. One effect of PPPs is often to damage the working conditions and morale of workers. A survey carried out by EPSU in 2003 found that in a number of

⁵ The IMF also commented that the *“recent Eurostat decision on accounting for risk transfer gives considerable cause for concern, because it is likely to result in most PPPs being classified as private investment. Since most PPPs involve the private sector bearing construction and availability risk, they will probably be treated as private investment, even though the government bears substantial demand risk (e.g., when it guarantees to the private operator a minimum level of demand for the service provided through the PPP). ...the recent decision thus could provide an incentive for EU governments to resort to PPPs mainly to circumvent the Stability and Growth Pact (SGP) fiscal constraints.”*
<http://www.imf.org/external/np/fad/2004/pifp/eng/031204.htm>

countries workers were displaced outside sectoral agreements on pay and conditions, or forced onto worse conditions. The development of outsourcing in energy has displaced workers from mainstream energy companies to contractors who have an incentive to cut costs to retain the next contract: as a result there is a training crisis throughout Europe for energy workers.

17. Damaging effects on labour have been noted by a number of reports of experience with PPPs in the UK. A recent review of the impact of PPPs on labour in the UK observed that the tendering process, based on lowest price, had damaged the security and conditions of the workforce, especially of women, as well as the quality of service; in the case of prison service Public Finance Initiatives (PFI) schemes, the effect had been to reduce wages, increase hours, and increase staff turnover.

Conclusion

18. EPSU reiterates that the Green Paper not the right starting point to develop EU policy on PPPs. It ignores the main question that needs to be addressed, namely not whether a PPP should be done this way or that, but whether it should be done at all. While the Green Paper acknowledges that *“recourse to PPPs cannot be presented as a miracle solution for a public sector facing budget constraints. Experience shows that, for each project, it is necessary to assess whether the partnership option offers real value added compared with other options...”* (para 5), it fails to discuss these other options, and does not elaborate at any point on how this assessment should be carried out, or on what principles such an evaluation should be made.
19. The Green looks at PPPs exclusively from the perspective of competition policy and the interest of private economic operators. It ignores issues linked to the broader, long-term public interest and to social and employment concerns. It does not evaluate PPPs or show that they provide “value for money”. It assumes that the private sector is better than the public sector and so it can ignore all evidence to the contrary.

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