



Public-Private Partnerships and Community law on public contracts and concessions

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http://europa.eu.int/comm/internal_market/publicprocurement/ppp_en.htm



PPPs and Community law on public contract and concessions

BACKGROUND

- PPP schemes increasingly applied within the EU
- No specific Community rules on PPP



This can create uncertainty for Community players – potential obstacle to the creation or success of PPPs



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Current legal situation at EC level

- ⇒ PPPs qualifying as **public works contracts** or as **priority service contracts**: application of the detailed provisions of the Community Public Procurement Directives.
- ⇒ PPPs qualifying as **public works concessions** or **non-priority service contracts**: application of few provisions of secondary legislation.
- ⇒ PPPs qualifying as **service concessions**: no secondary EC legislation applicable, but...



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European Court of Justice in TELAUSTRIA judgment (C-324/98):

The fundamental rules of the EC-Treaty, in particular the principle of non discrimination apply to service concessions. Advertising must be sufficient to open the services market up to competition.

The fundamental rules of the Treaty include:

- Equality of treatment
- Transparency
- Proportionality
- Mutual Recognition



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Institutionalised PPPs

To take full advantage of PPPs, public authorities establish entities held jointly by the public partner and the private partner.

The law on public contracts and concessions does not of itself apply to the transaction creating a mixed-capital entity.

However, when such a transaction is accompanied by the award of a public contract or a concession, it is important that there be compliance with the rules and principles arising from this law.



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The in-house concept

Teckal-Jurisprudence (C-107/98)

- EC Public Procurement Law is applicable when a contracting body decides to entrust a task to a third party, i.e. a person legally distinct from it.
- In-house entities are not considered to be third parties: when (1) the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and (2) that person carries out the essential part of its activities with the controlling local authority or authorities.



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The in-house concept

• **Stadt Halle-Jurisprudence (C-26/03)**

In principle, Public Procurement Directives apply when a contracting authority intends to conclude a contract for pecuniary interest with a company legally distinct from it, the capital of which is at least partly held by private undertakings.



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Follow-up to the consultation

- ⇒ **2004:** Large public consultation on the Green Paper on PPPs and Community Law on Public Contracts and Concessions
- ⇒ **May 2005:** Report on the public consultation on the Green Paper on PPPs and Community Law on Public Contracts and Concessions
- ⇒ **November 2005:** Commission Communication on the political follow-up to the public consultation
- ⇒ **Autumn 2006:** Interpretative Communication on Institutionalised PPPs
- ⇒ **2007:** Legislative Initiative on Concessions?