

# EUROPEAN PARLIAMENT

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*Committee on Transport and Tourism*

31.8.2006

**2006/2043(INI)**

## **OPINION**

of the Committee on Transport and Tourism

for the Committee on the Internal Market and Consumer Protection

on public-private partnerships and Community law on public procurement and concessions  
(2006/2043(INI))

Draftsman: Paolo Costa

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## SUGGESTIONS

The Committee on Transport and Tourism calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

- A. having regard to the strategic need to update the infrastructure of the Union and especially transport infrastructure and services and logistics – from large-scale networks such as TEN-T to specific ones such as ports and airports, logistics platforms and modal interchange platforms, and those related to urban transport (car parks, local railways, tramlines, underground systems, buses and local public transport services) – which, because of their huge financial dimension, place increasing pressure on Member States' budgets,
- B. having regard, for example, to the huge financing needs – beyond the Community's own resources – in the forthcoming years of the TEN-T infrastructure projects, which are estimated at EUR 600 billion in the period up to 2020 (including EUR 225 billion for the 30 priority projects of which EUR 140 billion in the period 2007-2013), which needs cannot be met except by drawing on a variety of sources involving a wide range of public and private persons and bodies via the financial incentive of Community grants,
- C. having regard to the proposal for a regulation of the European Parliament and of the Council determining the general rules for the granting of Community financial aid in the field of the trans-European transport networks and energy (COM(2004)0475), which was designed to encourage public investment in the sector by increasing the Community cofinancing rate,
- D. having regard to the experience of public private partnership - both 'contractual' and 'institutional' - gained over the years in some Member States, in particular in the field of transport projects and particularly through concession-based PPPs, as a means for public authorities to optimise the value for money of public resources and share risks with private partners,
- E. whereas this phenomenon assumes various forms, which increasingly involve the application of specific Community principles and rules, and has produced a set of rules which call for an initial framework, although they should be left to evolve,
- F. whereas public-private partnerships can and must help to improve the quality and continuity of public service by means of arrangements for sharing risks between the public and private sectors,
- G. whereas, in order to ensure that expenditure on transport infrastructure is deployed as effectively and efficiently as possible, it is necessary in any event to promote the widest possible private sector participation in the planning, construction, management and funding of infrastructures by means of transparent invitation to tender, tendering and contract award procedures,
- H. whereas Eurostat identifies the way in which the main categories of risk (construction risk, availability risk and demand risk) are apportioned as the criterion for determining

the impact of PPP projects on Member States' national accounts,

- I. whereas, in PPPs, public undertakings and bodies may not be eligible for Community grants because they do not bear construction costs, while private undertakings and bodies may not be eligible for the same grants because they receive 'availability payments' to cover construction costs,
  - J. whereas the planning, decision, and construction phases of TEN projects may continue well beyond the financial framework under which grants are made available,
1. Takes the view that the Commission should adopt a legal instrument that defines guidelines with a view to bringing together existing legislation and principles as well as definitions and basic concepts underpinning the various types of public-private partnership found in Europe and which are applicable to both 'contractual' and 'institutional' PPPs in order to ensure compliance with the principles of equal treatment and uniformity among Member States while leaving Member States and their local authorities maximum freedom to settle the details of contractual or institutional arrangements, in accordance with the subsidiarity principle;
  2. Considers that the legal instrument on institutional and contractual PPPs should seek to establish a list of 'best practice' and 'worst practice' in relation to PPPs, particularly with regard to the stage at which a private, public or semi-public contractor is selected, and to define the cases in which an 'in-house' solution may be applied;
  3. Considers that, in the case of contractual PPPs, a prior public sector comparator and a value for money analysis are necessary for the public sector when launching a PPP project; considers furthermore that this category of PPPs, which should be understood in the wider sense of concessions, so as to include contracts whose object is the provision of public services requiring the carrying out of infrastructure works and where the majority of the concessionaire's revenues derives from direct payments by public authorities, the legal instrument which defines the guidelines should address the stage of the selection of the private contractor and should standardise several examples of best practice – which should not, however, be binding – for public authorities and private operators; considers that these guidelines should also set out the principles which are applicable to the contractual framework following the awarding of the contract, by taking a proscriptive approach and indicating which kinds of conduct or contractual provisions conflict, or risk conflicting with the principles of Community law; further considers that these guidelines should contribute to a well-balanced and fair share of profit and risk between public and private partners, preventing unacceptable damage to the public; lastly, considers that the Commission should provide examples of best practice in risk sharing between the public and private sectors;
  4. Emphasises that the expression 'conflict of interests' should be precisely defined at EU level, in the interests of establishing fair and equitable risk sharing;
  5. Considers that, as regards institutional PPPs, in view of the current lack of legal certainty, particularly having regard to the case-law of the Court of Justice of the European Communities concerning 'semi-public undertakings' (judgment of 11 January 2005 in case C-26/03, Stadt Halle and RPL Lochau), they should be placed on a more secure legal footing, on the basis of an assessment of the experience of certain Member States in that

area, by a specific legal instrument to clarify the rules applicable and the link between Community rules and principles with regard to company law, competition law and the law on public contracts and concessions and that this instrument should comply with the criteria laid down in the judgment of 18 November 1999 in case C-107/98, Teckal, the principle of the administrative freedom of local authorities and the exclusive competences of the Member States, particularly with regard to property arrangements; further considers that the instrument should also establish a distinction between the rules applying to the activities of semi-public undertakings which are in the general public interest and the rules applying to activities pursued in their private interest;

6. Calls for the cross-subsidisation of concessions, a method which enables non-profitable regional development infrastructures to be financed from the proceeds of profitable infrastructures without excessive recourse to public spending, and is currently under threat from the implementation of the directive on the award of public contracts, to be regarded as constituting a separate and original type of public-private partnership and placed on a sound legal footing as such;
7. Hopes that the national accounting arrangements for public-private partnership contracts may facilitate the financing of the EU's updating of infrastructure, albeit whilst respecting the Maastricht deficit and debt commitments (press release STAT/STAT/18);
8. Calls, in the case of operations involving 'institutional' PPPs (i.e. semi-public undertakings), for the private partner to be identified on the basis of an open public procedure, in the course of which the criteria which will govern the subsequent commercial relationship between the semi-public undertaking and its private partner must also be laid down (to address the problem of 'double tendering');
9. Calls on the Commission to ensure, by exercising Community control over State aid, that the granting of subsidies does not involve any discrimination between operators, whether private, public or a mixture of the two;
10. Emphasises that, in addition to the fulfilment of the requirements of the EUROSTAT decision on the accounting treatment of public-private partnerships, further directions should be given as regards quantification of the risks associated with projects in order to prevent possible circumvention of the Maastricht criteria;
11. Believes that the leverage effect created by public private partnerships will be considerably increased when, over the coming financial framework (2007-2013) EUR 2,907 million per year will be available for TEN-T funding by the EU, as opposed to EUR 600 million during the current financial perspectives period, combined with a specific Loan Guarantee Fund designed with reference to the specific needs of PPPs and higher ceilings for EU contributions to TEN-T projects;
12. Encourages the Commission and the European Investment Bank to gather together their expertise and disseminate it especially in those countries where the authorities are not familiar with PPPs;
13. Believes that revision of the existing rules for granting Community financial aid in the framework of PPP schemes is necessary in order to remove obstacles to the effective use of this form of aid.

## PROCEDURE

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|---|---|
| <b>Title</b>  | Public-private partnerships and Community law on public procurement and concessions   |
| <b>Procedure number</b>   | 2006/2043(INI)]   |
| <b>Committee responsible</b>                                    | IMCO  |
| <b>Opinion by</b><br>Date announced in plenary                  | TRAN<br>16.2.2006   |
| <b>Enhanced cooperation - date announced in plenary</b>         | 16.2.2006   |
| <b>Drafts(wo)man</b><br>Date appointed                          | Paolo Costa<br>23.11.2004   |
| <b>Previous drafts (wo)man</b>                                  |   |
| <b>Discussed in committee</b>                                   | 15.6.2005      29.8.2005  |
| <b>Date adopted</b>   | 30.8.2005   |
| <b>Result of final vote</b>                                     | for: 45<br>against: 1<br>abstentions: 1   |
| <b>Members present for the final vote</b>                       | Inés Ayala Sender, Etelka Barsi-Pataky, Philip Bradbourn, Paolo Costa, Michael Cramer, Arūnas Degutis, Christine De Veyrac, Petr Duchoň, Saïd El Khadraoui, Robert Evans, Emanuel Jardim Fernandes, Luis de Grandes Pascual, Mathieu Grosch, Ewa Hedkvist Petersen, Jeanine Hennis-Plasschaert, Stanisław Jałowiecki, Georg Jarzembowski, Dieter-Lebrecht Koch, Rodi Kratsa-Tsagaropoulou, Jörg Leichtfried, Bogusław Liberadzki, Evelin Lichtenberger, Patrick Louis, Erik Meijer, Robert Navarro, Josu Ortuondo Larrea, Willi Piecyk, Luís Queiró, Reinhard Rack, Luca Romagnoli, Gilles Savary, Renate Sommer, Dirk Sterckx, Gary Titley, Georgios Toussas, Marta Vincenzi, Corien Wortmann-Kool, Roberts Zile |
| <b>Substitutes present for the final vote</b>                   | Zsolt László Becsey, Johannes Blokland, Den Dover, Nathalie Griesbeck, Zita Gurmai, Elisabeth Jeggle, Anne Elisabet Jensen, Sepp Kusstatscher, Zita Plešinská   |
| <b>Substitutes under Rule 178(2) present for the final vote</b> |   |
| <b>Comments (available in one language only)</b>                |   |