

EUROPEAN AND EXTERNAL AFFAIRS COMMITTEE

Date: 1 July 2004

Time: 09:00

Venue: Committee Rooms 3 & 4, National Assembly Building, Cardiff Bay

Title: **Scrutiny of EU Legislation: European Commission Green Paper on public-private partnerships**

PURPOSE

1. At its meeting on 27 May 2004, the European and External Affairs Committee decided to give further consideration to COM(2004) 327 final, a Green Paper on public-private partnerships and Community law on public contracts and concessions (the Green Paper). Because of the wide-ranging nature of the issues in the Green Paper, it will also be considered by the Assembly's Economic Development and Transport, and Local Government and Public Services Committees at their meetings on 7 July 2004.
2. The Green Paper was considered by Members during a discussion about proposed changes to the state aid régime. Members might wish to note that a more detailed briefing on various state aids issues is provided in paper EUR(2) 06-04(p6) provided by the Welsh Assembly Government. That paper also comments briefly on the current review by the European Commission of the regional aid guidelines, a key element of the overall state aids régime, which is expected to be considered in greater detail by the Economic Development and Transport Committee at an extra meeting on 29 June.
3. This is an overview of the background to the Green Paper and main issues arising from it, to inform the Committee should Members wish to make a response.

ACTION

4. The Committee is invited to consider whether it wishes to respond to the Commission on the issues raised in the 2004 Green Paper. Responses must be with the European Commission by 30 July 2004.

BACKGROUND

5. In June 2003, the Commission launched COM(03) 270, a Green Paper on services of general

economic interest. The results of the consultation informed COM (2004) 374 final – a White Paper on services of general interest, which was issued on 7 June 2004. Services of General Economic Interest (SGEIs) cover both market services and non-market services which public authorities class as being of general interest and subject to specific public service obligations. It applies to electricity, gas and water supply, telecommunications, railways, postal and health services, education and social security as well as to a wide range of services provided by local authorities.

6. The 2004 Green Paper, launched on 6 May 2004, relates to one area of SGEIs, public-private partnerships (PPPs). Members may find it helpful to consider the Green Paper in the context of the 2004 White Paper on SGEIs.

White Paper on SGEIs

7. The White Paper on SGEIs sets out the Commission's approach towards developing a positive role for the EU in fostering the development of high quality SGEIs.

8. The purpose of the paper is to define a range of possible future approaches at the EC level to support the development of SGEIs. However, the Committee may wish to note that the paper emphasises the Commission's recognition of the importance of subsidiarity in defining these approaches, and does not at this stage envisage a need for legislation. The White Paper states that SGEI issues do not have to be considered at Community level at the moment, and further says that in principle, the Commission agrees that it is not necessary to give the Community extra powers in this area. However, the Paper goes on to say that if the draft treaty on a European constitution enters into force, "this will provide an additional legal basis for Community action in the field of services of general economic interest (SGEIs)". Potentially, therefore, this issue could in future be taken out of the hands of regional and national government and placed at Community level.

Green Paper on PPPs

9. The 2004 Green Paper aims to "launch a debate on the application of Community law on public contracts and concessions to the PPP phenomenon", to ensure that PPPs develop in a context of effective competition and legal clarity. The paper does not touch on the decision to contract out public services or keep them in the public sector, which the Commission notes remains within the competence of the public authorities of Member States.

10. The Green Paper also represents an action planned under the European Initiative for Growth, which envisages PPPs playing a role in increasing investment in trans-European transport infrastructure. The paper initiates a process which has potential to remove uncertainty or other barriers to the implementation of PPPs. The paper therefore considers what barriers might exist, and seeks to gather examples of good practice in the implementation of PPPs.

11. The paper divides PPPs into two categories: contract-based PPPs (both public works contracts and

concessions) and ‘institutionalised PPPs’, involving the establishment of a joint venture between public and private partners. For contract-based PPPs, the Commission seeks responses to the following opinions:

- The "competitive dialogue" procedure, allowing contracting bodies to open dialogue with bidders on the solution they propose to the authority's output specifications, is particularly well adapted to the award of such contracts;
- The current position for concession contracts – no co-ordination of Member States' legislation and selection rules drawn up on a case-by-case basis – raises the question whether the current legal framework is sufficiently detailed to allow effective competition, and leads the Commission to consider making the award of all contractual PPPs subject to identical award rules;
- In the phase following selection of the private partner, clauses covering changes made during the operation of a PPP, and the sub-contracting of work to third parties, have the potential to have a discriminatory effect and may justify more detailed rules; and
- The implementation of "step-in" rights by financial institutions to replace failing contractors may present a problem in terms of transparency and equal treatment.

12. For PPPs involving the establishment of a joint public and private sector entity, the Commission notes that the law on public contracts and concessions does not of itself apply to the creation of a mixed-capital entity, but that the transfer of tasks to such an entity should comply with the rules and principles arising from this law. The Commission questions respondents as to whether initiative is required at Community level to clarify or define the obligations of contracting bodies in the creation of such PPPs.

13. The First Minister of the Scottish Executive, the First Minister of the National Assembly for Wales and the Secretary of State for Northern Ireland have responsibility for PPP policy in the devolved administrations.

14. The UK government supports the increased use of PPPs in both national and Trans-European infrastructure delivery, where the use of private finance can offer better value for money than conventional public investment. Consequently the UK is keen to see that the right conditions for the development and implementation of PPPs are in place, and states that it would welcome removal of any unnecessary obstacles to PPP procurement.

15. The most favourable conditions for the further development of PPPs in investment and service delivery include a transparent procurement framework and the flexibility to deal with innovative or complex approaches. The UK feels that the existing public procurement rules largely meet these needs, and would be concerned to see that any reform did not disrupt the procurement process of existing national PPP programmes.

16. The Green Paper, as a consultation document on the application of procurement and public contract laws, has no direct financial implications.

Consideration by the House of Commons' European Scrutiny Committee

17. The House of Commons' European Scrutiny Committee looked at the original Green Paper on SGEIs in June 2003, and considered the White Paper on SGEIs and the Green Paper on PPPs at its meeting on 16 June 2004. Both documents have been recommended for debate, but a report on consideration of the documents has not yet been published.

RECOMMENDATION

18. It is recommended that the Committee considers the possible implications of the Green Paper on public-private partnerships and decides whether it wishes to respond to the consultation points in paragraphs 10 and 11 (above).