

I can see clearly now

Wolfgang Tiede, Julia Spiesberger and Barbara von Gayling-Westphal review and contrast transparency requirements for public-private partnerships in Germany and the UK

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'The lack of one homogenous framework leaves prospective parties to a public-private partnership with a plurality of potentially applicable rules together with soft laws and guidelines at different levels.'

This article assesses the transparency requirements for the procurement of public-private partnerships in Germany and the United Kingdom.

Transparency requirements for the procurement of public-private partnerships at EU level

Public-private partnerships must adhere to the relevant EU law since economic activities by public authorities fall within its scope. While there is no specific secondary EU legislation on public-private partnerships, public authorities must comply with the Treaty provisions, namely the freedom of establishment and the freedom to provide services, Article 49 and Article 56 of the Treaty of the Functioning of the European Union (TFEU). These freedoms in particular encompass the principles of transparency, equality of treatment, proportionality and mutual recognition. Additionally, EU public procurement law must be complied with if the public-private partnerships – or the tasks assigned to it – qualify as a public contract or concession. With regards to public procurement law secondary legislation exists, namely the public procurement directives (Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal service sectors [2004] OJ L134/1 and Directive 2004/18/EC on the coordination of procedures for the award of public

works contracts, public supply contracts and public services contracts [2004] OJ L134/114). The public procurement directives distinguish three types of contracts: public contracts fully covered by the directives, public works concessions and public contracts partially covered by the directives and public contracts and service concessions not covered by the directives.

In addition to these binding rules and principles of EU law, there are guidelines and soft laws such as communications by the European Commission which advise member states on EU rules and best practices concerning public-private partnerships.

Preliminary remarks

Before assessing the transparency requirements for the procurement of public-private partnership, it should be noted that the guidelines on public-private partnerships draw a distinction between two main types of public-private partnerships: purely contractual (European Commission's Green Paper on public-private partnerships and community law on public contracts and concessions COM (2004) 327, 2.0) and institutionalised public-private partnerships (COM (2004) 327, 3.0). The former refers to public-private partnerships whose relationship is based on purely contractual bonds, while the latter refers to public-private partnerships that cooperate within a distinct entity held jointly by both partners.

The choice of one of these models does not only affect the nature of the

relationship between the private and the public partner. Moreover, it also has certain implications regarding the procurement process of the public-private partnership, which will be analysed in the following.

Publication requirements

In *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria* [2000], at para 62, the European Court of Justice stated that the obligation of transparency resulting from Art 49 and 56 TFEU:

... consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

A sufficient degree of advertising entails on the one hand the scope of the information to be published, and on the other hand the accessibility of the advertisement for potential bidders. In case the public-private partnership contract falls within the scope of the public procurement directives, the publication requirements provided therein must be complied with (see Directive 2004/17/EC Articles 41-50, Annexes XIII, XIV, XV A, XV B and XVI and Directive 2004/18/EC Articles 35-43, Annexes VII A, VII B, VII C and VII D).

Besides these varying specific publication requirements, the principles of transparency and equal treatment generally require the public authority to provide potential bidders with equal access to suitable information. The Commission has taken the view that this obliges the public authority to publish the bidding criteria which must comply with the principle of equal treatment and to undertake sufficient advertising in order to ensure competition (Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP, C(2007) 6661 of 5 February 2008, 2.3.5). Moreover, in the view of the Commission the tender documents should contain basic information on the public contracts and/or concessions, the statutes and articles of association and the shareholder agreement in case of an institutionalised public-private

partnership and all other elements governing the contractual relationship.

Transparency of terms and conditions

In addition to a transparent procurement process, the establishment of transparent terms and conditions during the procurement plays an important role in enabling the partners, as well as the general public, to adequately predict the contractual rights and obligations of the parties. In order to achieve this, the terms and conditions for performance of the contract need to be formulated in a

of the contract, the contract should be newly procured (European PPP Expertise Centre, 'A Guide to Guidance: How to Prepare, Procure and Deliver PPP Projects', available at: www.legalease.co.uk/guide-to-guidance, 3.2.1). A contract term is material if tenderers would have been able to submit substantially different tenders on the basis of it, had it been included in the tender documents.

Furthermore, the possibility of sub-contracting should be defined in the public-private partnership contract, as private partners are generally free to sub-contract (COM (2004) 327, 2.3.1).

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way that allows the various candidates to interpret them in the same way. In particular, this means that the private partner should be informed about the anticipated distribution of risks, evaluation mechanisms and the period of performance (European Bank for Reconstruction and Development, Procurement Policies and Rules, available at: www.legalease.co.uk/procurement-policies-and-rules, para 3.24 and 3.25). In addition the period of performance should be fixed so as to enable financial stability of the project.

As the relatively long duration of the relationship between the public and private partners is one of the general characteristics of a public-private partnership, the contractual framework must allow for optional renewals or amendments of the contract and the possibility of adapting to changing macro-economic and technological conditions. This may be achieved through an automatic adjustment clause such as one indexing the price. In order to guarantee transparency, such clauses and the respective procedures to be followed must be included in the tender documents during the procurement process (C(2007) 6661 of 5 February 2008, para 3.0). Where the changes to the contract affect a material term

Transparency requirements for the procurement of public-private partnerships in Germany

In Germany, the introduction of the Public-Private Partnership Acceleration Act (Gesetz zur Beschleunigung der Umsetzung von Öffentlich Privaten Partnerschaften und zur Verbesserung gesetzlicher Rahmenbedingungen der Öffentlich Privaten Partnerschaften) has facilitated the adoption of public-private partnerships. Until then privatisation was often an easier route to choose. The main amendment brought to existence by the Public-Private Partnership Acceleration Act was the introduction of the competitive dialogue procurement procedure. Nonetheless, there is no homogenous law regulating public-private partnerships. For example, the German Civil Code (Bürgerliches Gesetzbuch) applies to the setting up of the public-private partnership and the German Law against Constraints of Competition (Gesetz gegen Wettbewerbsbeschränkung (GWB)) sets out general principles of public procurement law. The general principles of German procurement law are further specified in a number of regulations, such as the German Construction Tendering

and Contract Regulations (Vergabe- und Vertragsordnung für Bauleistungen – VOB) and the German Services Tendering and Contract Regulations (Vergabe- und Vertragsordnung für Leistungen – VOL).

Transparency of the public procurement process

Most public-private partnerships fall within the scope of a public contract pursuant to the provisions of the GWB and are therefore covered by German procurement law. Where the public-private partnership is realised in terms of a works concession model, ie instead of receiving a remuneration directly from the public authority, the private partner refinances its costs through charging the end user – only parts of the German procurement law apply, in accordance with ss32-32a VOB Part A (VOB/A). Service concessions, on the other hand, are not covered by German procurement law. Nevertheless, service concessions should be procured in a competitive

procedure. Thus, like in EU law, the type of contract at hand determines the scope of application of the national procurement law including the publication requirements. Pursuant to VOB and VOL publication requirements generally consist of an invitation to tender, bidding criteria and general contract terms, including description of performance, duration of contract and the anticipated risk allocation (see for example s8 and s9 VOB/A and s9-EG VOL Part A (VOL/A). The bidding criteria should not be amended later on and it is recommended to state them in a rating matrix including comprehensible sub-criteria (PPP Task Force im BMVBS und PPP-Task Force NRW, PPP im Hochbau: Vergaberechtleitfaden, available in German at: www.legalease.co.uk/ppp-task-force, para 8.3.). The public authority may consider attributes of the private partner and factors that lie outside the project only in very special circumstances. The criteria should be weighed to their relevant importance. In addition to the criteria, the weighing

itself has to be communicated to bidders (see for example s10 VOB/A).

The public authority should also make any necessary information available to all bidders, such as studies on the feasibility of the project. During the procurement process bidders have to be given the opportunity to ask questions (s17 VOB/A and s17 VOL/A). Answers to the questions have to be made accessible to all other bidders anonymously in order to ensure a fair and transparent process.

German guidelines (eg PPP im Hochbau: Vergaberechtleitfaden) embrace a complete life cycle approach in the procurement and setting up of a public-private partnership. This has a considerable impact on the transparency of public procurement in comparison as to ordinary public procurements is as much as the cost analysis during the procurement for example takes account of all anticipated costs during that life cycle.

Transparency of terms and conditions

In accordance with German procurement law, tender documents must contain standard contract terms (VOB Part B and VOL Part B) and additional contract terms as specified in the German procurement regulations (ss8-9 VOB/A and s9 VOL/A). These *inter alia* contain provisions on the manner and extent of the performance, payment, performance documents time limits for performance, risk allocation, liability, sub-contracting and amendment of the contract price.

It is recommended that payment conditions and mechanisms are bound to quality standards of the performance of the private partner. Additionally, control and influence mechanisms for the public authority to oversee the performance of the private partner should be included in the contractual provisions (ÖPP Deutschland AG, public-private partnership for state and municipal road projects (Band VIII: ÖPP im Bereich von Landes- und Kommunalstraßen) available in German at www.legalease.co.uk/partnerschaften-deutschland, 4.6). If tenderers can propose amendments to the contract during the procurement process, the selection method of such amendments has to be included in the procurement documentation, so that tenderers have a chance to give an

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elaborate reasoning on their proposed changes (Federal Ministry of Transport, Building and Urban Development Advisory Group PPP, 'PPPs in Public Building Construction' vol I – Gutachten 'PPP im Öffentlichen Hochbau' Band I available in German at www.legalease.co.uk/ppp-im-offentlichen-hochbau, 9.3). By the same token, it is crucial to specify those terms and conditions that are non-negotiable for the public authority. The terms and conditions should be flexible regarding future amendments and should include necessary clauses so as to avoid re-conclusion of the contract, since a re-conclusion would require a new procurement.

Transparency requirements for the procurement of public-private partnerships in the UK

In the UK, like in Germany and at EU level, no homogenous legal framework on public-private partnerships exists. As public-private partnerships are a devolved matter in Wales, Scotland and Northern Ireland, the following text will focus on public-private partnerships in England. The Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006 implement the public procurement directives into UK law and govern public procurement in general (for Scotland see Public Contracts (Scotland) Regulations 2012 and Utilities Contracts (Scotland) Regulations 2012). The responsibility for setting the public-private partnership in England lies with the British Ministry of Finance and Economy (HM Treasury), which has provided guidance on a number of topics mainly focusing on private finance initiatives, the most prominent public-private partnership model in the UK (The HM Treasury's guidelines are available at www.legalease.co.uk/ppp-guidance). While not providing for a legally binding framework, these guidelines nevertheless offer a comprehensive account of the procedures to be followed in the procurement of public-private partnership projects. For this reason, the following analysis is mainly based on the guidelines.

Transparency of the public procurement process

While the British guidelines mentioned above focus on external transparency and transparency for the public authority during the partnership as a control mechanism rather than transparency of the procurement process itself, British procurement law as provided in the 2006 Regulations nevertheless sets out certain publication requirements. Section 23 of the Public Contracts Regulations 2006 for example spells out the rules

on bidding criteria. Thus, the public authority must only use criteria linked to the subject matter of the contract and shall include its weighing in the contract notice, contract documents or descriptive documents in accordance with the applicable procurement procedure.

The UK government has adopted a new approach to public-private partnerships, which it hopes will provide increased access to wider sources of equity and debt finance as well as improving the value for money of financing projects. This approach will go hand in hand with measures designed to improve the transparency of public-private partnerships: HM Treasury, 'A new approach to public private partnerships', December 2012, available at: www.legalease.co.uk/new-approach-to-public-private-partnerships. The government will require equity return information for publication, publish an annual report detailing the projects including the financial information, introduce a business case approval tracker and improve the information provisions within the standard contractual guidance, which is outlined in the following paragraph.

Transparency of terms and conditions

In order to avoid ambiguity of the terms and conditions in public-private partnership project contracts, the British HM Treasury provides standardised contracts to be used as guidance (available at: www.legalease.co.uk/standardised-contracts). The British government is currently drafting new standardised contracts within its new public-private partnership policy under the heading of 'PF2' (guidance on PF2 including detailed drafting provisions of the PF2 contracts are available under

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www.legalease.co.uk/standardisation-of-PF2-contracts). The new PF2 contracts will contain detailed provisions on essential issues that should be considered for the partnership contract. Moreover, HM treasury also offers guidance and explanations on particular provisions of the contracts. The current draft *inter alia* comprises a part entitled 'Public Sector Equity and Shareholder Arrangements', which includes the shareholder agreement and provisions on change in ownership (Part D); a section on flexibility and changes (Part F), which lays out the rules on different types of possible changes; a part on risk allocation (Part G); and a part on transparency and information (Part K), including the contractor's records and provision of information. The extensive and detailed provision in the standardised contracts together with the guidance provided alongside enables the public authority as well as the private partner to interpret the terms and conditions in the same way and thus enhance the predictability and transparency of the contractual relationship in general.

As part of its transparency agenda, the UK government has introduced new requirements which require all new central government tender

documents for contracts over £10,000 to be published on a single website free of charge.

Comparison

Transparency of the procurement process

As regards the transparency requirements of the procurement process, Germany and the UK have a very similar system. Neither Germany nor the UK provide for a homogenous framework on public-private partnerships. Both systems rely on their general procurement

be operationalised in practice. However, the lack of one homogenous framework leaves prospective parties to a public-private partnership with a plurality of potentially applicable rules together with soft laws and guidelines at different levels. This does not only potentially deter parties from considering the option of a public-private partnership, moreover such a complex system may have the effect of the parties not appropriately applying transparency requirements.

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law as regards the public-private partnerships. Where this general public procurement law applies, both legal systems provide for detailed rules and procedures to be followed, which ensure a certain degree of advertisement and publication of information. This is in line with the approach taken by the EU legislature, which, as well, has only harmonised procurement law provisions. Nevertheless, procurement, aiming not only at the award of a public contract or concession, but also at the establishment of a public-private partnership, can have a number of implications not provided for by general procurement law. Such implications may, in particular, arise with regard to institutionalised partnerships. While a number of guidelines, primarily at EU level, tackle such questions, no hard law in either of the systems addresses these issues. A further lack of regulation exists as regards those public-private partnerships not covered by procurement law. Here again, it is guidelines that provide some assistance on how the general principle of transparency should

Transparency of terms and conditions

The transparency of terms and conditions in England is far developed through the provision of the standardised contracts for public finance initiatives and an extensive set of guidelines explaining these provisions. While these standardised contracts provide the parties with sufficient guidance as to what terms and conditions should be considered in the public procurement and thereby help to ensure a coherent and adequate interpretation of the partners' rights and obligations in the public-private partnership, it must be pointed out that these standardised contracts are envisaged for private finance initiatives, which are only one possible model of a public-private partnership.

In Germany, the standard terms and conditions of the VOB and VOL are part of the national procurement law and are therefore liable to the same criticism as the procurement process under German national law outlined in the preceding paragraph: they are not adapted to the special implications of public-private partnerships. Guidelines that aim to remedy this deficiency are various and therefore contribute to an even more complex system for the parties involved.

Conclusion

The lack of a homogenous legal framework for the procurement of public-private partnerships at EU and national level in Germany and the UK results in a complex system of procurement and establishment of public-private partnerships that weakens the principle of transparency. Standardising and formalising the public-private partnership procurement procedures and requirements would not only help to remedy transparency deficiencies and ensure that the objective of free and undistorted competition is met (*Stadt Halle* [2005], para 37), but also reduce procurement costs. It is crucial to regulate the relationship between the public authority and the private partner comprehensively at the time of procurement, in particular as regards the rights and obligations of the partners as well as the risk allocation. Thus publication requirements and control mechanisms must be sufficiently regulated. Furthermore, standardised contracts contribute to a better understanding of the terms in the way that the parties can interpret them in the same way. Such standardised contracts must also anticipate future amendments and ensure that clauses are included that allow and regulate the procedure for such amendments.

Enhancing transparency and clarifying the involvement of the private partner through a homogenous framework for the procurement of public-private partnership will therefore not only lead to greater legal certainty, but also encourage more public and private authorities to enter into public-private partnerships. Until such a homogenous framework is introduced, practitioners are best advised to make use of detailed guidelines and standardised contracts that take account of legal transparency requirements and help to ensure a transparent procurement process and a transparent resulting partnership relationship for both parties. ■

Stadt Halle
[2005] EUECJ C-26/03
Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria
[2000] EUECJ C-324/98