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“Public-Private Partnerships – Options to ensure effective competition”

“Broad public consultation has shown the need for clarification of how Community Law on public contracts and concessions applies to the founding of Institutionalised Public-Private Partnerships. The Communication released today responds to this demand: It provides practical guidance and thereby increases legal certainty to the benefit both of the public and of the private sector. I expect that legal certainty in this area will contribute to increased competition for IPPP. Increased competition could improve the quality of PPP and ultimately lead to saving taxpayer's money.”

Charlie McCREEVY, European Commissioner for Internal Market and Services

IPPP – Institutionalised Public-Private Partnership Trends in the European Union

1. Abstract – Preamble

Between 25 and 29 September 2006 I had the opportunity to participate on the Tenth Session of United Nations Commission on International Trade Law (UNCITRAL) Working Group I. (Procurement) in Vienna as an observer. The Working Group was drawing up the Model Law on Procurement of Goods, Construction and Services. During the session Public – Private Partnerships (PPP) came up many times, as a comparatively recent phenomenon with numerous benefits.

It is generally held that the PPP-structure is one of the possible developmental trend of the concessions.¹ On the other hand PPP is a special, supportable model of the public

¹ PAPP: A koncesszió 142-144. p

procurement. Legislators of the European Union more often treat with the issue of PPPs, primarily with the question whether there is necessity for legislation on Community level which would ensure fair and effective competition and transparent appropriation of public funds. According to the latest update on 5 February 2008 the Commission adopted an Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP).²

I will briefly present the PPP-structure generally, then outline the development of the PPP-regulation in the European Union. Finally I will demonstrate the latest outcome in the European Union, the Institutionalised Public-Private Partnerships (IPPP).

2. General features of the PPP-structures

The term public-private partnership ("PPP") does not have a definition of universal validity neither at Community level, nor in the national legal systems.³ In general, the term refers to forms of cooperation between public authorities and the world of business where the parties jointly assume the responsibility and the risk of providing public services. In the case of a PPP-model as opposed to the traditional practice the public authority places an order with the private sector for supplying public services for a long-range, usually 20 or 30 years. The private company is responsible for the planning, implementation, operation of the infrastructure as well as (at least partly) financing of the project. On the other hand the public authority pays service fee. As the result of the process the public purpose will be realized with the co-operation of the private sector.

The public partner concentrates primarily on defining the objectives to be attained in terms of public interest, quality of services provided and pricing policy, and it takes responsibility for monitoring compliance with these objectives.

The most frequent fields of the adoption of the PPP-structure with international examples: Building public roads, motorways (Great Britain: A69 between Newcastle and Carlisle; A50/A564 between Stoke and Derby; Portugal: 'Vasco de Gama' bridge; Poland: A2 highway; Hungary: M6, M5 highway); Property Development (Building of the British Embassy in Berlin; Royal Armouries Museum, Leeds); Building of Prisons (Her Majesty's Prison Parc, Bridgend, Fazakerley PFI Prison); Investments in hospitals and healthcare

² COM(2007)6661

³ PAPP: A koncesszió, COM(2004) 327 final 3. p.

equipments (Redevelopment of West Middlesex University Hospital; Dartford & Gravesham Hospital)

Benefits of using PPP-structures:

- 1) Due to the distribution of risks that party should bear the risk who can treat them more effectively
- 2) Due to the presence of the private sector cost effective, innovative and efficient technologies and procedures appear
- 3) Public financing pretension presents more constantly, in the course of 20, 30 years
- 4) With the co-operation of the private sector projects will be realized faster

On the basis of the Green Paper the types of PPPs are the following:

1. PPP-model without the financial risk of the private sector: Build-Operate-Transfer (BOT)
2. PPP-models with the financial risk of the private sector are:
 - a) DB: Design-Build
 - b) DBO: Design-Build-Operate
 - c) DBFO: Design-Build-Finance-Operate
 - d) Concession
 - e) Joint Venture

3. PPPs in the European Union

With the well-known historical background, parallel to the development of the Internal Market of the European Union the numbers of public procurement has grown to more and more considerable proportions both on Community level and national level. It was the reason for working out the Community regulation which is aimed at ensuring transparency, non-discrimination and equality of treatment in the public procurement.⁴ White Paper considering public procurement was published in conformity with the Single European Act (SEA-1986) which included 282 directive proposals. The White Paper practically was a large-scale legislative program. As a result of this program by the nineties the European Union was in possession of an extensive system of directives regarding all areas of public procurement. Naturally the implementation of the framework regulation was not going without a hitch. This yielded the publishing of the Green Paper⁵ in 1996. This document made attempts revealing problems in procurement system and recommending potential solutions. After receiving

⁴ see more in Közbeszerzés 40-51. p.

⁵ COM(96) 583 final

approximately 300 contributions the modernization of directive-system took place. Still the process of the reform considering EU-regulation can not be regarded as an accomplished issue. As a result of the above mentioned the European Commission issued a Green Paper regarding PPPs: On the basis of a Green Paper, the European Commission has launched a debate on the desirability of adapting the Community rules on public procurement and concessions to accommodate the development of PPPs. The main objective is to see whether it is necessary to improve the current rules in order to ensure that economic operators have access to PPPs under conditions of legal clarity and real competition.⁶ This Green Paper analyses the phenomenon of PPPs with regard to Community law on public procurement and concessions; the main purpose is to reveal required legislative duties.

4. IPPP

The public consultation on the Green Paper on Public-Private Partnerships and Community law on public contracts and concessions showed that there was considerable need for clarification on the application of Community rules to so-called "institutionalised" PPP (IPPP). Due to the latest developments the Commission issued guidance on setting up IPPPs on 5 February 2008. The European Parliament formerly declared that it supports the Commission's efforts to take action in the field of IPPPs in view of the clear signs of existing legal uncertainty. Furthermore the Parliament acknowledged that practitioners want clarity about the application of procurement law to the creation of public-private undertakings in connection with the award of a contract or concession, and it called on the Commission to provide the relevant clarifications at the earliest opportunity.⁷

The aforesaid Communication⁸ sheds light on the Commission's understanding of how the Community provisions on public procurement and concessions are to be applied to the founding and operation of IPPP. Herewith the Communication aims at enhancing legal certainty. This Communication definitely does not create any new legislative rules. It reflects the Commission's understanding of the EC Treaty, the Public Procurement Directives and the relevant case-law of the European Court of Justice (ECJ). It is worth mentioning that, in any event, the binding interpretation of Community law is ultimately the role of the ECJ.⁹

⁶ Green Paper COM(2004) 327 final

⁷ European Parliament resolution on public-private partnerships and Community law on public procurement and concessions ([2006/2043\(INI\)](#))

⁸ The following study is based on COM(2007)6661

⁹ COM(2007)6661

IPPP are understood by the Commission as a cooperation between public and private parties involving the establishment of a mixed capital entity which performs public contracts or concessions.

Regarding the directing principles during the founding of an IPPP the Commission made mention of the principle of equal treatment and the specific expressions of that principle (e.g. the prohibition of discrimination on grounds of nationality, etc.), transparency, mutual recognition and proportionality. For certain cases¹⁰ detailed provisions, namely ‘the Public Procurement Directives’ should be applied. Therefore either the Public Procurement Directives or the general EC Treaty principles apply to the selection procedure of the private partner.

In connection with the founding process the Commission does not consider a double tendering procedure¹¹ to be practical. The Commission put forward a suggestion for one possible way of setting up an IPPP, which is suitable for complying with the principles of Community law while at the same time avoiding a double tendering procedure. Namely the private partner of the IPPP is selected by means of a procedure, the subject of which is both the public contract or the concession which is to be awarded to the future public-private entity, and the private partner's operational contribution to perform these task and/or his contribution to the management of the public-private entity. The selection of the private partner is accompanied by the founding of the IPPP and the award of the contract or concession to the public-private entity.

In the section “Information about the Project” the Commission makes clear that the suitable information can best be guaranteed by publicising a notice that is sufficiently accessible to potentially interested parties before the private partner is selected.

Community law requires the contracting entity to publicise the selection and award criteria for identifying the private partner for the IPPP. The criteria used must comply with the principle of equal treatment. This applies both to public contracts fully covered by the Public Procurement Directives and also to other public contracts and concessions.

The principles of equal treatment and non-discrimination imply an obligation of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition.¹² In the context of

¹⁰ which are covered by the Directives on the coordination of procedures for the award of public contracts

¹¹ one for selecting the private partner to the IPPP and another one for awarding public contracts or concessions to the public-private entity

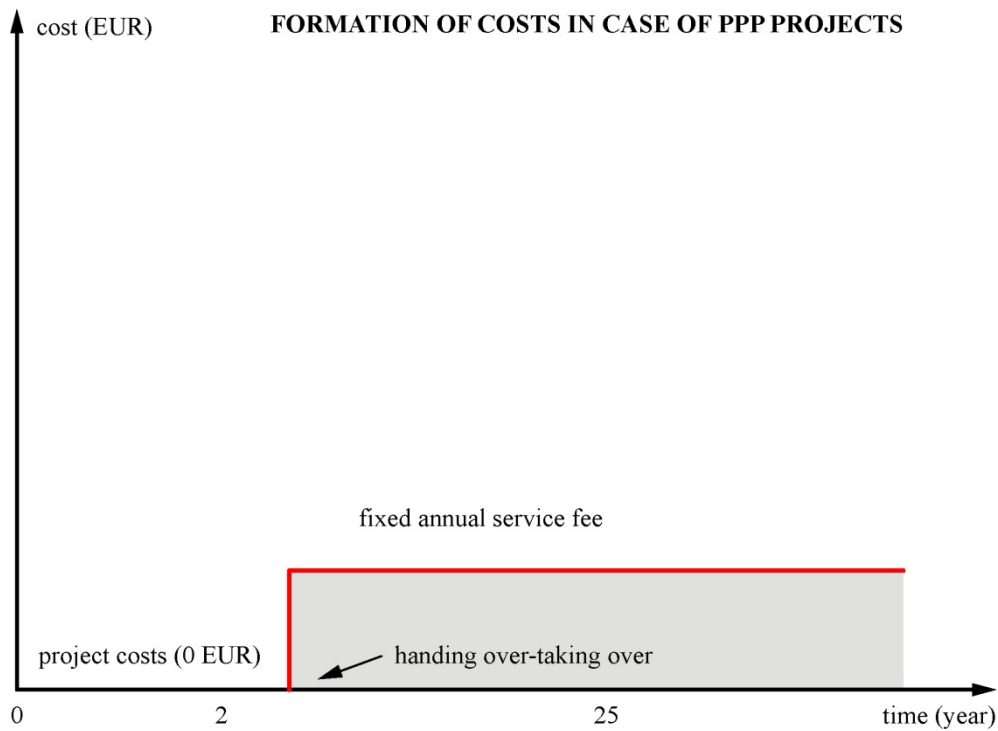
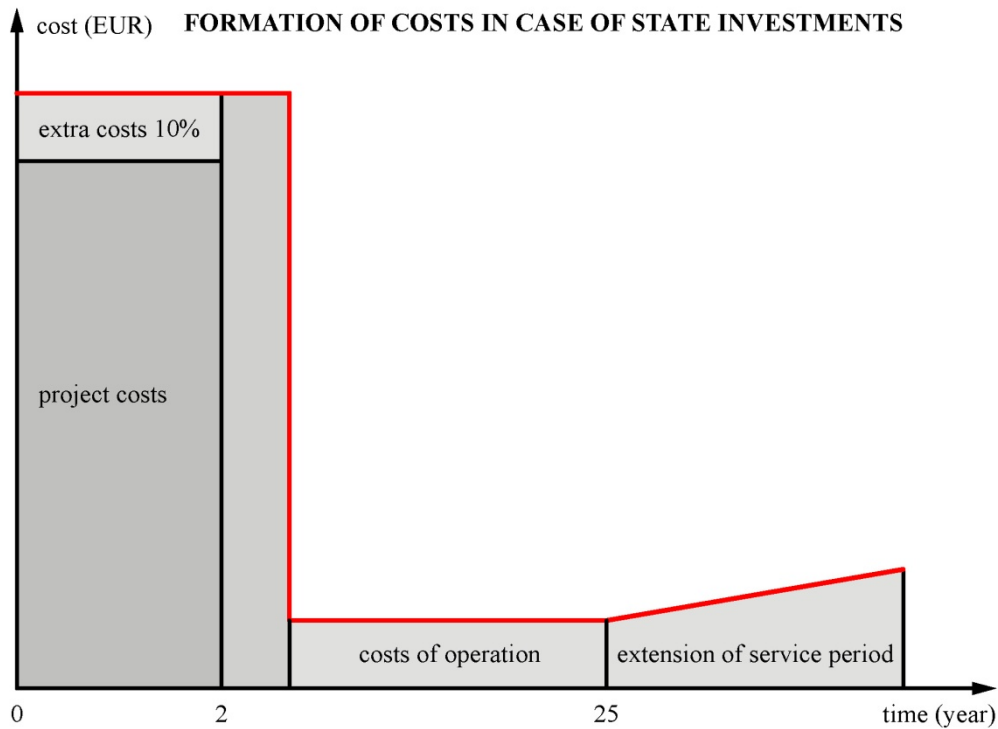
¹² Case C-324/98, Telaustria, ECR 2000, I-10745, paragraph 62; Case C-458/03, Parking Brixen, ECR 2005, I-8612, paragraph 49.

the founding of an IPPP, this obligation implies, that the contracting entity should include in the contract notice or the contract documents basic information on the following: the public contracts and/or concessions which are to be awarded to the future public-private entity, the statutes and articles of association, the shareholder agreement and all other elements governing the contractual relationship between the contracting entity and the private partner on the one hand, and the contracting entity and the future public-private entity on the other hand.

In the phase after founding, the IPPP must remain within the scope of their initial object and can as a matter of principle not obtain any further public contracts or concessions without a procedure respecting Community law on public contracts and concessions. However, as the IPPP is usually set up to provide a service over a fairly long period, it must be able to adjust to certain changes in the economic, legal or technical environment. Thus, should the contracting entity wish, for specific reasons, to be able to amend some conditions of the invitation to tender after the successful tenderer has been selected, it is required expressly to provide for that possibility, and for the relevant detailed rules, in the notice of invitation to tender or in the tender documents and to define the framework within which the procedure must be carried out.

Finally I would like to share my opinion: In my view the Communication on IPPP has achieved its object, as it put an end to legal uncertainty, as it gave a detailed explanation on how the EC rules to comply with when private partners are chosen for IPPP. Naturally, in the first time there are and will be some problems applying these rules for this extremely recent phenomenon. Still I hope that there will be more and more successful Institutionalised Public – Private Partnerships.

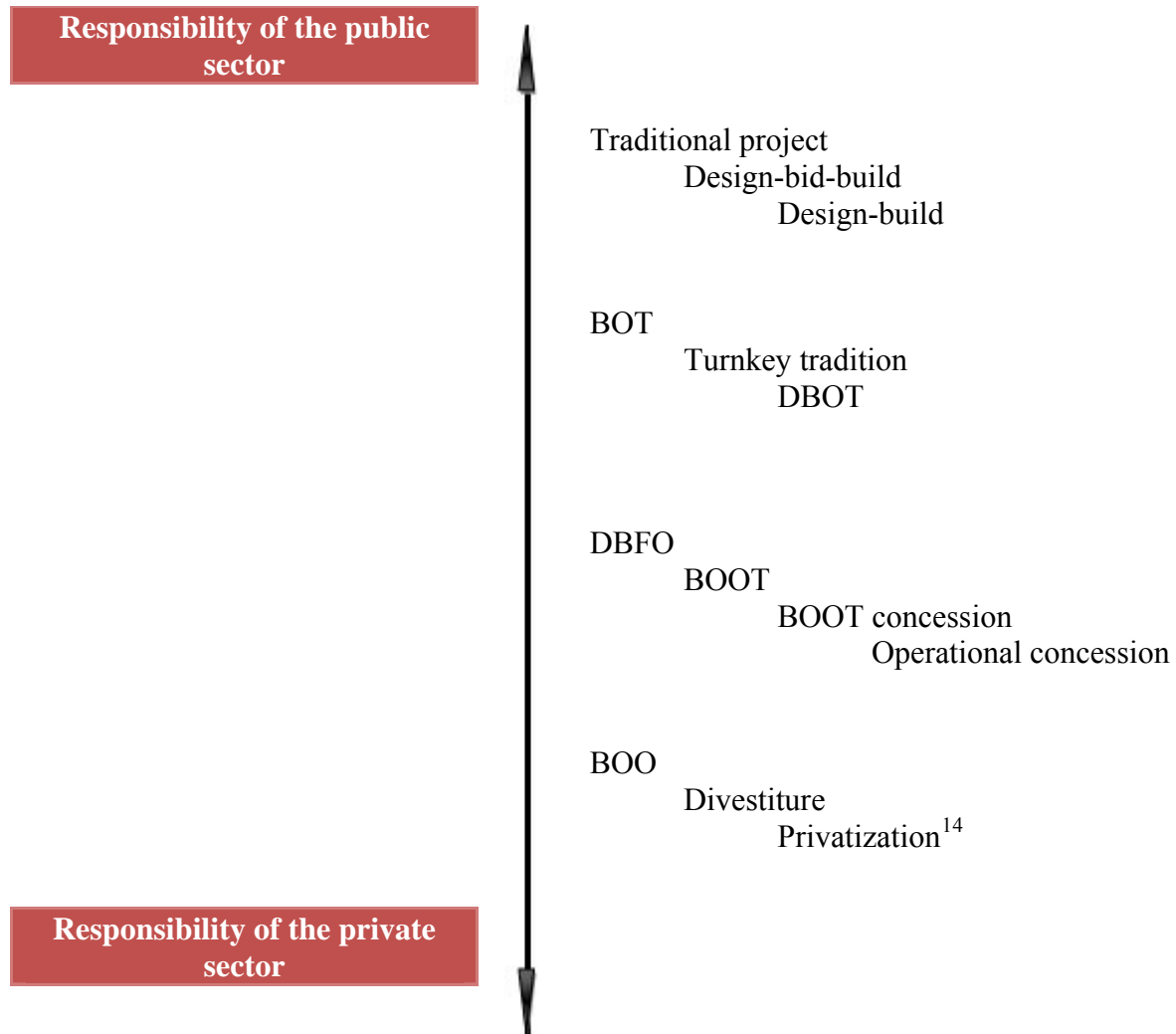
Annex 1 - Formation of costs in case of State Investments and PPP-projects



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¹³ On the basis of PPP-kézikönyv 13. p.

Annex 2 - Comparison of the traditional model, PPP-structure and the privatization



¹⁴ On the basis of 24. p. of PPP-kézikönyv

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Abbreviations

UNCITRAL	United Nations Commission on International Trade Law
PPP	Public – Private Partnerships
EU	European Union
IPPP	Institutionalised Public-Private Partnerships
BOT	Build-Operate-Transfer
DB	Design-Build
DBO	Design-Build-Operate
DBFO	Design-Build-Finance-Operate
SEA	Single European Act

ECJ	European Court of Justice
EC	European Commission
EC	European Communities
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