

**The New Greek Law
on Public-Private Partnerships (PPPs)**

A new market in the making

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The fast developments of today's competitive global economy have redefined the way of doing business worldwide by introducing a new market of complex and varied types of contractual and financial tools. The field of public contracts is one of the areas of law and finance that has been influenced by this progress. PPPs are basically a new method of contracting public projects. They are a new type of project finance and, according to many specialists, the only advantageous way to "value for money" public projects. The PPP market has been introduced in Greece by the recent law enacted in 2005.

I. THE PPP PHENOMENON

An abstract definition of Public-Private Partnerships (PPPs) would classify the PPP agreement as *any joint venture between a public body and a private company, typically involving the joint ownership of a special purpose vehicle (SPV) established under company law, to work in collaboration on a variety of projects.* Although the precise legal characterization of a PPP contract cannot be *in abstracto* determined, it is however generally accepted that PPPs are a type of public procurement akin to the traditional types of public contracts. What differ are the financial aspects of the agreement and the precise transfer of risk in the contractual relationship. Clearly the most interesting feature of the PPP approach is the transformation of a classical public works contractual relationship (which is a bilateral relationship in principle) into a modern financial tool with a wide

potential of investment. This necessarily means that the PPP market is a totally new market *per se*.

The emerging market of PPPs throughout the European Union, presents an exciting new prospect of investment and business opportunities and poses new challenges to all interested parties, i.e. challenges: to the Legislature of the Member States (for the implementation of the proper legal framework of this new scheme), to the Government of Member States (as a new means of Financial and Fiscal Policy and Public Procurement), to the Public Authorities (for the betterment of public service and the enhancement of public interest), to the Private Businesses and Industries throughout the EU and, last but not least, to the citizens of the Union (who are entitled to the best possible public service as a return for the taxation they bear).

PPPs have been the subject of public debates in Europe and throughout the world. They have been named a key component of the United Nations' programme for sustainable development. It is noteworthy that, following the Global Compact and the Millennium Summit, the United Nations issued a declaration calling for the development of partnerships between the private and the public sector to address critical challenges of poverty and social deprivation. PPPs have also been examined within the framework of the EU common market. The initial conclusions from the wide ongoing dialogue throughout Europe launched by the European Commission with the Greek Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions which was published in May 2004, indicate that the primary legislative initiative and the respective competence on the regulation of PPPs is left with the Member States.

The recent Greek Law (Law 3389/2005) introduces the first regulation on PPPs in Greece and opens the market to this new type of public procurement.

II. THE BASIC PROVISIONS OF THE NEW GREEK LAW

1. *General legal observations*

At the very outset of this brief analysis, it should be noted that the *terminus technicus* "PPP", in strictly legal terminology, has more than one dimension and covers different areas of law. In particular:

a) The first meaning that comes to mind is the actual contract between the Public Authority and the Private Entity and the relative contractual obligations and performance of the parties in the duration of such a contract. It is commonly accepted that this particular legal aspect should solely concern the national law applicable to the contract as agreed by the parties (usually this law shall be the law of the State of the Public Authority).

b) The second legal aspect of the PPP is the procedure for the award of such a contract. This area of law has been given an autonomous Community meaning of "Public Procurement Law" and is most commonly treated as an area of Public Law with significant EU Law intervention, usually binding upon the national legislation. The aforementioned Green Paper by the Commission was primarily focused on this meaning of the term.

c) A third legal aspect with great practical importance is the relation of the contracting parties with third parties (in particular with Financial Institutions, but also with respect to the legal entity derived from the contract – the "Partnership") as regards the Financial Law of PPPs. This is the legal basis for the secondary market of PPPs and the so-called "bankability" of a PPP, the core issue for a financially viable and successful PPP.

d) Lastly, the question of the precise legal characterization of PPP, albeit a theoretical quest *per se*, does have a practical impact on the market. In

terms of EU Law, it seems that it is not an easy assignment to safely diagnose if a particular PPP is a “Public Contract” or a “Concession”. Depending on the legal characterization, the legal treatment of the particular contract may alter significantly, as today there is no precise secondary EU legislation on concession contracts. This significant legal matter, however, cannot be fully presented in this brief analysis. Suffice it to say here that this problem may sufficiently be tackled at national level by means of precise legislation. The Greek legislature has managed to overcome this difficulty by adopting a general characterization of “Public Contract” and enforcing common rules adherent to the precise terms of primary and secondary EU legislation in this field. Using financial criteria, PPPs can broadly be classified into two general forms: Projects with end-user fees and projects subsidized by the State without end-user fees. Both forms of PPPs present great investment opportunities for the Private Sector. With the end-user fees, the profit margin of the Private Sector is identical to concession projects, a scheme which is well known in practice already. With projects funded by the Government, the profit of the private sector is double: a) The Private Sector has control over a new market of services through public assets (a market formerly monopolized by the State) and b) The Private Sector has a long term guaranteed stream of payments by the Government. This is a top rated quality for securitization and a very competitive secondary market backed by the PPP project.

On the basis of the aforementioned general legal aspects of PPPs, we can briefly examine the basic structure and provisions of the Greek Law on PPPs.

2. Basic structure and provisions of the Greek Law

The Greek Law 3389/2005 is comprised of thirty-two articles divided into six chapters. In the preamble of the Law, it is specifically noted that the Law adopts the provisions of the recent EU secondary legislation on public procurement (i.e. Directives 2000/52/EC and 2004/18/EC).

The First Chapter of the Law (arts. 1-2) is titled “MEANING – SCOPE OF APPLICATION”. Article 1 of the Law defines the public sector entities (in accordance with the relevant EU secondary legislation) that can enter into PPP agreements pursuant to the provisions of the Law. It is notable that the Law provides a broad definition of PPP contracts (“written contracts for partnership with private sector entities for the execution of works or the provision of services”) and enters into a more detailed description of the agreement in its special provisions. Article 1 further provides that special (secondary) agreements (that may include e.g. loan, insurance or collateral agreements) between the contracting public or private sector with third parties within the framework of a PPP agreement fall within the ambit of the provisions of the Law. Furthermore, the Law clearly provides that the private sector can enter into PPP agreements solely with the form of a Special Purpose Vehicle (SPV), and in particular as a *societas anonyma* (S.A.), according to the provisions of Greek company law. Article 2 of the Law lists the necessary conditions for the application of the provisions of the Law. According to this provision, a particular agreement between the public and private sector may fall under the provisions of the law if: (a) the agreement concerns works or services for which the specific public entity is competent, (b) the private sector undertakes a significant portion of the risks (financial, administrative and technical) involved in the project, (c) the project is funded by the private sector and (d) the cost of the project does not exceed the maximum amount of 200 million euros. An agreement between the public and private sector that does not satisfy one of the above conditions (b), (c) and (d) may, nonetheless, exceptionally be regulated by the Law by virtue of a unanimous decision by the competent Ministerial Committee. The Law clearly excludes any form of PPP agreement with respect to services provided solely by the Greek State according to the Greek Constitution (e.g. police, judicial system, governing public bodies etc).

Chapter Two of the Law (arts. 3-6), titled “MINISTERIAL COMMITTEE AND SPECIAL SECRETARIAT FOR PUBLIC-PRIVATE PARTNERSHIPS”, establishes the competent governing bodies for the application of the provisions of the Law: (a)

The Ministerial Committee, comprised of three Ministers under the *ex officio* chairmanship of the Minister of Finance and National Economy, is the superior body that approves a proposed PPP project from a public entity, (b) The "Greek PPP Taskforce" has the form of a Special Secretariat with the Ministry of Finance and National Economy and is entrusted with the promotion of PPPs throughout the public sector and the assistance to all public entities who wish to enter into a PPP agreement, (c) The public entity, as defined in Article 1 of the Law, that wishes to enter into a PPP agreement, must apply, with the assistance of the PPP Taskforce, to the Ministerial Committee for approval of a PPP project. This application must be accompanied by a detailed analysis stating the reasons for the project and its viability.

The Third Chapter of the Law (arts. 7-16) is titled "AWARD PROCEDURES". The articles of this Chapter adopt the respective provisions of Directive 2004/18/EC. The general principles of the award procedure are outlined in Article 9 of the Law. These are the principles of: equal treatment, openness, fairness, mutual recognition, protection of public interest, protection of rights of private parties, freedom of competition, protection of the environment and viable and continuous development. The provided types of award procedure are: (a) the "open procedure", a type of procedure according to which all interested contenders may submit an offer, (b) The "closed procedure", a type of procedure according to which only contenders who meet a predetermined standard are invited to compete, (c) the "competitive dialogue", a new type of procedure (introduced by the recent EU legislation), according to which, for particularly complex projects, an open procedure is initiated and the public body commences a dialogue with the contenders in order to specify the needs and details of the project and to determine the further standards for award of the project according to the solutions found by the dialogue and (d) the "negotiated procedure" involves direct negotiations of the public body with the competing private entities, at a later stage of the procedure, on the precise terms of a proposed public contract. The Law provides for two criteria which may be used by the public body for the award of the contract, namely the criterion of the

most advantageous financial bid (this criterion is obligatorily used in the competitive dialogue and the negotiated procedure), or the criterion of the lowest price. Special provisions on the exclusion of contenders are also included in the Law.

The Fourth Chapter of the Law (arts. 17-18) is titled "CONTRACTUAL FRAMEWORK" and provides that the PPP contract and all secondary agreements shall contain the terms and conditions of the tender document for each project, which shall be the sole contractual framework between the parties. The agreement is governed by the provisions of the Law and, supplementary, by the Greek Civil Code. Article 17 of the Law also lists a total of twenty-five categories of contractual clauses which must be included in the PPP contract. These minimally required provisions briefly include: the precise description of the scope of the agreement, the method of performance, the time frame of the project, the way in which the public sector shall grant the use of the project to the private sector, the financing of the project, the allocation of risks, the insurance, the protection of the environment and of cultural property, the protection of intellectual property, the fees payable by the end-users of the project, the guarantees and "step-in" clauses, the reasons for termination of the agreement, the applicable law and dispute resolution procedure and any other secondary agreement connected with the contract.

Lastly, Chapters Five (arts. 19-24) titled "SPECIAL PROVISIONS" and Six (arts. 25-32) titled "LEGAL MATTERS" contain special provisions regarding the execution of public works on the basis of a PPP contract. The special provisions of Chapter Five concern matters relating to the protection of the end-users of the project, the issuance of permits and the protection of the environment and cultural property. The special provisions of Chapter Six aim at protecting the financial stability and interests of the Partnership SPV by allowing the assignment of its rights, by maintaining the validity of all sureties provided by the SPV, even in the event of its insolvency and by providing specific tax relief. However, all transfers of shares of the SPV and any decision by the SPV to go

public, require the prior approval by the contracting public body. Finally, Article 31 of the Law provides that all disputes concerning the PPP agreement shall be resolved by arbitration. The PPP agreement and all relevant matters or disputes shall be governed by Greek Law.

III. CONCLUSION

In conclusion, it can be noted the Greek Law on PPPs is successful in clearly avoiding the “gray areas” concerning the Public Procurement Law on PPPs.

Concisely, the Law:

- a) Adopts the recent EU Directives on Public Procurement in all occasions, therefore ensuring the set EU standards.
- b) Safeguards the interests of the private entity that enters into the contract
- c) Provides sufficient space for shared better practice.
- d) Enhances bankability and the secondary market for PPPs by allowing step-in clauses and subcontracting, subject to agreement between the parties.
- e) Avoids unfair circumvention of the aforementioned principles.
- f) Creates a level playing field and ensures due process.
- g) Finally, and most importantly, it is a simple, clearly written and practically oriented piece of legislation, as every commercial instrument should be.

Under this new legal regime, the first PPP projects are now being successfully launched in Greece.