**The European Business Regulation**

**on Public-Private Partnerships (PPPs)**

**[Some thoughts concerning the Green Paper issued by the Commission]**

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Distinguished Guests,

At first I would like to thank the British-Hellenic Chamber of Commerce for their kind invitation extended to me to participate in the workings of this conference. From what has already been said by the speakers before me, it is more than apparent that the topic of our discussion today and in particular with respect to 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 E.U. but also to the necessary collaborators in this endeavour of Partnership (i.e. Financial Institutions, Legal and Financial Advisors) and, last but not least, to the citizens of the Union (who, I think we all agree, are entitled to the best possible Public service as a return for the taxation they bear).

In the limited time that I have, I would like to emphasize on certain legal aspects of the PPP as a matter of public procurement law and contract law, in light of the recent public discussion launched by the Commission with the relative Green Paper.

**I. THE MAIN LEGAL ASPECTS OF THE PPP**

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

1. 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. The lengthy duration of this contract and the term “Partnership”, as a matter of Greek Civil Law (as derived from the German Legal System) indicates of form of *societas* (εταιρεία) entailing significant fiduciary duties (what in England would also be derived from the law of equity). I believe 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)
2. 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. We shall see that the Green Paper is primarily focused on this meaning of the term.
3. 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 on PPPs. This is indeed a very delicate legal matter, as the traditional meaning of privity of contract may be questioned in certain aspects.
4. 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 this diagnosis, the legal handling 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 analysed in the short time available. For the needs of this presentation, suffice it to say that, in my view, this problem may sufficiently be tackled at national level by means of precise legislation. I believe that 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.

It is on the basis of the aforementioned general legal aspects of PPP that I shall share some thoughts with you as regards the Green Paper by the Commission.

**II. THE GREEN PAPER**

On April 30th, 2004, the Commission of the European Communities adopted the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions and, with this Green Paper, launched a public debate throughout the EU on certain aspects of PPPs with respect to European legislation and Common Market Principles.

It is self evident that the particular interest of the Commission in this specific matter and the significant contribution and replies to the debate display a grave interest in PPPs, as I noted in my introduction.

It is notable that the Commission received a total of 195 replies to the list of the questions set out in the Green Paper, mainly by Governments or individual Ministries (with a strong representation of contributors from the UK, Germany, France, Italy and Austria), 111 associations with private and/or public entities as their members, 38 enterprises and 13 individuals, but also by the European Economic and Social Committee and the Committee of Regions.

On May 3rd, 2005 the Commission issued its Report on the replies received on the Green Paper and on November 15th, 2005 issued a White Paper (of Communication) to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions where the Commission assesses the responses received and reports on the next steps necessary by the Community.

In reviewing this Green Paper and the list of the 22 questions set out therein, I would like to categorize the key issues dealt with and the respective responses, as follows:

**1. Community competence to intervene**

As in every Green Paper, the premier question is that of Community competence and authority to intervene in a particular area of law, either by legislation or by a means of a soft law approach. The Commission asks whether it is necessary to have such an intervention by means of EU legislation on concessions and on PPPs in particular. Such an intervention would, as it seems, be focused on Public Procurement Law. The rationale of this intervention, according to the Commission, is to ensure a level playing field in all aspects of PPP, whether they are classified as Public Contracts or Concessions. Unfortunately, I do not have the time to discuss the intricacies of this important issue of European Law, which has not yet been adequately solved at Community Level. I shall only say that I concur with the almost uniform opinion voiced by the interested parties that a soft-law approach (by means of sharing schemes of better practice rather than having new burdensome legislative hurdles to cross) would be preferable in this respect. I believe that the Commission took this opinion into serious consideration, as in the White Paper it seems that a direct legislative approach on PPPs is not preferred after all.

**2. The Public Procurement law of PPPs**

The main contents of the Green Paper are focused on the Public Procurement Law on PPPs (i.e. the proper procedure for awarding PPPs).

The Commission seems concerned that the existing legal framework (and the uncertainty of legal qualification of PPPs, as mentioned above) may hinder the basic principles of the Common Market with respect to fair terms of awarding such contracts. The three main occasions that are worth mentioning in this respect are: a) The “in-house” issue, b) The “Institutionalized PPPs”, and c) The “Competitive Dialogue”.

*a) The “in-house” issue*

The precise secondary Community legislation on Public Procurement (as recently amended pursuant to Directives 2000/52 and 2004/18 – I should note here that these Directives have been *in toto* implemented by Greece in the new Law 3389/22-9-2005 on PPPs) exhaustively covers all matters concerning the award of public contracts to individuals according to the standards of the Common Market and the Rights of Establishment, Free Movement of Capital, Non-Discrimination and Fairness, as these rights are bestowed by the EC Treaty. The primary rationale of this legislation is the general rule that a Member State may not directly award a public contract to an individual, without due process.

**However,** there is an important exception to this rule. The European Court of Justice (in the Teckal case C-107/1998) ruled that the aforementioned legal framework is inapplicable as regards awards of contracts within Public Authorities. The Commission and several contributors to the public debate voiced their concern that this concept may serve as a way for the Public Authority to circumvent the proper procedure for awarding a contract. An example given by the Commission in the Green Paper is that of a single entity (with public participation) being directly awarded the contract and, in the course of the duration of the contract, there is a change (i.e. an entry of a private entity) in that participation. I feel that this was a poor example given by the Commission, as, in this example I can see no infringement or circumvention of Public Procurement Law *per se*, which, in every occasion, should be applied as to the future changes in the participation of the contracting entity or can be safeguarded by means of national legislation on PPPs.

In this respect, the Commission concludes that a clarification of this term and in general of the terms of good practice is necessary. This view is shared by many contributors to the dialogue, however there is no consensus as to the form of the Community intervention. I believe that a soft-law approach of shared good practice subsequently implemented in the national law of PPPs would suffice in this respect. I should add that the main concern of the contributors to the dialogue is the avoidance of discrimination in awarding the contract. This, in my view, is clearly a matter of better practice, than a legal basis for further legislation.

*b) The “Institutionalized PPPs”*

The described in the Green Paper arrangement of outsourcing of public tasks involving the creation of public service undertakings held jointly by both a public and a private partner, is referred to by the Commission as “Institutionalized PPPs”. Again, the main concern of the Commission and several contributors to the debate is whether such arrangements pose a threat of Public Procurement Law circumvention. As stressed above, I would agree with a number of other contributors (including the UK Government) that this is an issue of good practice as implemented by national law (according to the relevant and existing Community legislation). It is apparent that in this case, the “in-house” principle shall not apply (since this contract entails private participation from the very outset). It seems that this case shall be treated as a public tender for finding the most appropriate private partner in this “Institutionalized PPP”.

*c) The “Competitive Dialogue”*

The new Directives on Public Procurement Law introduce the term “Competitive Dialogue”, as stated to be available for “particularly complex contracts”. In a nutshell, this procedure entails the opening of pre-award discussions between the Public Authority and the Private contenders regarding the proposed and preferable way of performing the contract and the necessary technical means and method to achieve the desired result.

Several contributors to the public debate on the Green Paper voiced their concern as regards the practical implementation of this procedure. Some haste to question the flexibility and clarity of this new scheme. I believe that the two noteworthy objections to this system are those concerning: a) the protection of intellectual property rights of the contenders (as a competitive dialogue would indeed entail “sharing secrets” between the contenders even before they put forward their bid) and b) the plea of several contenders (and in particular the smaller businesses) for compensation in the event of rejection of a proposal. These objections may at first seem well grounded. However, as this matter is also an issue of good practice, I believe that it is premature to derive negative conclusions before the practical application of this scheme. In this respect, I share the view of the Commission that practical experience with this procedure (which has been implemented in Greece by virtue of the new Law on PPPs), together with a soft-law Community intervention (by means of shared good practice) will dissipate the above concerns, as the Competitive Dialogue, in my view, serves the greater need of fairness and uniformity of result, which are the general principles of Public Procurement Law.

The same can be said with respect to the related issue of Private initiative PPPs.

**3. The Contract Law (substance) of PPPs**

It is notable that the Green Paper also enters into matters concerning the substance of PPPs (i.e. the obligations and performance of the parties), in relation of course with the Public Procurement procedure (as substantive matters should remain a matter of the national (governing) law as agreed between the contracting parties). The main issues worth mentioning here are: a) The “step-in” clauses, b) The subcontracting issue and c) The duration and alteration of the contract and performance by the parties. My quick comment on these issues would be as follows:

As noted at the beginning of my presentation, in public contracts, the relation of the contracting parties with third parties (with respect mainly to the financing of the project) is a very important as well as delicate matter. Especially on the side of the private partner, his performance may be further enhanced or secured by entering into agreements with third parties (I must note that there is much that can be said –but unfortunately not in such short time!- about the delicate legal issues surrounding the doctrine of privity of contract and the law on assignment of rights and/or debts). It is apparent that these issues solely concern the governing law of the contract and the relations between the parties.

However, the Commission, in the Green Paper, seems concerned that such clauses may present a problem in terms of transparency and equality of treatment.

This view of the Commission is, rightly, not shared by the contributors in the debate, who consider that these clauses are of crucial importance for the financing and proper function of PPPs. I share this view. We must not forget that the main characteristic of PPP contacts is that the risk is usually shifted to the private partner. It is a general principle of law that risk management (by way of insuring a debt or a particular contractual obligation and not solely for speculation) is crucial for a contractual relationship. Therefore, these clauses are indeed indispensable for the function of a PPP contract.

The Commission also adopts the view that an alteration of the terms or of the duration of a PPP contract should lead to a new tender procedure. This clearly seems as a matter of practice that could be tackled by a relative clause in the initial contract. Therefore I can envisage no particular problems in this respect.

**4. The Commission’s next steps**

As mentioned in the White Paper (dated November 15th, 2005), the Commission’s next steps in this respect entail: a) New legislation on concessions (possibly similar or akin to the existing legal framework on the award of public contracts), b) A “soft-law” approach to PPPs (and in particular to “Institutionalized PPPs” and to the Competitive Dialogue scheme), by means of an interpretative document and basic guidelines for best practice.

In light of the above analysis, I believe that the Commission chose wisely.

**III. CONCLUSION – THE GREEK LAW**

In conclusion, I would briefly like to stress that the new Greek Law 3389/22-9-2005 on PPPs is successful in clearly avoiding the aforementioned “gray areas” concerning the Public Procurement Law on PPPs.

Concisely, the law:

1. Adopts the new Directives on Public Procurement in all occasions, therefore ensuring the set EU standards
2. Adopts a middle approach of the creation of a new entity to perform the contract
3. Adopts the Competitive Dialogue with flexible guidelines and proper State monitoring
4. Respects the practical needs of the private sector by allowing step-in clauses and subcontracting, subject to agreement between the parties
5. Avoids unfair circumvention of the aforementioned principles (as the “in-house” principle seems to be incompatible with this law)
6. Creates a level playing field and ensures due process
7. Finally, and most importantly, it is a simple, clearly written and practically oriented peace of legislation, as every commercial instrument should be (this much we have learned from the practical wisdom of the Anglo-American Commercial Law!).

In conclusion, I would say that the difficulties surrounding the PPP contract can be mitigated and faced by shared better practice and by a good construction of the contract itself, rather than with the imposition of new legislation. I am content and happy that the Greek law adopts this approach.

I thank you for your attention.

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