

EPPPL

EUROPEAN
PUBLIC PRIVATE
PARTNERSHIP
LAW

REVIEW

Articles

Public Procurement, Public-Private Partnerships
and Public Services in the EU

Christopher Bovis

The Legal and Policy Considerations in the Award
of Public-Private Partnerships

Antoinette Calleja

ACT4PPP – A Transnational Initiative to Promote
Public-Private Cooperation in Urban Development

Katrin Fischer

The Privatisation of Water Utilities in Italy
and the Associated Debate

Federica Fotino

Country Reports

Denmark · Portugal · United Kingdom

THE LEGAL PUBLISHER

lexxion

BERLIN

V. How to deal with the dilemmas?

The report of the Enterprise & Construction Authority describes how 6 municipalities have dealt with the above challenge. In all of the cases, there has been a high level of awareness that the local planning process must not be an obstacle to the PPP process.

One way of dealing with the challenge is to produce the local plan at a very early stage of the PPP planning process, ensuring that the local plan process will not delay the PPP project. The catch, however, is that the local plan may be too general and unspecific. In such case, it cannot secure a certain PPP project according to principles of the Planning Act. This may lead to unintended delay.

Other municipalities have awaited the determination of the PPP project before producing the necessary local planning. This approach meets the intention of PPP but did influence the time frame of the project.

VI. Guidelines

Based on the experiences of the 6 municipalities, the report concludes that a parallel process, establishing a close dialogue between participants of the PPP process and the municipality, is very important.

Furthermore, another planning tool is introduced as a potential solution – although it is not provided by law and not legally binding for any party.

The municipality of Odense, for instance, succeeded in providing general, informal plans, describing the visions and strategies of the municipality in respect of inter alia city architecture. The plan was used as an input to the preparation of the tender documentation and did not restrict the tenders in terms of creative suggestions and innovation.

The publication of such informal plans may also take the edge of any objections in connection with the following hearing process as quite often objections will be stated already in the informal plan phase.

According to the report, the municipalities have requested some guidance on how to coordinate the PPP projects with the regulation on municipal planning. The report provides a certain degree of

guidance and emphasizes the vitality of a close and parallel cooperation between project participants and municipalities.

*Martin André Dittmer
Malene Buchholt Cederlund
Mette Fjelsted
Gorrissen Federspiel*

Portugal

Changes in the Road Sector

Portugal, as many other European countries, is facing economic problems due to the financial crisis of 2008 and to a growing budget deficit and foreign debt. As a result, the administration has presented a new plan in order to rebalance the public accounts and to pay respect to the European “Stability and Growth Plan”.

Some of the measures recently announced have direct impacts on PPP projects. It is expected that a substantial part of the high-speed railroad program will be postponed (at this stage only the recently awarded connection with Spain was not deviated). Where one can expect more changes is probably in the road sector. In reality, this is a mature sector in Portugal at the moment and many of the changes now underway were already under preparation and were only speeded up due to the economic environment.

In fact, in the mid nineties Portugal launched its first PPP program in the road sector. It was a very ambitious program which compressed several PPPs materialized in concession agreements. The large majority of the projects was inspired by Great-Britain’s Public Finance Initiative commenced while Tony Blair was Prime-Minister.

For that reason, most of the PPPs of those times consisted in shadow concessions and not in tools concessions. This means that contrary to traditional concessions where users pay for the service rendered in these concessions the payment was made directly from the contracting authority to the concessionaires.

For some years now various analysts have stated that the state would not be able to face the future charges that would emerge from those contracts. So far, the administration, after negotiation with the concessionaires involved, has decided to change the

majority of the concessions agreements that they entered into.

Those changes were published on 4 June 2010 in the official journal. Even though not all of them are fully accessible, two are of ultimate importance: first, several shadow concessions were converted into toll concessions; and second, the tolls collected do not belong to the income of the concessionaire but rather to the state (i.e., the public company created by the state to run road concessions, e.g., Estradas de Portugal, S.A.).

In fact, the system or the philosophy of the contracts has also changed. At the beginning, the concessionaires were paid in accordance with the traffic, and are now being paid according to an availability system.

Needless to say that the introduction of all these changes was a very delicate juridical issue that still has not come to an end but already experiences practical application.

Diogo Duarte de Campos
PLMJ – Law Firm

The United Kingdom

Current Developments in the United Kingdom

January to May 2010

We have a new government in the UK. On 6 May, the UK public elected 306 Conservative MPs, 258 Labour MPs and 57 Liberal Democrat MPs, presaging an entry into a period of Conservative-Liberal Democrat coalition, with none of the parties having the 326 seats needed to govern without support. At the time of writing it is too early to say what this means for public-private partnerships. Given how little any of the parties said about public-private partnerships in their manifestos, and faced with a coalition government, it is even harder to predict the prospects for PPPs going forward. We will have to wait for the dust to settle. One thing is certain, a coalition probably means a period of hiatus over the summer, as far as PPP is concerned, while the new government works out what the huge budget deficit means for investment.

Notwithstanding the political uncertainty, eleven PPP projects reached financial close in the first five months of 2010 with a value of £1.5bn¹, although

the bulk of this is accounted for by two projects, the Bristol Southmead Hospital project and the Birmingham Highways Maintenance Project. These comprise six education projects, a hospital project, a highways maintenance project, a library project, a police investigation centre project and a leisure project. All of these projects were funded by senior debt with the most active lenders being Barclays, Lloyds, Nationwide and the Royal Bank of Scotland (RBS). Carillion was the most successful sponsor, in terms of both deals closed and value, closing 3 projects with a value of around £750m. This figure compares very favourably with the first four months of 2009, when very few deals closed due to the credit crunch. Lending margins remain high compared to historical levels.

1. Policy

UK PPP policy has, of course, been driven for the last 13 years by the Labour government. UK policy initiatives over the first few months of 2010 should therefore be viewed with caution as predictors of the future, although there is general support for a Green Investment Bank. Both the Conservatives and the Liberal Democrats talk of PPP as being inflexible and discredited, but are short on answers for a replacement.

1. Strategy for national infrastructure

In March, Infrastructure UK² published a 'Strategy for national infrastructure'³. The strategy sets out a range of actions to be undertaken to enable long term investment, develop effective long term plans and priorities and improve delivery.

Chapter 1 of the Strategy considers UK infrastructure as it is today, including the way in which that infrastructure is currently funded and financed, and the future demand for investment in infrastructure. Chapters 2, 3 and 4 then address IUK's objectives and how it proposes to meet them. Some of the measures proposed include the establishment of a Green Investment Bank that will operate on a commercial basis and will involve both

¹ Note figure based on value of investment made rather than value of payments contracted.

² See 1 *European Public Private Partnership Law Review* (2010), p. 72.

³ Available on the Internet at <http://www.hm-treasury.gov.uk/d/budget2010_national_infrastructure.pdf>.