

Institutional Public Private Partnerships (IPPP) - A clear way forward at last?

Uncertainty about the legal framework has surrounded IPPP for several years since the *Teckal* judgement. The way forward has been much debated in places such as, for example, the European Commission's 2004 PPP Green Paper and the 2006 European Parliament hearings on the workings of the Public Procurement Directives.

In its PPP Communication of November 2005 the Commission said that it would undertake further analysis with a view to publishing an Interpretative Communication on IPPP.

The conclusions of this further analysis are eagerly awaited by those in municipal government seeking clarity about what constitutes "in house" relationships, the need to apply the Public Procurement Directives to inter-communal structures (so-called "public-public partnerships") and how to apply the Public Procurement Directives and EC Treaty principles to the creation of mixed capital entities ie companies with both public and private shareholdings.

What can we expect? There was a fairly clear steer in the November 2005 PPP Communication that the *Stadt Halle* case is regarded as settled case law and that relations between public bodies are not per se excluded from the scope of the Public Procurement Directives. So the forthcoming Communication is likely to focus on how mixed capital entities are created and are awarded contracts.

There are two key issues.

Firstly, how will the private partner be selected initially in the most common situation ie where an operational management role is envisaged for it?

Prior to the development of the concept of PPP there was a well established model used in the UK for the opening up of the share capital of a publicly owned enterprise to a private partner to undertake an operational role in the delivery of services to a Contracting Authority.

This involved a single procurement process conducted in accordance with the EU public procurement rules which was used both to select the private partner and to assign the tasks to the private partner.

The result of this process was that **at the same moment:**

- The share capital of the previously publicly owned enterprise ("**OldCo**") was transferred by a Contracting Authority to a private partner. The transfer of the share capital meant that the assets of the enterprise were also transferred (eg physical, financial, human, information assets etc)
- The now privately owned enterprise ("**NewCo**") assumed responsibility for the tasks assigned to it by a contract with the Contracting Authority (ie the delivery of services to the Contracting Authority).

In the classic UK model, given that IPPP are far less common than in other EU Member States, this approach was typically applied to transfer the entire share capital of the previously publicly owned enterprise.

However it is an approach which can be used for the creation of an IPPP ie where the Contracting Authority continues to play a role as a service deliverer with a shareholding in the entity providing the service. In this case it is **part** of the share capital of OldCo which transfers to the private partner.

This approach is consistent with the principle set out in the *Stadt Halle* case that the opening up of the share capital changes the nature of the service delivery entity and thus that **at the moment of opening up of the share capital** a new contract comes into being, requiring the application of the public procurement rules.

But some arguments have been made for derogations from the Public Procurement Directives, including ones relating to the character of the partner (eg if is not for profit), minority private shareholdings and/or, possibly, if the tasks undertaken by the IPPP are limited by value or geographical remit.

Secondly, should a different approach be adopted if the role of the private partner is to be a financial or strategic one rather than one of operational management?

If *Stadt Halle* is regarded as settled case law **irrespective of the reason for opening up of the share capital**, and there is no suggestion currently that it is not, the creation of an IPPP with a private financial or strategic partner will need to proceed through a similar transparent and competitive process of pre-qualification and award, with the selection of the partner being based on criteria relevant to the purpose of the engagement of the private partner.

But, again, some arguments have been advanced for derogations where the private partner's role is to be purely as a financial investor.

Resolving these difficult issues looks like a full agenda for the Commission, in addition to clarifying what should happen if further work is to be awarded to the IPPP, the rules relevant to changes in the share capital of NewCo during the life of the IPPP and what might happen at the end of the IPPP.

I'm looking forward to our debate on the need for a new legislative framework for IPPP at our seminar in December.

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