



The IPPP Interpretative Communication – creating a loophole for misuse?

The eagerly awaited Interpretative Communication on IPPP – foreseen in the Commission’s PPP Communication of November 2005 - was published by the European Commission in February 2008.

Much of the content was as expected, addressing the issues of how the private partner be selected initially in the most common situation ie where an operational management role is envisaged for it and possible events during the life of the IPPP. As the Interpretative Communication makes clear, the private input to the IPPP normally consists – apart from the contribution of capital or other assets – in the active participation in the operation of the contracts awarded to the public-private entity and/or the management of the public-private entity.

But what was unexpected was the inclusion in the Interpretative Communication of the statement – not further elaborated - that “simple capital injections made by private investors into publicly owned companies do not constitute IPPP and are therefore not covered by the present Communication”.

This is in contrast to the fairly clear steer in the November 2005 PPP Communication that the *Stadt Halle* case (ECJ case C-26/03) was regarded as settled case law – ie that the opening up of the share capital of a previously 100% owned public enterprise to a private investor changes the nature of the service delivery entity. It follows from this that, **at the moment of opening up of the share capital of the public enterprise**, a new contract comes into being, requiring the application of the public procurement rules.

This outcome is in effect what happens with any kind of capital injection by a third party, so it is unclear whether or not this Interpretative Communication is consistent with the judgement of the ECJ in *Stadt Halle*.

In any event, it is almost invariably the case that a private investor who invests in a public enterprise will be doing so to influence the direction of the entity, even if their only intention is to receive dividends.

The lack of qualification of the statement about capital injections in the Interpretative Communication also leaves a number of questions still to be answered, namely:

- Is any limit on the size of initial shareholding in public enterprise to which this derogation applies?
- What happens if a private financial investor then acquires a further stake in the public enterprise, especially one which results in majority shareholding?
- What happens if a private financial investor subsequently wants to assume service delivery responsibilities?
- What decisions would, if influenced by the private investor, be regarded as operational management eg would asset acquisition or disposal, expansion to new business areas, cessation of business activities, appointment of non-executive directors or dividend policy decisions fall into this category?
- Does “operational management” extend to any decisions for which the private investor’s approval is needed?

- Should there be a time limit or value threshold for the unexpired period of any contract held by the public enterprise with its host contracting authority beyond which a capital injection is not covered by the derogation?
- How should capital injections made in the period prior to the expected award of a new contract by the Contracting Authority?

There is, of course, nothing to prevent a Contracting Authority which wants to conduct a process for the injection of capital conforming to the procedures in the Public Procurement Directives from doing so and every reason for them to do so on grounds of compliance with the principles of transparency, equality of treatment and non-discrimination as well as securing value for money.

Nor is it impossible to devise selection and award criteria for such a process, weighted to be relevant to the purpose of the engagement of the private partner. For example, if the private partner were being selected because of the size of the capital injection needed, it would be expected that the award criteria might be more heavily weighted to the amount that it was prepared to pay for the shares acquired than if, for example, the private partner was being co-opted because of its ability to raise money from third parties in capital markets, the goodwill (in the strict accounting sense of reputational benefits) it would bring or because of its ownership of intellectual property assets.

In short, this derogation has created the possibility of legal uncertainty about what constitutes a "simple capital injection" and, possibly, a loophole for avoidance of the Public Procurement Directives which almost certainly was not the Commission's intention.

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