

Public Service Partnerships as Instruments of Public Sector Management in the European Union

Professor Christopher H. Bovis, JD, MPhil, LL.M., FRSA
H.K. Bevan Chair in Law
Professor of European Business Law
University of Hull

Abstract

European States are changing their role and their responsibilities in the process of delivering public services. Recent developments have shown that public services require state intervention for their provision, organization, and delivery. Public services often emerge and interface in a *sui generis* marketplace that does not correspond to private markets. This axiom implies the relative inability of anti-trust law and policy to regulate this marketplace, alongside an overwhelming need for safeguarding the principles of transparency and accountability. The aforementioned principles underpin modern EU public sector governance. The notion of partnerships in delivering public services has been gaining intellectual credibility and has been attracting regulatory momentum over the last decade. This Article focuses on the conceptual insights of instruments such as public-private partnerships, concessions, and public forms of cooperation in the format of public-public partnerships and in-house arrangements. The objective is to elaborate on a new era in public sector management in the EU that links the concept of public service with current and future principles of public sector management.

I. Introduction

Diachronically and traditionally the role of the state has been as the conduit for providing public services.¹ The term *public services*, which often refers to services that are offered to the general public, highlights that a service has been assigned a specific role in the public interest, or refers to the ownership or status of the entity providing the service. In the latter situation, public service fuses with the concept of *public sector*, which covers the state and its organs, bodies governed by public law and undertakings controlled by public authorities.

Two models for the treatment and regulation of public services have been developed based on different theoretical and conceptual values. One model theorizes that public services capture the general needs of the public and are delivered through market based mechanisms, whereby the public sector interfaces or competes with private sector undertakings; by contrast, other models describe public services as being essential

¹ See Christopher H. Bovis, *The State, Competition and Public Services*, in THE EUROPEAN UNION LEGAL ORDER AFTER LISBON 137 (Patrick Birkinshaw and Mike Varney eds., 2010); L. Flynn, *Competition Policy and Public Services in EC Law after the Maastricht and Amsterdam Treaties*, in LEGAL ISSUES OF THE AMSTERDAM TREATY 196–97 (D. O'Keefe & P. Tworney eds., 1999). ; J. L. Buendia Sierra, EXCLUSIVE RIGHTS AND STATE MONOPOLIES UNDER EC LAW 330 (1999); A. Moriceau, *Services d'intérêt économique général et valeurs communes*, 519 REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE 358 (2008); M. Ross, *Article 16 E.C. and Services of General Interest: From Derogation to Obligation?*, 1 EUROPEAN LAW REVIEW 22–38 (2000).

facilities (for example defense, policing) which should be sheltered from competition in order to ensure the integrity of their delivery.²

a. Externalization and Public Procurement

The public interest task conferred on a contracting authority might ultimately be carried out by resources external to the contracting authority. This can be the case where the competence for the given public task is transferred, as such, to another public authority. The performance of a given task may also be entrusted to another entity altogether. This may be done (i) without establishing contractual links, (ii) by calling on another contracting authority, which enjoys an exclusive right, or (iii) through joint procurement with other contracting authorities or through central purchasing bodies. Legal competence for a public task could be understood as the exclusive obligation and right to fulfill the task by an entity's own administrative, technical or other means, or even by calling upon external entities. The term "competence" for a given public task includes the official authority necessary to establish the regulatory framework for fulfilling the task at the level of the authority concerned.

The organization of national administration as such does not fall within the competence of the European Union (EU). Consequently, it is up to each Member State to reorganize its administration and, as part of such re-organization, to allow for the transfer of competences for given public tasks from one public authority to another.

The objective of public procurement rules is to regulate situations where a contracting authority procures goods, services or works (i.e., purchases the output of certain economic activities in order to satisfy its own needs or those of its citizens). A contracting authority transferring all competences for a given public task does not purchase any service for its own purposes. Instead, it hands over the responsibility for a certain task to another entity.

The transfer of competence for a given public task from one contracting authority to another is not governed by normal public procurement rules, which are based in part on Article 56 TFEU (ex Article 49 TEC), i.e., the freedom to provide services.³ Transferring competence for a given public task from one public body to another involves transferring both the official authority and any associated economic activities. In the area of waste management, for example, the transfer of all competences means transferring the right to set tariffs, to fix rules for collecting, sorting, storing, and treating waste, as well as the right to manage and ultimately to carry out the task according to these rules. All these rights constitute official authority. Part of these rights is the right to determine how the actual economic activities that need to be performed in order to fulfill the public task are to be performed: either by the public body itself or by a third party mandated by it.

² See T. Prosser, *THE LIMITS OF COMPETITION LAW*(2005); see also C. Graham, *Essential Facilities and Services of General Interest*, in *DIRETTO E POLITICHE DELL'UNIONE EUROPEA* 29 (2007); W. Sauter, *Services of general economic interest and universal service in EU Law*, *EUROPEAN LAW REVIEW*, Vol.33 No2, 172 (2008).

³ Article 56 TFEU (ex Article 49 TEC) stipulates: "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union."

Although situations where competence is transferred occur in Member States, neither EU legislation nor the case law of the European Court of Justice explicitly recognize such situations. The Court has referred to the transfer of official authority when a Member State invoked the transfer of competences from a public body to a third person.⁴ According to this case law, a transfer of competences has not taken place if, (i) the public entity that is originally competent remains primarily responsible for a project because it has a legal obligation not to withdraw from its task; (ii) the new entity may only take legally relevant actions after the public entity that is originally competent has given its approval, and (iii) the new entity is financed by the public entity that is originally competent to fulfill its tasks, with the result that it has no room for maneuver.⁵ On this basis, the distinctive feature of transferring competences from one public body to another as part of the re-organization of public administration is the comprehensive nature of the transfer. The body transferring competence does not retain any responsibility. The beneficiary of the transfer must exercise the competence independently and based entirely upon its own responsibility. In particular, the transferring body does not retain the right to determine the performance of economic activities undertaken in the context of the respective public task. Such economic tasks are performed under the authority of the beneficiary of the transfer. However, this does not exclude the possibility that the transferring body might have some influence on the practical organization of the performance of the public task in question. In fact, officials of the transferring public body could be members of the executive or management bodies of the authority to which competence for the public task in question was transferred. The transferring authority may also retain the right to receive certain information.

The EU Public Procurement Directives presuppose the existence of a contract, which necessitates at least two, legally distinct entities that are independent of each other in regard to decision-making. A contract is essentially a meeting of wills, whereby the parties to it are able to decide whether they wish to initiate or to terminate the contractual link.⁶ Other indications of the existence of a contract are the ability of the parties to negotiate on the actual contents of the services to be rendered and the tariffs of those services. A contract implies a transactional relationship. If there is no contract, the EU Public Procurement Directives do not apply. The Court's case law finds that if an entity carries out an activity on account of its obligations resulting from national legislation, rather than on a contractual basis, it is not covered by the EU Public Procurement Directives. More specifically, in the *Tragsa* case the Court found that, on the basis of the relevant national law, Tragsa—a public undertaking—had no choice as to the acceptance of an assignment, or the tariff for its services, but was obliged by law to execute the demands of the contracting authority, insofar as it was an instrument and technical service of that authority. The Court held that Tragsa's relations with the contracting authorities using its services were not contractual, but internal, dependent, and subordinate in every respect. Consequently, the EU Public Procurement Directive did not apply to this relationship.

⁴ Case C-264/03, *Commission v. France*, [2005] ECR I-08831, ¶ 54. See also Opinion of Advocate General Maduro of 24 November 2004, ¶¶39–41.

⁵ Case C-264/03, *Commission v. France*, *supra*.

⁶ Case C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v. Transformación Agraria SA (Tragsa) and Administración del Estado*, [2007] ECR I-02999, ¶ 54 and Case C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado*, [2007] ECR I-12175, ¶ 55.

However, it should be noted that the application of the TFEU does not depend on the existence of a contract. The Treaty applies whenever a contracting authority, “entrusts the supply of economic activities to a third party.”⁷ By contrast, the Court also recognized the in-house exception in the context of the Treaty.

b. Public Procurement Rules and Exclusive Rights in the Delivery of Public Services

The term “exclusive rights” could refer to quite different phenomena, ranging from reserving a whole economic sector to public authorities to the exclusive assignment of one specific task to one specific undertaking. However, not every exclusive right justifies the exemption of the award of a public service contract. Article 18 stipulates that the respective exclusive right needs to be granted by a law, regulation or administrative provision, which is published and compatible with the Treaty.⁸ Furthermore, Article 18 only concerns rights granted to particular public sector bodies to provide certain services, on an exclusive basis, to the public sector. The limitation of this exception to contracts awarded to entities which are themselves contracting authorities ensures competitive procurement on downstream markets, since the contracting authority enjoying the exclusive right has to comply with the EU Public Procurement Directives for its own purchases. The published law, regulation or administrative provision must be compatible with the relevant rules of the Treaty, in particular Articles 49 (ex Article 43 TEC) and 56 (ex Article 49 TEC) of the TFEU and the rules and principles that flow from these articles.⁹ These rules and principles include non-discrimination, transparency, proportionality, mutual recognition, and the protection of the rights of individuals. If a contracting authority enjoys an exclusive right in terms of Article 18 of Directive 2004/18/EC, other contracting authorities can only award the respective services contracts to this entity.¹⁰ The key reason for introducing this provision was to avoid competitive award procedures in cases where—due to the existence of an exclusive right—only one entity could ultimately be awarded the contract in question.

⁷ See Christopher H. Bovis, *The State, Competition and Public Services*, in *THE EUROPEAN UNION LEGAL ORDER AFTER LISBON* 142 (Patrick Birkinshaw and Mike Varney eds., 2010);

⁸ Article 18 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts provides for service contracts awarded on the basis of an exclusive right and in particular stipulates: “This Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty”.

⁹ Article 49 TFEU (ex Article 43 TEC) stipulates: “Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State”.

Article 56 TFEU (ex Article 49 TEC) stipulates: “Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.”

¹⁰ Directive 2004/18/EC, L 134/114, 2004.

An exclusive right, which by definition restricts the freedom of other entities to provide services, is justified only under certain conditions.¹¹ Thus, the exclusive right must be justified either by a derogation expressly provided for by the Treaty (e.g., exercise of official authority (Article 51 TFEU (ex Article 45 TEC)), grounds of public policy, public security, or public health (Article 52 TFEU (ex Article 46 TEC))¹² or, in accordance with the case law of the Court which has established imperative requirements thought to be in the general interest, which must be appropriate for achieving the objective that they pursue, not go beyond what is necessary in order to attain it, and must in any event be applied without discrimination.¹³

Article 18 of Directive 2004/18 EC concerns rights granted to particular public sector bodies to provide certain services, on an exclusive basis, to the public sector. If the justification for the restriction of the freedom to provide services is an imperative requirement in the general interest, one of the conditions to be met is that the measure in question must be non-discriminatory. This means that, in general, no private entity should be placed in a more advantageous position than its competitors. Therefore, if an exclusive right were to be awarded to a contracting authority involving private capital (which may arise in the case of a body governed by public law), it is difficult to see how this principle could be complied with in the absence of a transparent procedure that ensures equal treatment. On the other hand, in view of the history and purpose of Article 18, as well as recent case law on comparable situations, this might not be necessary if the beneficiary of the exclusive right is a state body, such as a contracting authority without private capital.

Joint procurement may take many different forms, ranging from organizing one specific common call for tenders, to systematic recourse, to specialization (e.g., one contracting authority being responsible for certain types of procurements to be used by

¹¹ Case 203/08, *The Sporting Exchange Ltd, Trading as Betfair v. Minister van Justitie*, [2010] not yet published, ¶¶ 23–25; C-124/97, *Markku Juhani Läärrä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State)*, [1999] ECR I-06067, ¶¶ 29–31; C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, [2009] ECR I-07633, ¶¶ 52–55

¹² Article 51 TFEU ex Article 45 TEC stipulates: “the provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities.”

Article 52 TFEU ex Article 45 TEC stipulates: “the provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions.”

¹³ Case C-243/01, *Gambelli*, [2003] ECR I-13031, ¶ 65; C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, [1991] ECR I-04007. Furthermore, decisions to award exclusive rights to undertakings can amount to an infringement of the Treaty where the public service requirements to be fulfilled by the service provider are not properly specified. *See* Case C-66/86, *Silver Line Reisebüro*, [1989] ECR I-803. Alternatively, where the service provider is manifestly unable to meet the demand awarding exclusive rights to undertakings can also constitute an infringement of the Treaty. *See* Case C-41/90, *Höfner*, [1991] ECR I-1979. Finally, where there is an alternative way of fulfilling the requirements that would have a less detrimental effect on competition, the award can be viewed as a Treaty violation. *See* Case T-266/97, *Vlaamse Televisie Maatschappij*, [1999] ECR II-2329. Also, the condition that the granting of the exclusive right is compatible with the Treaty is not fulfilled if the measure by which it is awarded is incompatible with secondary EU legislation. *See* Case C-220/06, *Correos*, ¶¶ 64–66.

all entities concerned, another carrying out a different type of procurement etc.) to setting up a specific structure for joint procurement. The relationships between the various participants themselves may or may not be subject to EU rules on public procurement, depending on the method chosen. In the case of simple administrative cooperation in drawing up common specifications that does not necessitate any contracts for pecuniary interests between the parties, i.e., when public authorities limit themselves to organizing a common call for tenders, they are applying the public procurement rules together, but their cooperation is not subject to these rules. Article 1(9) of Directive 2004/18/EC defines contracting authorities *inter alia*, as “associations formed by one or several such authorities, meaning one or several regional or local authorities or bodies governed by public law.”¹⁴ This provision might be of interest in the context of public-public co-operation.

Furthermore, certain centralized purchasing techniques have been developed in the Member States. Central purchasing bodies are contracting authorities responsible for making acquisitions or for awarding public contracts/framework agreements intended for other contracting authorities. Article 11 of Directive 2004/18/EC explicitly provides that contracting authorities may purchase works, supplies and/or services from or through a central purchasing body. A central purchasing body may operate either as a wholesaler (it purchases so that other authorities may purchase *from* it), or it may act as an intermediary which handles the award procedures and the administration of contracts so that other authorities may purchase *through* it.¹⁵ In neither case does a procurement procedure need to be organized in respect of the relationship between the central purchasing body and the authorities having recourse to it, as long as the central purchasing authority has itself awarded its contracts in accordance with the relevant EU Public Procurement Directives.

II. The Evolution of Public Private Partnerships

Public-private partnerships denote a sophisticated interface between public authorities and private sector undertakings, which aims at delivering infrastructure projects, as well as public services.¹⁶ According to the EU institutions, the term public-private partnership

¹⁴ Article 1(9) of Directive 2004/18/EC stipulates the following: ‘Contracting authorities’ means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law. A ‘body governed by public law’ means any body:

- (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (b) having legal personality; and
- (c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

¹⁵ Article 11 of Directive 2004/18/EC covers public contracts and framework agreements awarded by central purchasing bodies and stipulates: “Member States may stipulate that contracting authorities may purchase works, supplies and/or services from or through a central purchasing body. Contracting authorities which purchase works, supplies and/or services from or through a central purchasing body shall be deemed to have complied with this Directive insofar as the central purchasing body has complied with it.”

¹⁶ See European Commission, Report to the Laeken European Council: Services of General Interest, COM (2001) 598; European Commission, Communication from the Commission to the Council, the European

refers to “forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service.”¹⁷ At the European level, as part of the Initiative for Growth, the Council has approved a series of measures designed to increase investment in the infrastructure of the trans-European transport networks and also in the areas of research, innovation, and development,¹⁸ as well as the delivery of services of general interest.¹⁹

The United Nations (UN) followed suit and embraced the concept, defining public private partnerships as:

Innovative methods used by the public sector to contract with the private sector, who bring their capital and their ability to deliver projects on time and to budget, while the public sector retains the responsibility to provide these services to the public in a way that benefits the public and delivers economic development and an improvement in the quality of life.²⁰

The UN devised a blueprint to close the gap between the poorest countries and industrialized nations in the UN Millennium Declaration, committing its members to a new global partnership and emphasizing the potential of public-private partnerships in achieving the realization of the United Nations Millennium Development Goals.²¹

The principal benefit from involving the private sector in the delivery of public services has been attributed to the fact that the public sector does not have to commit its own capital resources in funding the delivery of public services, whereas other benefits include quality improvement, innovation, management efficiency, and effectiveness, elements that are often underlying private sector entrepreneurship.²² Consequently, the public sector receives value-for-money in the delivery of public services, while it can also be maintained that through this process the state manages in a better, more strategic way the public finances. Value for money denotes a concept which is associated with the economy, the effectiveness and the efficiency of a public service, product or process, i.e., a comparison of the input costs against the value of the outputs and a qualitative and quantitative judgment of the manner in which the resources involved have been utilized and managed.²³

Parliament, the Economic and Social Committee and the Committee of the Regions on the Status of Work on the Examination of a Proposal for a Framework Directive on Services of General Interest, COM (2002) 689; European Commission, Green Paper on Services of General Interest, COM (2003) 270; European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: White Paper on Services of General Interest, COM (2004) 374.

¹⁷ See European Commission, Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, COM (2004) 327.

¹⁸ See Conclusions of the Presidency, Brussels European Council, 12 December 2003, COUNCIL OF THE EUROPEAN UNION, Brussels, 5 February 2004, 5381/04. See Communication from the Commission to the Council and to the Parliament “Public finances in EMU 2003,” published in the European Economy No 3/2003 (COM (2003) 283 final).

¹⁹ See COM (2003) 270.

²⁰ See United Nations Economic Commission for Europe, *Guidebook on promoting Good Governance in Public Private Partnerships*, ECE/CECI/4, United Nations, 2008.

²¹ Citation needed for UN Millennium Declaration.

²² See P. Grout, *The Economics of the Private Finance Initiative*, in 13 OXFORD REVIEW OF ECONOMIC POLICY 53–66 (1997).

²³ See J. Kay, *Efficiency and Private Capital in the Provision of Infrastructure*, in INFRASTRUCTURE POLICIES FOR THE 1990S, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (1993).

The erosion of confidence in the role of the public sector as organizer and asset holder in the sphere of public services has led to attempts to moderate the widespread dissatisfaction from traditional public procurement methods in delivering public services and infrastructure projects.²⁴ The outcome revealed that the nexus of contractual relations between public authorities and the private sector were not providing genuine value-for-money outcomes.²⁵ The criticism has been primarily directed towards: (i) adversarial contractual relations as a result of competitive tendering, (ii) inappropriate risk allocation, and (iii) poor contractual performances resulting in delayed and over-budget completions.²⁶

Competitive tendering in public procurement has been reproached for creating a confrontational environment, where the antagonizing relations, which emanate from the tendering processes, are often adversely reflected in the performance stage of the contract. In addition, competitive tendering has been dissociated with innovation and quality. Also, as a result of inefficiently written specifications upon which the tenders have been constructed, the deliverables or the outcomes often differ dramatically from contractual expectations and stipulations.²⁷

On the other hand, risk allocation is probably the most crucial element in contractual relations between public and private sectors that affects pricing as well as the overall contractual framework. Risk represents the level of financial exposure of a party prior to, after the conclusion of, or during its performance of a contract. In a traditional public contract, risk is apportioned in accordance with the expected modalities, features, or perceptions of the public and private sectors; contractual elements of risk, which are associated with the design or construction of a project, maintenance, and operational matters, are usually passed to the private sector. On the other hand, risks related to the required investment, financing, and currency transactions, planning issues, residualization, obsolescence, political and legal aspects, industrial relations, and usage volumes remain with the public sector.

In traditional public procurement, the risk allocation tends to favor the supply side (the private sector), which mainly assumes the risks related to the tendering process, and includes project risks. During the performance stage of the contract and up to its completion, the public sector would, usually, place an amount of risk to the private sector by requiring performance bonds or other means of financial guarantees. Risk allocation is the result of negotiations between the parties and is normally expected to reflect the pricing element of contractual arrangements between them. Thus, risk allocation and overall pricing for a traditional public contract operate in an analogous relation within a contract. The more risk a party assumes, the higher the price to be paid by the other party, and *vice versa*.

It is difficult to ascertain what represents an acceptable transfer of risk in a contract between the public and private sectors. Risk allocation primarily reflects the parties' perception of a transaction with reference to their own criteria. These criteria are

²⁴ See Christopher H. Bovis, *Public-private partnerships in the 21st century*, ERA Forum: Volume 11, Issue 3 page 379, Springer, (2010).

²⁵ In its policy statement, *Public Sector Comparators and Value for Money*, February 1998, the HM Treasury Taskforce in the United Kingdom set out the role of comparators in public procurement, stressing the importance of the value-for-money principle. The comparators are indices that help to distinguish between the lowest cost and the best value for money for public authorities and also their uses as an exercise of financial management and a means of demonstrating savings to public authorities.

²⁶ See Christopher H. Bovis, *PUBLIC PROCUREMENT: CASE LAW AND REGULATION*, Oxford University Press, Chapter 11, 594 (2006).

²⁷ See generally J.J. LAFFONT AND J. TIROLE, *A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION* (1993).

often influenced by a range of parameters such as speculation, fear, and certainty, as well as by a number of qualitative attributes of the parties, such as forecast and planning, as well as market intelligence. In traditional public contracts the public sector inevitably accepts excessive risks as a result of its procurement practices. Where the award of publicly funded contracts is predominately based upon *the lowest price*, which constitutes one of the two permissible award criteria under the procurement rules (the other being the criterion of *the most economically advantageous offer*), this would normally reflect the amount of risk the relevant public sector contracting authorities are prepared to accept.²⁸

Finally, traditional procurement methods have often revealed a picture of poor contracts management as a result of inefficient control systems operated by public authorities. Poor contracts management systems have often resulted in out-of-control contractual performances with all the adverse financial consequences attributed to the delayed completions of the projects. The traditional public procurement process often suffers from unnecessarily repetitive functions, which do not offer long-term savings and value-for-money-considerations—particularly the advertisement, selection, and qualification processes—and could pose a considerable financial burden on the public sector.

One of the most advanced Public-Private Partnerships (PPP) programs has been developed in the United Kingdom.²⁹ The PPPs, including Public Finance Initiatives (PFI) schemes, are currently responsible for about 24% of public investment, with projects in most of the key infrastructure areas.³⁰ Many continental European Union states, including Ireland, Sweden, Finland, Germany, Greece, Italy, the Netherlands, Portugal, and Spain, have developed legal and policy frameworks to deliver PPP projects, although their share in total public investment is between five and fifteen percent. Reflecting a need for infrastructure investment on a large scale, and weak fiscal positions, a number of countries in Central and Eastern Europe, including the Czech Republic, Hungary, and Poland, have embarked on PPPs.³¹

Other countries in the world with significant PPP programs include Canada, Japan, and Australia, in particular the state of Victoria.³² PPPs in most of the above countries focus on road infrastructure projects, while the United States has considerable experience with leasing programs in the delivery of public services.³³ Mexico and Chile have pioneered the use of PPPs to promote private sector participation in public

²⁸ Two criteria laid down in the public procurement Directives provide the conditions under which contracting authorities award public contracts: the lowest price or the most economically advantageous offer. See Directive 2004/18 Art. 26, OJ L 134, 30.4.2004 (on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts); see also Directive 2004/17 Art. 30, OJ L 134, 30.4.2004 (coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors). The first criterion indicates that, subject to the qualitative criteria and financial and economic standing, contracting authorities do not rely on any other factor than the price quoted to complete the contract. The most economically advantageous offer includes a series of factors chosen by the contracting authority, including price, delivery or completion date, running costs, cost-effectiveness, profitability, technical merit, product or work quality, aesthetic and functional characteristics, after-sales service and technical assistance, commitments with regard to spare parts and components and maintenance costs, and security of supplies.

²⁹ See HM TREASURY, PUBLIC PRIVATE PARTNERSHIPS: THE GOVERNMENT'S APPROACH (2000). See also, HM TREASURY, PFI: MEETING THE INVESTMENT CHALLENGE (2003).

³⁰ See L. De Pierris, *Improving the Infrastructure*, 40 PFI JOURNAL 44–45 (2003).

³¹ See M. Spackman, *Public-Private Partnerships: Lessons from the British Approach*, 26 ECONOMIC SYSTEMS 283–301 (2002).

³² See DEPARTMENT OF TREASURY AND FINANCE, PARTNERSHIPS VICTORIA (MELBOURNE), (2000). See also, DEPARTMENT OF TREASURY AND FINANCE, PRACTITIONERS' GUIDE-GUIDANCE MATERIAL (2001).

³³ See, OFFICE OF MANAGEMENT AND BUDGET, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET, OMB Circular No. A-11 (2002).

investment projects in South America. In Mexico, PPPs were first used in the 1980s to finance highways and, since the mid-1990s, a growing number of public investment projects in the energy sector. There are plans to extend the use of PPPs to the provision of other public services. Chile has a well-established PPP program that has been used for the development of transport, airports, prisons, and irrigation. Brazil is planning significant use of PPPs and there is also a regional approach to infrastructure development across the countries in South America. PPPs have also emerged in Asia, especially in India, Korea, and Singapore, and there is strong interest in PPPs in South Africa.³⁴

a. The Characteristics of Public–Private Partnerships

Public-private partnerships have been utilized as a credible solution to bridge the infrastructure deficit of many states in both the developed and developing world. PPPs can provide a number of specific benefits to the public sector. In particular, they can offer value for money solutions, where the PPP can attain lower costs, higher levels of service through innovation, and reduced risk for the public sector. One of the most significant attributes of PPPs is the increased certainty of outcomes both in terms of on-time delivery of projects (the private partner is strongly motivated to complete the project as early as possible to control its costs and so that the payment stream can commence) and in terms of within-budget delivery of projects (the payment scheduled is fixed before construction commences, protecting the public from exposure to cost overruns).

Public-private partnerships possess some distinctive characteristics, when compared with traditional public-private contractual formats. These characteristics reveal a different ethos in public sector management. The pivotal characteristic is that the private sector partner is expected to play a strategic role in financing and delivering the infrastructure project or the public service by providing its input into the various phases such as the design, implementation, construction, completion, operation, and maintenance stages of the project. As a result, the duration of the relations between public and private sectors must reflect the need for longevity, in order to allow affordability for repayment on the part of the public sector and also the ability of the private sector to recoup its investment profitably. Another characteristic that complements both the strategic role of the private sector and its long-term engagement in delivering infrastructure and public services is reflected in the distribution of risks between the public and private sectors, and in the expectation that the private sector will assume substantial risks. Risk assessment in PPPs is a totally different exercise than the assessment of risk in traditional public contracts.³⁵

A range of different risks features in PPPs: construction or project risk, which is related to design problems, building cost overruns, and project delays; financial risk, which is related to variability in interest rates, exchange rates, and other factors affecting financing costs; performance risk, which is related to the availability of an asset and the continuity and quality of the relevant service provision; demand risk, which is related to the ongoing need for the relevant public services; and residual value risk, which is related to the future market price of an asset.³⁶ Finally, political risks cover a general term used to

³⁴ See D. Grimsey and M. Lewis, *PUBLIC PRIVATE PARTNERSHIPS: THE WORLDWIDE REVOLUTION IN INFRASTRUCTURE PROVISION AND PROJECT FINANCE* (2007).

³⁵ See D. MOSS, *WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER* (2002).

³⁶ See H. POLACKOVA-BRIXI, AND A. SCHICK, EDS., *GOVERNMENT AT RISK: CONTINGENT LIABILITIES AND FISCAL RISK* (2002).

describe risks arising from external or internal factors that are determined or influenced by governments. External political risks, such as currency convertibility, war, sanctions, and political instability may be avoided, mitigated, hedged, or insured against and could be significantly mitigated by actions of the state within which the PPP is structured. On the other hand, internal political risks, such as taxation, terrorism, inflation, and industrial unrest are usually uninsurable and could affect the risk allocation within PPPs. Their respective mitigation would potentially reflect on the perceptions of the parties to manage such risks.

Another essential dynamic of PPPs is that the private sector provides the financing. PPP financing is specialized financing which is different from both public finance and corporate finance. The PPP debt financing is regarded as off-balance sheet borrowing, which means that the borrowing does not affect the state's public sector borrowing requirements and any measurements or calculations of measures of its indebtedness. PPPs allow the public sector to access alternative sources of capital.

PPPs seek to transfer risk from the public sector to the private sector. Whilst the provision of private capital and the strategic involvement of the private sector partner in managing the delivery of public services could prove beneficial, significant risk transfer from the public to the private sector is necessary to derive a genuine value-for-money partnership. The impact of risk transfer on financing costs and the pricing of risk to ensure efficient risk transfer are crucial in understanding how risk is treated within public-private partnerships.

The cost of capital needed to finance a public-private partnership depends only on the characteristics of project related risks and not on the source of finance. However, the source of financing can influence project risk depending on the maturity and sophistication of the risk bearing markets. On the one hand, within advanced risk bearing markets, it is irrelevant whether project risk is borne by the public sector or the private sector. On the other hand, when risk-bearing markets are less developed, project risk depends on how widely that risk is spread. Since the public sector can spread risk across taxpayers in general, the usual argument is that this gives the public sector an advantage over the private sector in terms of managing risk. Nevertheless, the private sector can spread risk across financial markets. The outcome is likely to be that project risk is lower in the private sector. The public sector's ability to forcibly spread risk across taxpayers, while financial markets have to be provided with an incentive to accept risk, may put the private sector at more of a disadvantage as far as large and risky projects are concerned. The scope for the private sector to spread risk will also be somewhat limited in countries with less developed financial markets.

This outcome might contravene the assumption that private sector borrowing generally costs more than government borrowing. However, this mainly reflects differences in default risk. The public sector's power to tax reduces the likelihood that it will default on its debt, and the private sector is therefore prepared to lend to the public sector at close to the risk-free interest rate to finance risky projects. The crucial issue is whether PPPs result in efficiency gains that offset higher private sector borrowing costs.³⁷

Risk transfer from the public sector to the private sector has a significant influence on whether a PPP is a more efficient and cost-effective alternative to public investment and publicly funded provision of services. The public sector and the private sector typically adopt different approaches to pricing market risk. The public sector tends to use the social time preference rate (STPR) or some other risk-free rate to discount future cash flows

³⁷ See K. Arrow and R. Lind, *Uncertainty and the Evaluation of Public Investment Decisions*, 60 AMERICAN ECONOMIC REVIEW 364–78 (1970).

when appraising projects.³⁸ The private sector in a PPP project will include a risk premium in the discount rate it applies to future project earnings. Under the widely used capital asset pricing model (CAPM), the expected rate of return on an asset is defined as the risk-free rate of return plus a risk premium, the latter being the product of the market risk premium and a coefficient that measures the variance between the returns on that asset and market returns.³⁹

III. The Legal Formats of Public–Private Partnerships

Three major legal types of public private partnerships exist: the concession, the contractual public-private partnership, and finally, the institutional public-private partnership, often described as the “joint-venture model.”⁴⁰

a. The Notion of Public Concessions

A concession is a public contract where the consideration of the private sector for the provision of services consists either solely in the right to exploit the service or in this right together with some form of payment by the public sector. The notion of a concession is based on the fact that no contractual payment remuneration is paid by the granting public entity to the concessionaire. The latter must therefore simply be given the right to economically exploit the concession, although this right may be accompanied by a requirement to pay some consideration to the grantor, depending on elements of risk allocation agreed between the parties.

There are three main distinctive features in public concessions. First, the beneficiaries of the service provided must be third parties (usually the public or end users of a public service) rather than the awarding public entity itself. Second, the subject of the service upon which the concession is based must concern a matter that is in the public interest. Finally, the concessionaire must assume the economic risk related to the performance of the relevant service.⁴¹ A public concession is a revenue generating PPP which involves an infrastructure or a service, the use of which necessitates the payment of fees borne directly by end users, and any operation or function emanating from the sale, rent, or exploitation of public land or buildings.⁴²

It is maintained that the absence of consideration passing from the granting entity to the concessionaire constitutes the essence of a public concession.⁴³ The above characteristic represents a fundamental feature of a concession whose importance is not limited to projects that are concerned with infrastructure or the delivery of public works

³⁸ See Christopher H. Bovis, *Future Directions in Public Private Partnerships*, in THE LAW OF THE FUTURE AND THE FUTURE OF THE LAW, Muller, Zouridis, Frishman and Kistemaker, (Eds), Torkel Opsahl, Oslo, 782 (2012).

³⁹ Ibid.

⁴⁰ See INTERNATIONAL MONETARY FUND DEP'T OF FISCAL AFFAIRS, PUBLIC-PRIVATE PARTNERSHIPS (2004).

⁴¹ See Case C-324/98, Telaustria Verlags GmbH and Telefonadress GmbH v. Post & Telekom Austria AG, [2000] ECR I -10745.

⁴² See Christopher H. Bovis, *Future Directions in Public Private Partnerships*, in THE LAW OF THE FUTURE AND THE FUTURE OF THE LAW, Muller, Zouridis, Frishman and Kistemaker, (Eds), Torkel Opsahl, Oslo, 782 (2012).

⁴³ See Christopher H. Bovis, *Public Procurement and Public Services in the EU* in REGULATING TRADE IN SERVICES IN THE EU AND THE WTO: TRUST, DISTRUST AND ECONOMIC INTEGRATION, Lianos and Odudu Eds, 287 Cambridge University Press (2012).

projects, but also extends to projects concerning the delivery of public services. This feature finds justification in the fact that the concessionaire itself must bear the principal, or at least the substantive, economic risk attaching to the performance of the service involved. If the argument is satisfied that the economic burden or risk has effectively been passed to the concessionaire by the grantor of the concession, then there must be a very strong presumption that the arrangement concluded between them amounts to a concession rather than a contract.

The single most important indication of whether economic risk is to be borne by the concessionaire will emerge from examining the nature of the exploitation in which the supposed concession requires it to engage.⁴⁴ Thus, where, for example, the public authorities effectively guarantee to indemnify the concessionaire against future losses, or where there is no effective exploitation by the concessionaire of the service whose performance is ceded, the arrangement at issue could not amount to a concession.⁴⁵

There is no overriding legal definition of a public services concession under EU Law or international law.⁴⁶ It is, therefore, necessary in each case to look at a number of factors that will indicate whether in reality the arrangement amounts to a written contract for a pecuniary interest with respect to the provision of public services. In the case of a concession, the beneficiary of the service must be a third party unconnected with the contractual relationship and the concessionaire effectively must obtain at least a significant proportion of its remuneration, not from the granting entity, but from the exploitation of the service. Therefore, a case-by-case approach should be adopted to answer the question of whether a contract amounts to a concession or a service contract. Such a fact-specific inquiry necessarily takes account of all indicative factors, the most important of which is whether the supposed concession amounts to a conferral of a right to exploit a particular service as well as the simultaneous transfer of a significant proportion of the risk associated with that transfer to the concessionaire. The likelihood that the concessionaire will be able beneficially to exploit the concession would not suffice to ascertain that there is no economic risk. Such assessment would need to satisfy the probability of economic loss on the part of the concessionaire.⁴⁷

⁴⁴ See Case C-360/96, *Arnhem and Rheden*, [1998] ECR I-6821 ¶ 25. *Arnhem and Rheden* provides a strong indication that the European Court views the requirement to exploit the right ceded in order to obtain remuneration as the core of what constitutes a genuine concession. The Court maintained that an important feature of service concessions in the Community context is that the concessionaire automatically assumes the economic risk associated with the provision and management of the services that are the subject of the concession.

⁴⁵ See European Commission Interpretative Communication of Community Law on Public Procurement Concessions 2 fn.10, O.J. 2000, C 21.

⁴⁶ A concession is a public contract where the consideration of the private sector for the provision of services consists either solely in the right to exploit the service or in this right together with some form of payment by the public sector. The notion of a concession is based on the fact that no contractual payment remuneration is paid by the granting public entity to the concessionaire. The latter must therefore simply be given the right to economically exploit the concession, although this right may be accompanied by a requirement to pay some consideration to the grantor, depending on elements of risk allocation agreed between the parties. There are three main distinctive features in public concessions. First, the beneficiary of the service provided must be third parties (usually the public or end-users of a public service) rather than the awarding public entity itself. Second, the subject of the service upon which the concession is based must concern a matter which is in the public interest. Finally, the concessionaire must assume the economic risk related to the performance of the relevant service. See Christopher H. Bovis, *PUBLIC PRIVATE PARTNERSHIPS*, 452 Routledge, (2012).

⁴⁷ See S. VAN GRASSE, *DE CONCESSIE IN HET RAAM VAN DE PUBLIEK-PRIVATE SAMENWERKING* (2007). See also, A. ALEXIS, *SERVICES PUBLICS ET AIDES D'ETAT* 63–107 (2002); J. ARNOULD, *LES CONTRATS DE CONCESSION DE PRIVATISATION ET DES SERVICES "IN-HOUSE" AU REGARD DES REGLES COMMUNAUTAIRES* 2–23 (2000).

i. *The Significance of Concessions for the Internal Market*

Concession contracts are different from public contracts, which are traditionally used by public authorities to procure supplies, works, or services. In the case of public contracts, an economic operator is awarded a fixed payment for completing the required work or service. Concessions, on the other hand, are contractual arrangements between a public authority and an economic operator (the concession holder) where the latter receives substantial remuneration by being permitted to exploit the work or service. Hence, concessions involving private partners are a particular form of PPP. Although PPPs have never been defined in EU Public Procurement legislation, they are usually referred to as relationships of cooperation between a public authority and a private partner, where the latter bears risks that are traditionally borne by the public sector and often contribute to financing the project.⁴⁸ Some PPPs are structured as public contracts, but the majority of PPPs take the form of concessions.

The award of public contracts and work concessions is subject to EU rules.⁴⁹ The same rules do not apply to different categories of concessions and public contracts. Unlike public contracts, which are exhaustively regulated in secondary legislation, and works concessions, which are partially covered by secondary rules, the award of service concessions is only subject to the general principles of the Treaty. This has resulted in irregularities and economic inefficiencies, and has a negative impact on the achievement of value for public money. In order to apply the Treaty principles more effectively and efficiently, secondary legislation was developed containing specific rules on award procedures.⁵⁰

The European legislature decided to differentiate between *public contracts*, conceived of as the procurement of works, goods, or services against payment, and *concession contracts*, where works or services are provided to contracting authorities or to users in consideration for the right to exploit a facility.⁵¹ With regard to the latter, it

⁴⁸ See Christopher H. Bovis, *PUBLIC PRIVATE PARTNERSHIPS*, 452 Routledge, (2012).

⁴⁹ Directive 2004/18 EC has adopted a special, mitigated regime for the award of concession contracts in its Article 1(3). The provisions of the Directive only apply to concession contracts when the value is at least EURO 6 242 000 million EURO. There are no rules given as to the way in which the contract value must be calculated. For the award of concession contracts, contracting authorities must apply similar rules on advertising as the advertising rules concerning open and restricted procedures for the award of every works contract. Also, the provisions on technical standards and on criteria for qualitative selection of candidates and tenderers do apply to the award of concession contracts. The Directive does not prescribe the use of specific award procedures for concession contracts.

⁵⁰ Article 59 Directive 2004/18 EC stipulates that the Directive does not provide for a specific award procedure envisaged for public works concession. Contracting authorities are free to select the standard procedures specified for the award of public contracts. However, contracting authorities must allow a time limit not less than 52 days from the date of dispatch of the notice for the presentation of applications for the concession.

⁵¹ According to Article 1(2)(b) of Directive 2004/18 EC, public works contracts are public contracts which have as their object either the execution or both the design and execution, of works, or the completion, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A work means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function. According to Article 1(3) of Directive 2004/18 EC, public works concession is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment. According to Article 1(4) of Directive 2004/18 EC, service concession is a contract of the same type as a public service contract except for the fact that the consideration for the

should be pointed out that the award of *works concessions* under the Classic Directive is currently subject to a limited number of provisions only.⁵² In particular, it is compulsory to publish a concession notice in the Official Journal and to respect a minimal period for the submission of applications. Moreover, there are rules on the obligations of concession holders. Bidders also enjoy judicial protection and review procedures provided by the Remedies Directive 2007/66.⁵³ Their award is supplemented by the general Treaty principles. On the other hand, the award of works concessions under the Utilities Directive is only subject to the general principles of the TFEU.⁵⁴ Similarly, *service concessions* are currently subject only to the general principles of the TFEU.

In practice, the distinction between works concessions and service concessions may prove to be difficult to determine. Concession contracts underpin an important share of economic activity in the EU. They are particularly significant in economic sectors that are of great importance to both citizens and economic operators, such as network industries and services of general economic interest. They are important vehicles in the long-term structural development of infrastructures and strategic services, as they help to harness private sector expertise, achieve efficiency, and deliver innovation. Moreover, their role is also likely to become more prominent in years to come in the face of increasing constraints on public finances. Indeed, by transferring the main operating risks to a private partner and alleviating the public authorities of this burden, concessions make it possible, in certain cases, to carry out much needed public works and services while keeping the corresponding commitments out of the government balance sheet. There is further potential for increased take-up of concessions in many projects supported by the European funds, where the use of PPPs in co-funded projects is currently low.

A decision by Member States and contracting authorities to resort to a concession should be assessed on a case-by-case basis and its costs and benefits should always carefully and comprehensively be compared with those of alternative solutions. The fact that Member States use different definitions for concessions and the current lack of transparency on their award makes systematic and precise measurement of their economic and social importance difficult. Comparable data across the Internal Market are generally lacking or remain inconsistent, particularly in Member States where concessions are not sufficiently regulated.⁵⁵

With regard to PPPs and concessions in several Member States where concessions are subject to specific rules, concessions are mostly used in water distribution

provision of services consists either solely in the right to exploit the service or in this right together with payment.

⁵² Directive 2004/18, OJ L 134, 30.4.2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

⁵³ See Directive 2007/66/EC of 11 December 2007, OJ L335/31.

⁵⁴ Directive 2004/17, OJ L 134, 30.4.2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

⁵⁵ In the Commission's 2006 report on the evaluation of the performance of Network industries providing services of general economic interest, network industries were estimated to account for 7 % of the EU 15 total value added. In the new Member States this share was calculated to be much higher, ranging from 9.8 % in Hungary to 14.3 % in the Slovak Republic. In 2005, slightly more than 10.5 million people were employed in EU25 network industries corresponding to 5.4 % of the total workforce. For public services in the EU, the Commission estimates the number of persons employed by Services of General Interest to be over 64 million. The number of enterprises providing SGI is estimated to be more than 500,000. SGI providers of electricity, gas, water, transport, post and telecommunications and research contribute to 6.4 % of the total investment in the EU which, for the year 2006 was over EURO 150bn. See European Commission, Public Services in the European Union and in the 27 Member States, Mapping of the Public Services, CEEP Managed Project, May 2010.

and treatment, road and rail transport, ports and airports services, motorway maintenance and management, waste management, energy or heating services, leisure facilities, and car parks. Concessions in these sectors imply significant amounts of capital investment.⁵⁶

ii. Concessions in the Utilities Sectors

The Utilities Directive covers important sectors such as water, ports, airports, energy, and heating. These sectors are characterized by a significant number of concessions, but even works concessions are at present excluded from the scope of application of this Directive.⁵⁷ This situation appears unjustified. Both the contracting authorities and other contracting authorities in the Utilities sectors are bound to apply Treaty principles with regard to concessions. Consequently, when dealing with concessions in these sectors, they encounter the abovementioned problems relating to the imperfect application of the Treaty, lack of legal certainty, and barriers to entry. If works and service concessions were to be covered by the classic Directive, but utilities remained outside its scope, this would add yet another level of legal uncertainty regarding which set of rules apply.

iii. Concessions in Priority and Non-priority Services

Non-priority services (e.g., port services, catering, health, education, and social services) are at present only partially covered by the Public Procurement Directives. The intention of the legislator was that certain specific service contracts, which were considered not to have much potential for cross-border trade, should be excluded from the full application of the rules of the Directives, for a transitional period.⁵⁸ Nevertheless, services such as social, health, and education continue to have a

⁵⁶ According to the European Investment Bank, in more than 1300 PPP contracts were signed in the EU from 1990 to 2009, representing a capital value of more than EUR 250 billion. The EIB itself, which is Europe's foremost funder of PPP projects, has a portfolio of 120 projects representing an investment of around EUR 25 billion. Funding of new projects was in excess of EUR 3.5 billion in 2008 and in 2009 was worth EUR 2 billion despite difficult economic conditions. See European Commission, Assessment of an Initiative on Concessions, Brussels, 20.12.2011, SEC(2011) 1588fin.

⁵⁷ Directive 2004/17, OJ L 134, 30.4.2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

⁵⁸ The predecessor to 2004/18 EC Directive, Directive 92/50, O.J. 1992, L 209 had adopted a two-tier approach in classifying services procured by contracting authorities. This classification is based on a "priority" and a "non-priority" list of services, according to the relative value of such services in intra-community trade. *Priority services* include: Maintenance and repair services, Land transport services (except for rail transport services), including armoured car services and courier services, except transport of mail, Air transport services of passengers and freight, except transport of mail, Transport of mail by land and by air, Telecommunications services (except voice telephony, telex, radiotelephony, paging and satellite services), Financial services including (a) Insurance services, (b) Banking and investment services (except contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services), Computer and related services, Research and development services, Accounting, auditing and book-keeping services, Market research and public opinion polling services, Management consultant services (except arbitration and conciliation services) and related services, Architectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services, Advertising services, Building-cleaning services on a fee or contract basis, Publishing

limited cross-border dimension, due to the strong impact of different national cultural traditions. Furthermore, concessions are less prevalent in the above sectors. It must also be said that the full coverage of these services by the complete framework is politically very sensitive. It is therefore appropriate to establish a specific regime for the award of these services. This regime should include the obligation to publish by contracting authorities at the beginning of the budgetary year, a prior information notice. Such a notice would ensure adequate transparency, without prejudice to national systems of purchase of this kind of services. Such a legal framework should also encompass a requirement to publish a concession award notice.

iv. Concessions in Public Passenger Transport

At the time when the Transport Regulation 1370/2007 was adopted, service concessions in this field were governed by the Treaty principles.⁵⁹ Nevertheless, this sector was considered sufficiently distinctive to be subject to a more precise and specific set of rules (including the possibility of awarding contracts to “internal operators”).⁶⁰ For this reason, and in order not to interfere with the objectives of EU transport policy, and to maintain the stability of the legal framework, service concessions currently subject to the Transport Regulation should be excluded from the scope of the future EU legislation on concessions. Moreover, as the current rules applicable in this sector already provide for transparency and a fair degree of legal certainty, changing the legal framework applicable to these concessions is not considered a priority.

v. Concessions in Air Transport

Pursuant to Regulation 1008/2008, a Member State may impose a public service obligation (PSO) with respect to scheduled air services between two airports in the Union, in particular when one of them serves an outlying or developing region.⁶¹ To this end, the Regulation lays out a very detailed procedure for setting up these PSOs and for compulsory tendering.

vi. Concessions Awarded to Entities Enjoying of Exclusive Rights

and printing services on a fee or contract basis, Sewage and refuse disposal services, Sanitation and similar services. *Non-Priority services* include: Hotel and restaurant services, Rail transport services, Water transport services, Supporting and auxiliary transport services, Legal services, Personnel placement and supply services, Investigation and security services, Education and vocational education services, Health and social services, Recreational, cultural and sporting services. The division was not permanent and the European Commission had under constant review the situation, by assessing the performance of “non-priority” services sectors. The two-tier approach, in practical terms, means that the award of priority services contracts are subject to the rigorous regime of the public procurement Directives (advertisement, selection of tenderers, award procedures, award criteria), whereas the award of non-priority services contracts must follow the basic rules of non-discrimination and publicity of the results of the award.

⁵⁹ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 03/12/2007.

⁶⁰ See Mihalis Kekelelis and Ioana Eleonora Rusu, *The Award of Public Contracts and the notion of “Internal Operator” Under Regulation 1370/2007 on Public Passenger Transport Services by Rail and by Road*, *Public Procurement Law Review* (2010).

⁶¹ See Regulation 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast), OJ L 293, 31.10.08

In the utilities sector, the grant of exclusive rights for the operation of a network is part of specific legislative measures aimed at liberalizing such sectors. An exclusive right granted in compliance with EU law makes it unnecessary and redundant to follow a competitive procedure for the award of a concession of network management services to the holder of an exclusive right since no other competitor would be in a position to apply for such contract. Moreover, the transparency resulting from a mandatory publication of the act granting the exclusive right should permit all interested parties to fully evaluate the compliance of such right with Treaty or Union sectoral legislation.

vii. Concessions of Sub-dimensional Value

Currently, secondary legislation on Public Procurement applies only to public contracts and works concessions of a value equal to or superior to a certain threshold, above which they are subject to a presumption of cross-border interest. Similarly, national provisions on concessions usually apply only to contracts above a certain value. Thresholds currently applicable to public contracts and works concessions indicate not only their economic importance, but also reflect a political consensus on their cross-border interest. The appropriate threshold for service concessions should therefore reflect the extent to which economic operators located in other Member States are interested in such concessions. However, such interest depends not only on the value of the concession but also on its geographic location, the sector concerned, differences in economic wealth, the rate at which concessions are used, and costs (including labor costs). To assess the cross-border interest would mean gathering data on the actual participation of non-domestic companies in bidding procedures for concessions of different values. Accessing such information is extremely difficult if not impossible, given the existing lack of transparency.

Furthermore, reference to existing national thresholds is largely irrelevant, not only because they differ widely in those Member States which have regulated concessions, but also because national thresholds reflect interests of national policy rather than the cross-border interest of the contracts. It does not appear appropriate to take the existing thresholds for service contracts and automatically extend them to service concessions, since concession contracts have a higher value and are more complex and longer-term. The same applies to the method used for calculating the value of public service contracts. Indeed, given that in concession contracts the investments and revenues are often spread over many years, it seems inadequate to calculate the contract value on the basis of a fixed and limited initial time span (as is the case with public contracts). Consequently, the threshold value applicable to a service concession should be calculated on the basis of the total value of services provided during the whole duration of the concession. Against this background, it does not seem appropriate to establish a threshold for service concessions that is equal to or slightly greater than the one applicable to public service contracts but calculated on the basis of the total value of services stipulated. The risk is that this threshold would cover concessions that have no clear cross-border interest and would impose unreasonable costs and administrative burdens both on contracting authorities and companies.

viii. Direct Awards and Concessions

In many Member States concession markets remain predominantly national, with a limited presence of companies originating in other EU Member States. Entry barriers stem from divergent national legal regimes for the award of concessions, as well as from

inappropriate or even unlawful practices of the national awarding authorities. Identified divergence of legal regimes in member States reveals several potential problems, including issues with the definition of concession, whereby economic operators have to contend with a complex pattern of setups considered to be concessions in different Member States (e.g., administrative authorizations or licenses) and contracts qualifying as concessions under EU law but not considered as such by national legislators. In addition, divergent publication standards where, as a result of different national frameworks, concessions of the same type and importance are being published at different levels in different Member States and even within the same Member State (e.g., in a local or trade newspaper, on the contracting entity's website, in the official journal, or even in the OJEU) frustrate an EU-wide concession market from developing.⁶²

Barriers emanating from a divergence of national regimes are made worse by the often unlawful practices of contracting authorities, which stem from the lack of clarity of EU rules. One of the fundamental problems in this regard is the direct award of a concession contract with a cross-border interest. Direct awards originate from inadequate application of the principle of transparency, either by national lawmakers or by contracting authorities.⁶³ This concerns, in particular, Member States that do not regulate the award of concessions, but it also often concerns Member States where the award is governed by national rules.

Direct awards have particularly negative consequences for the proper functioning of the Internal Market. This applies to concession contracts, which are often extended or renewed without any competition or transparency. Another unlawful practice concerns the award of public contracts in accordance with lenient rules applicable to concessions, thus undermining the effectiveness of Public Procurement rules. In other instances, concessions are granted as licenses or authorizations (usually encompassing exclusive rights) in breach of the Treaty principles. This means that a concession contract is wrongly qualified as a unilateral act and may be granted without a competitive procedure. Despite this, the Court has made it clear that granting a license encompassing an exclusive right must comply with the principles of equal treatment and transparency.⁶⁴ It also acknowledged the existence of a wide derogation from these principles, excluding from this transparency obligation licenses granted to either public operators subject to direct State supervision or private operators subject to strict control by the public authorities.

Finally, the lack of clear rules also leads to the unlawful use of non-objective selection and award criteria.⁶⁵ This is the case when objectives unrelated to the subject

⁶² This is the case of a German notion of "*Konzession*." Licences or authorizations are acts whereby a public authority authorizes the exercise of an economic activity. While certain conditions for carrying out the activity usually need to be met by the licensee, or he might have been assigned certain public service obligations linked to the licensed activity, the authorization does not principally aim at assigning a given public task to the licensee. See, European Commission, Assessment of an Initiative on Concessions, Brussels, 20.12.2011, SEC(2011) 1588fin.

⁶³ See European Commission, *Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions*, COM (2004) 327 fin.

⁶⁴ See Case C-203/08, *Sporting Exchange Ltd Betfair v Minister van Justitie*, Judgment of the Court (Second Chamber) of 3 June 2010.

⁶⁵ Under the Directive, qualification criteria need to relate to technical, economic and financial capacity, whereas award criteria relate to price or the economically most advantageous tender. These requirements do not concern either work or service concessions. For example in France, until recently the award was to a large extent dependent on the "*intuitu personae*" or the relation of personal trust between the contracting authority and the concessionaire. In Lithuania, the "effect of the tender on the social and economic development of the country or an appropriate region" may be used as an award criterion which may give rise, in view of its wide scope, to possible discrimination. European Commission, Assessment of an Initiative on Concessions, Brussels, 20.12.2011, SEC (2011) 1588fin.

matter of the contract are included in the evaluation of the best offer. For instance, contracting authorities may want to take into account tenderers' social commitments not related to the subject matter of the contract or relations of trust with one of the bidders. Non-objective and discriminatory criteria undermine the fairness of the award. The same can be said about discretion in setting selection criteria, which may lead to some certain companies being disadvantaged. This problem concerns Small and Medium Enterprises (SMEs) in particular, which appear to be reduced largely to the role of sub-contractors.⁶⁶

Commented [KF1]: Small-Medium Enterprises? Need to Spell out acronym.

The above problems primarily concern service concessions and works concessions in the Utilities sector, as the existing provisions on works concessions in the Classic Directive cover the issues of publication. By contrast, the problems related to the misapplication of the Treaty principles at later stages of the award procedure may also concern works concessions, although to a lesser extent.

Pursuant to Article 47 of the Charter of Fundamental Rights of the EU, anyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy.⁶⁷ However, this right is not fully ensured to tenderers participating in procedures for the award of concessions. The Remedies Directive does not cover concessions falling outside the scope of the Classic Directive.⁶⁸ Hence, tenderers do not benefit from an adequate system guaranteeing effective enforcement of EU Treaty principles. Although some Member States (such as France, Portugal, and Romania) extended the application of the Remedies Directive to service concessions, a number of others (Germany, UK, Sweden, and Netherlands, for instance) have not done so.⁶⁹ It is maintained that some important guarantees provided for by the Remedies Directive (such as the obligation to refrain from concluding a contract before the expiry of the standstill period or the conditions for ineffectiveness of concessions awarded directly) are not available in many Member States. As a result, the aggrieved economic operators cannot adequately tackle potential violation of the EU Treaty principles. Moreover, any arbitrariness of contracting authorities enjoying wide discretion throughout the tendering process escapes effective scrutiny. Taking into account the number of concessions reported to be either awarded directly or tendered according to inadequate standards, this may effectively lead to a continuous failure to redress national situations of deficiency or non-compliance with the application of the Treaty principles.

Legal certainty is essential to any economic activity and is particularly important in the context of long-term, high-value contracts such as most concessions. However, the grant of concessions is currently impaired, on the one hand by the lack of a clear and adequate definition of these contracts in EU law and, on the other hand, by the imprecise character of the obligations arising from the Treaty principles. These problems are often not resolved by national regimes for awarding concessions. Uncertainty with regard to the definition of concession appears already at the stage of qualification of a given arrangement as falling within the scope of the rules on public purchases. The distinction between public contracts and concessions on the one hand and other types of agreements or unilateral acts (such as licenses and authorization schemes) on the other hand, is unclear and stakeholders (e.g., in the ports sector) reported that it is often

⁶⁶ See Report on the Public Consultation on the Green Paper on PPP and Community Law on Public Contracts and Concessions 11, SEC (2005) 629.

⁶⁷ Article 47 of the Charter of Fundamental Rights in the EU, OJ. C C 364/1, 18.12.2000.

⁶⁸ See Directive 2007/66/EC of 11 December 2007, OJ L335/31.

⁶⁹ See European Commission, Assessment of an Initiative on Concessions, Brussels, 20.12.2011, SEC(2011) 1588fin.

difficult to know which legal regime applies to a given scheme.⁷⁰ Furthermore, the lack of clarity stretches to certain activities carried out in the form of public-public cooperation.

The current definition of concessions makes it difficult to distinguish between concessions and public contracts. The Commission provided some clarity in this respect in its Interpretative Communication, explaining that the risk inherent in the exploitation of the work or service that the concessionaire has to bear is the essential feature of a concession.⁷¹ Although the case law of the Court shed some light on this definition, fundamental elements, such as the level and types of risk, still remain unclear.⁷² There is also some uncertainty regarding the distinction between works concessions and service concessions. Indeed, most works concessions also involve, to a certain extent, the provision of services. And, as it is not always easy to ascertain what the main purpose of the contract is, certain works concessions might be awarded as service concessions, thus unduly avoiding the application of the secondary rules.⁷³

Moreover, Member States' definitions of concession do not remove the aforementioned uncertainty at EU level. Some of them are as unclear as the current definition in the Directive. Moreover, it is unclear whether those national definitions that provide additional clarification do in fact comply with EU law.

The legal uncertainty regarding the definition of concessions is compounded by doubts regarding the content and application of the obligations of transparency and non-discrimination arising under the Treaty, which guide the award of concessions. Although the Court confirmed in *Telaustria* that contracting authorities that award concessions are bound to comply with the fundamental rules of the Treaty, it did not sufficiently explain the content of those rules.⁷⁴ Thus it remains difficult to judge the adequacy of measures aimed at ensuring compliance with the principles of equal treatment, non-discrimination, and transparency. A problem of uncertainty as to the applicable rules has also been identified in case of a contract modification. Many stakeholders have identified this issue as an important one. Although the case law of the Court applicable to modifications of public contracts also applies to concessions, the level of certainty provided by these judgments does not seem to be adequate.

As concession award regimes in Member States are often unclear, or in case of services concession, non-existent, the burden of ensuring, in each specific case, the compliance with the procedures to be followed under the Treaty principles falls on

⁷⁰ See Christopher H. Bovis, *Public Procurement and Public Services in the EU* in REGULATING TRADE IN SERVICES IN THE EU AND THE WTO: TRUST, DISTRUST AND ECONOMIC INTEGRATION, Lianos and Odudu Eds, 287 Cambridge University Press (2012).

⁷¹ See Commission Interpretative Communication on Concessions under Community Law 2-13, O.J. C 121, 29.4.2000 (2000).

⁷² Case law is still not sufficiently clear, in particular regarding the level of operating risk to be transferred to the economic operator so that a contract can qualify as a concession. It appears that Case C-437/07, *Commission v. Italy* [2008] ECR I-00153 and Case C-300/07, C-300/07, *Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik v. AOK Rheinland/Hamburg*, [2009] ECR I-4779 are difficult to interpret along Case C-206/08, *WAZV.Gotha v. Eurawasser Aufbereitungs*, [2009] ECR I-8377. The uncertainty is increased by lingering doubts on the categories of risk that can be transferred to the concessionaire. While demand risk for services seems to be widely accepted as relevant for the definition of a concession, there is uncertainty as to what other categories of risk (availability, construction, legal, and political) should also qualify. See *Eurawasser* [2009] ECR I-08377, at ¶ 79 (where the court ruled that “general risk resulting from amendments to the rules made in the course of performance of the contract cannot be taken into account”).

⁷³ See Case C-331/92, *Gestion Hotelera Internacional* [1994] ECR I-01329; see also Case C-220/05, *Jean Auroux and Others v. Commune de Roanne*, [2007] ECR I-00385, ¶¶ 36-37.

⁷⁴ See Case C-324/98, *Telaustria and Telefonadress*, [2000] ECR I-10745.

contracting authorities. Contracting authorities are faced with a situation where they apply national rules or ad hoc award procedures that do not necessarily meet EU Treaty standards. Similarly, economic operators remain uncertain about the legality of the procedures followed.

The current situation of uncertainty at several levels is causing significant economic inefficiencies and is prejudicial to contracting authorities, economic operators, and users of the services provided. For contracting authorities, the lack of legal certainty increases the risks and costs of cancellation or early termination of illegally awarded contracts, and ultimately prevents them from using concessions where this type of contract might be a good solution. This may have the effect of reducing the uptake of PPPs, resulting in missed opportunities for engaging private investments and know-how. This is particularly the case in new Member States, where uncertainty is compounded by a lack of experience. Indeed, contracting authorities may often prefer to remain within the framework of the direct provision of services, rather than confer these activities to a private operator on the basis of a concession.

b. The Contractual PPP

The contractual model of public private partnerships reflects on a relation between public and private sectors, which is based solely on contractual links. It is unlikely that there would be any element of exclusive asset exploitation or end user payments levied by the private sector partner. However, mechanisms of profit sharing, efficiency gain sharing, as well as risk allocation between the public and private partners distinguish contractual PPPs from traditional public contracts for works or services. The contractual model of PPPs assumes that the private sector partner will provide the financing for completing the project and the public sector partner will pay back by way of “service or unitary charges” which reflect payments based on usage volumes or demand (i.e., payments in lieu of fees or tolls for public lighting, hospitals, schools, or roads with shadow tolls). A variety of types of contractual PPPs have been developed in many jurisdictions including the EU, US, Canada, Australia, and Malaysia.

c. The Institutional PPP

The institutional model of public private partnerships involves the establishment of a separate legal entity held jointly by the public partner and the private partner. The joint entity has the task of ensuring the raising of finance and the delivery of a public service or an infrastructure project for the benefit of the public. The direct interface between the public partner and the private partner in a forum with a distinctive legal personality allows the public partner, through its presence in the body of shareholders and in the decision-making bodies of the joint entity, to retain a relatively high degree of control over the development and delivery of the project. The joint entity could also allow the public partner to develop its own experience of running and improving the public service in question, while having recourse to the support of a private partner. An institutional public private partnership can be established either by creating an entity controlled by the public and private sector partners, or by the private sector taking control of an existing public undertaking or by the participation of a private partner in an existing publicly owned company which has obtained public contracts or concessions.⁷⁵

⁷⁵ See Christopher H. Bovis, *Future Directions in Public Private Partnerships*, in *THE LAW OF THE FUTURE AND THE FUTURE OF THE LAW*, Muller, Zouridis, Frishman and Kistemaker, (Eds), Torkel Opsahl, Oslo, 782 (2012).

IV. The Operational Types of Public-Private Partnerships

Three major operational types of public private partnerships exist:

First, the private sector designs, builds, owns, develops, operates, and manages an asset with no obligation to transfer ownership to the public sector. PPPs with such modalities include formats such as:

- Design-Build-Finance-Operate (DBFO), where the private sector partner designs, builds, finances, and operates a public asset covering all aspects of management and maintenance with an option to sell at the end of the contractual period.⁷⁶
- Build-own-operate (BOO), where the private sector partner finances, builds, owns, and operates a facility or service for a stipulated period. Public sector control is exercised through the original contract or through a regulatory authority. After specified period, there could be the possibility that ownership is transferred back to the public sector.⁷⁷
- Build-develop-operate (BDO), where the private sector finances, builds, develops commercially, and operates for a stipulated period an asset or a facility.⁷⁸
- Design-construct-manage-finance (DCMF), where the private sector finances the design and construction of a facility or infrastructure and subsequently manages it for a stipulated period.⁷⁹

Secondly, the private sector buys or leases an existing asset from the public sector, renovates, modernizes, and/or expands it, and then operates the asset, again with no obligation to transfer ownership back to the public sector. PPPs with such modalities include formats such as:

- Buy-build-operate (BBO), where the public sector transfers a public asset to the private or quasi-public sector partner to operate and maintain for a specified period of time. Public sector control is exercised at the time of transfer.⁸⁰
- Lease-develop-operate (LDO), where the public sector leases a public asset to the private or quasi-public sector partner to operate and maintain for a specified period of time. Public sector control is exercised at the initiation of lease.⁸¹

⁷⁶ Design-Build-Finance-Operate (DBFO) Public Private Partnerships include the delivery of hospitals where ownership of the facility stock is retained by the private sector.

⁷⁷ Build-own-operate (BOO) Public Private Partnerships include the delivery of prisons, where regulatory regimes regarding standards operate alongside the retention of ownership of the assets by the private sector.

⁷⁸ Build-develop-operate (BDO) Public Private Partnerships include the delivery of commercial developments such as exhibition centers and recreational facilities where ownership of the facility stock is retained by the private sector.

⁷⁹ Design-construct-manage-finance (DCMF) Public Private Partnerships include the finance and delivery of schools and university accommodation projects.

⁸⁰ Buy-build-operate (BBO) Public Private Partnerships include housing and regeneration development contracts between local and municipal authorities and the private sector.

- Operate under License (OL): The private sector partner receives a license or rights to operate a public service, usually for a specified term. This is often used in IT projects. The options available for delivery of public services range from direct provision by a ministry or government department to outright privatization, where the public sector transfers all responsibilities, risks, and rewards for service delivery to the private sector. Within this spectrum, public-private partnerships can be categorized based on the extent of public and private sector involvement and the degree of risk allocation.⁸²

Thirdly, the private sector designs and builds an asset, operates it, and then transfers it to the public sector when the operating contract ends, or at some other specified time. The private partner may subsequently rent or lease the asset from the public sector. PPPs with such modalities include formats such as:

- Build-operate-transfer (BOT), where the private sector designs, finances, and constructs a new facility under a long-term contract, and operates the facility during the term of the contract after which ownership is transferred back to the public sector if not already transferred upon completion of the facility.⁸³
- Build-own-operate-transfer (BOOT), where a private entity receives a franchise or a concession to finance, design, build, and operate a facility (and to charge user fees) for a specified period, after which ownership is transferred back to the public sector.⁸⁴
- Build-lease-operate-transfer (BLOT), where a private entity receives a franchise to finance, design, build, and operate a leased facility (and to charge user fees) for the lease period, against payment of a rent.⁸⁵

V. The Financing of Public–Private Partnerships

A public-private partnership financing can take one of the following forms: (i) *a stand-alone project*, where the funding raised is for only one specific project; (ii) *a Special Purpose Vehicle* as the borrower, where an independent legal vehicle (SPV) is created to raise the funds required for the project; (iii) a high ratio of debt to equity through either gearing or leverage, where the newly created project company usually has the minimum equity required to issue debt for a reasonable cost, with equity generally

⁸¹ Lease-develop-operate (LDO) Public Private Partnerships include housing and regeneration development projects and the delivery of commercial developments such as exhibition centers and recreational facilities where the lease-holding of the facility stock is retained by the private sector.

⁸² Operate under License (OL) Public Private Partnerships include the delivery of IT related projects in the health, transport and defence sectors, where the private sector engages through licenses with the public sector to deliver a project.

⁸³ Build-operate-transfer (BOT) Public Private Partnerships include the delivery of infrastructure projects in transport such as motorways and bridges.

⁸⁴ Build-own-operate-transfer (BOOT) Public Private Partnerships include the delivery of government buildings and accommodation project, with the option or obligation to transfer ownership of an asset at the end of the Partnership's life span.

⁸⁵ Build-lease-operate-transfer (BLOT) Public Private Partnerships include the delivery of transport infrastructure projects such as airports and ports.

averaging between 10 to 30 percent of the total capital required for infrastructure projects; (iv) *private lending* based on project specific cash flow and not a corporate balance sheet, where the project company borrows funds from lenders. The lenders look to the projected future revenue stream generated by the project and the project company's assets to repay all loans; and (v) *various financial guarantees*, where the guarantees are provided by the private sector partners, often limited to their equity contributions.⁸⁶ The state usually does not provide financial guarantees to lenders. As a result of the private sector guarantees, the lender receives its payment from the income generated from the project or directly from the public sector.

The private sector can raise funds for investment in public-private partnerships through a variety of ways. First, where services are destined for the public as end-users, the private sector can access private financing in the money markets using the projected income stream from the public paying for the public services (i.e., toll revenue) as collateral. However, where the public sector is the main recipient or purchaser of the relevant services from the PPP, payments related to the demand for services or service payments by the public sector under operating contracts, which are based on continuity of service supply, can be used (i.e., shadow tolls paid by the public sector). The public sector may also make a direct contribution to project costs. This can take the form of equity (where there is profit sharing), a loan, or a subsidy (where social returns exceed private returns). The public sector can also guarantee private sector borrowing.

Second, public-private partnership financing can be provided via special purpose vehicles (SPVs) comprising consortia of banks and other financial institutions, which are set up to combine and coordinate the use of their capital and expertise, as well as share any relevant risks. Accountancy treatment of the SPV's consolidated accounts is aligned with the party that controls the SPV.⁸⁷ If the private sector partner controls the SPV, its debt is recorded off-balance sheet for public sector borrowing considerations. If an SPV is controlled by the public sector, it should be consolidated with public sector borrowing, and its operations should be reflected in the fiscal accounts. A private partner controlled SPV could be used to move debt from the public sector balance sheet through the direct involvement of public financial institutions, an explicit government guarantee of borrowing by an SPV, or a presumption that the public sector stands behind it. However, if risk stays with the public sector, even if the SPV is controlled by the private sector partner, the SPV consolidation should be recorded in the public sector accounts.⁸⁸

Third, a public-private partnership can be financed by securitization of claims on future project revenues. In a typical PPP securitization operation, the public sector would sell a financial asset—its claim on future project revenue—to an SPV. The SPV would then sell securities backed by this asset to private investors and use the proceeds to pay the public sector, which in turn would use them to finance the PPP. Interest and amortization would be paid by the SPV to investors from the public sector's share of project revenue. Since investors' claim is against the SPV, government involvement in

⁸⁶ See T. IRWIN, GOVERNMENT GUARANTEES: ALLOCATING AND VALUING RISK IN PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (2007).

⁸⁷ The International Financial Reporting Interpretations Committee (IFRIC) of the International Accounting Standards Board (IASB) identifies four criteria for consolidation: i) SPV operations are decided by the originator; ii) the originator controls the SPV; iii) the originator benefits most from the SPV; and iv) the originator assumes SPV risk. See INTERNATIONAL PUBLIC SECTOR ACCOUNTING STANDARDS (IPSASs) AND STATISTICAL BASES OF FINANCIAL REPORTING: AN ANALYSIS OF DIFFERENCES AND RECOMMENDATIONS FOR GOVERNANCE OF PPPs, January 2005.

⁸⁸ See INTERNATIONAL MONETARY FUND, LIMITS ON EXTERNAL DEBT OR BORROWING IN FUND ARRANGEMENTS-PROPOSED CHANGE IN COVERAGE OF DEBT LIMITS, EBS/00/128 (2000).

the PPP appears limited. However, the public sector is in effect financing the PPP, although recording sale proceeds received from the SPV as revenue masks this fact. Securitization operations have often raised questions as to their appropriate accounting treatment. If assets or real estate are sold to an SPV below market price for the latter to use as collateral in issuing bonds on its own account to pay the public sector, the bonds should be treated as debt and the sale of the real estate should be recorded on budget because the risks and rewards related to ownership have not been transferred to the SPV.

VI. Risk and Public–Private Partnerships

a. Assessing Risk Transfer in Public-Private Partnerships

Some criteria have been devised to assess the degree of risk transfer involved in PPPs. Where PPP contracts do not provide a basis on which to distinguish between the risks associated with ownership and operation, the extent of risk transfer can be assessed by reference to the overall risk characteristics of a PPP, where the specific aim for separable contracts (a distinction between asset ownership and delivery of public service elements) and non-separable contracts, is to determine whether the public sector or the private operator has an asset in a PPP.⁸⁹

For non-separable contracts, the baseline for the assessment rests on the balance of demand risk and residual value risk borne by the public sector and the private operator. Demand risk, which is an operating risk, and is the dominant consideration, is borne by the public sector if service payments to a private operator are independent of future need for the service. Residual value risk, which is an ownership risk, is borne by the public sector if a PPP asset is transferred to the public sector for less than its true residual value. Residual value risk is borne by the public sector because the private operator reflects the difference between the expected residual value of the asset and the price at which the asset will be transferred to the public sector in the price it charges the public sector for services, or the revenue the public sector receives from a project. If the asset ends up being worth more or less than the amount reflected in the service payment or government revenue, any resulting gain benefits the public sector and any or loss is borne by the public sector. Reference can also be made to various qualitative indicators, including government guarantees of private sector liabilities, and the extent of government influence over asset design and operation. The final conclusion is a judgment based on all relevant factors.

The European Union has provided guidance on the classification of PPP assets based on risk transfer. Eurostat has issued a Decision which holds that a private partner will be assumed to bear the balance of PPP risk if it bears most of the construction risk, and either most of the availability risk (which is also referred to as performance risk) or most of the demand risk.⁹⁰ The Eurostat Decision covers long-term contracts in areas where the private partner builds an asset and delivers services mainly to the public sector. Eurostat recommends that assets involved in public-private partnerships should be classified as non-government assets, and therefore recorded off balance sheet for

Commented [FC2]: Can the author please provide at least two footnotes throughout this paragraph to support all of this terminology/ definitional discussion?

⁸⁹ See INTERNATIONAL FINANCIAL REPORTING INTERPRETATIONS COMMITTEE [IFRIC], CONSOLIDATION: SPECIAL PURPOSE ENTITIES, STANDING INTERPRETATION COMMITTEE (SIC) 12 (1999).

⁹⁰ See Eurostat decision on DEFICIT AND DEBT TREATMENT OF PUBLIC PRIVATE PARTNERSHIPS, STAT/04/18, 11 February 2004.

government: if: (i) the private partner bears the construction risk, and (ii) the private partner bears one of either availability or demand risk.

Construction risk covers events such as late delivery, low standards, additional costs, technical deficiency, and external negative effects. If the public sector makes payments to the private partner irrespective of the state of the asset, this indicates that the public sector bears most of the construction risk. Availability risk relates to the ability of the private partner to deliver the agreed volume and quality of service. Public sector payments to the private partners that are independent of service delivery indicate that the public sector bears most of the delivery risk. Demand risk covers the impact of the business cycle, market trends, competition, and technological progress on the continued need for the service. Public sector payments to the private partner that are independent of demand indicate that the public sector bears most of the demand risk. Changes in demand due to changes in government policy are excluded.

Commented [FC3] : Can the author please add citations to this paragraph (see comment [2]).

VII. The Procurement of Public–Private Partnerships

Considerable emphasis has been placed on observing the principles of transparency and accountability, competitiveness and value for money during the procurement process of public-private partnerships.⁹¹

When a transaction creating a mixed-capital entity is accompanied by the award of tasks through an act that can be designated as a public contract, or even a concession, it is important that there be compliance with the principles of transparency and accountability, as well as the principle of non-discrimination. The principles of transparency and accountability depict the skeleton of public procurement regulation. They have direct influence on two fronts: a) the behavioral patterns of the state, public bodies and contracting authorities and b) the emergence and structure of a *sui generis* market place. The regulation of public procurement, through the principles of transparency and accountability provides for a pedestal of the legal, economic and policy interface between public and private sectors. Changes have been signaled by European Institutions towards a rethink of the role of the private sector in delivering public services. The conceptual themes of public private partnerships (PPPs) and services of general economic interest are classic examples. The principles of transparency and accountability emanating from public procurement regulation also have a transferable nature within public administrations of Member States. Although generic at first sight, their application unfolds desirable effects in the spheres of law and policy, effects which have long lasting influences.

The selection of a private partner called on to undertake such tasks while functioning as part of a mixed entity can therefore not be based exclusively on the quality of its capital contribution or its experience, but should also take account of the characteristics of its offer in terms of the specific services to be provided. The conditions governing the creation of the entity must be clearly laid down when issuing the call for competition for the tasks that one wishes to entrust to the private partner. Also, these conditions must not discriminate against or constitute an unjustified barrier to the freedom to provide services or to freedom of establishment, or be disproportionate to the desired objective.

Commented [FC4] : Must according to whom? Is this the author's original theory or definitional? If it is definitional, can the author please provide footnotes in support of these statements.

⁹¹ See Christopher H. Bovis, *The Effects of the Principles of Transparency and Accountability on Public Procurement Regulation*, in *LEGAL CHALLENGES IN EU ADMINISTRATIVE LAW* 288–321 (Hoffman and Turk eds., 2009).

In this context, the transaction involving the creation of such an entity does not generally present a problem in terms of the applicable Community law when it constitutes a means of executing the task entrusted under a contract to a private partner. However, the conditions governing the creation of the entity must be clearly laid down when issuing the call for competition for those tasks that one wishes to entrust to the private partner. Also, these conditions must not discriminate against or constitute an unjustified barrier to the freedom to provide services or the freedom of establishment, or be disproportionate to the desired objective.

In many jurisdictions, legislation allows the mixed entities, in which the participation by the public sector involves the contracting body, to participate in a procedure for the award of a public contract or concession even when these entities are only in the course of being incorporated.⁹² In this scenario, the entity will be definitively incorporated only after the contract has actually been awarded to it. In many states a practice has developed that tends to confuse the phase of incorporating the entity and the phase of allocating the tasks.⁹³ Thus the purpose of the procedure launched by the contracting authority is to create a mixed entity to which certain tasks are entrusted.

Commented [FC5] : Is this the same practice as referred to in the above two sentences? Please clarify because this is confusing as written. Thank you.

Such a solution is not satisfactory. In the first case, there is a risk that the effective competition will be distorted by the privileged position enjoyed by the company being incorporated and, consequently, by the private partner participating in this company. In the second case, the specific procedure for selecting the private partner also poses many problems. The contracting authorities encounter certain difficulties in defining the subject matter of the contract or concession in a sufficiently clear and precise manner, as they are obliged to do. This in turn raises problems not only with regard to the principles of transparency and equality of treatment, but even risks prejudicing the general interest objectives that the public authority wishes to attain. It is also evident that the lifetime of the created entity does not generally coincide with the duration of the contract or concession awarded, and this appears to encourage the extension of the task entrusted to this entity without true competition at the time of this renewal. In addition, it should be noted that the joint creation of such entities must respect the principle of non-discrimination with respect to nationality in general, and the free circulation of capital in particular. Thus, for example, the public authorities cannot normally make their position as shareholder in such an entity contingent on excessive privileges that do not derive from a normal application of company law.⁹⁴

On the other hand, the creation of an institutional public private partnership may also lead to a change in the body of shareholders of a public entity. When public authorities grant an economic operator a definite influence in a business under a transaction involving a capital transfer, and when this transaction has the effect of

⁹² For example, national legislation in Spain, Italy, France, Portugal, Germany allows the participation of a mixed-capital entity in public procurement for the award of a service or works contract during their incorporation stages. See Christopher H. Bovis, *Future Directions in Public Private Partnerships*, in THE LAW OF THE FUTURE AND THE FUTURE OF THE LAW, Muller, Zouridis, Frishman and Kistemaker, (Eds), Torkel Opsahl, Oslo, 782 (2012).

⁹³ In the UK, Sweden, the Netherlands, Austria and Belgium, national legislation allows for the fusion of award of a partnership or a concession contract and the incorporation of the entity which will perform the public service or task allocated as a result of the conclusion of the Public-Private Partnership. See Christopher H. Bovis, *Future Directions in Public Private Partnerships*, in THE LAW OF THE FUTURE AND THE FUTURE OF THE LAW, Muller, Zouridis, Frishman and Kistemaker, (Eds), Torkel Opsahl, Oslo, 782 (2012).

⁹⁴ See Case C-367/98, *Commission v. Portugal*, ECR I-4731 (2002); Case C-483/99, *Commission v. France*, ECR I-4781 (2002); See also, Case C-463/00, *Commission v. Spain*, ECR. I-4581 (2003); Case C-98/01, *Commission v. United Kingdom*, ECR. I-4641 (2003). On the possible justifications in this framework, see Case C-503/99, *Commission v. Belgium*, ECR I-4809 (2002).

entrusting to this operator tasks falling within the scope of the law on public contracts which had been previously exercised, directly or indirectly, by the public authorities, the provisions on freedom of establishment require compliance with the principles of transparency and equality of treatment in order to ensure that every potential operator has equal access to performing those activities that had been reserved.

VIII. Public-Public Co-operation in Delivering Public Services

a. *The In-House Arrangements*

EU law does not restrict the freedom of a contracting authority to perform the public interest tasks conferred on it by using its own administrative, technical, and other resources. As such, contracting authorities need not call upon outside entities, which are not a part of their own structures.⁹⁵ If a contracting authority performs a public task by using its own resources in such a way that no contract for pecuniary interest is concluded, EU public procurement law does not apply. Moreover, the possibility to perform public tasks using its own resources may also be exercised in cooperation with other contracting authorities. Several contracting authorities may mutually assist each other. If this does not involve remuneration or any exchange of reciprocal rights and obligations, there is no contractual interface within the meaning of EU public procurement law, and thus, EU public procurement legislation does not apply.

Article 6 of the Services Directive provides for the inapplicability of the public procurement Directives to service contracts that are awarded to an entity—that is itself a contracting authority within the meaning of the Directive—on the basis of an exclusive right that is granted to the contracting authority by a law, regulation, or administrative provision of the Member State.⁹⁶ Article 13 of the Utilities Directive provides for the exclusion of certain contracts between contracting authorities and affiliated undertakings.⁹⁷ An affiliated undertaking, for the purposes of Article 1(3) of the Utilities Directive, is one the annual accounts that are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Company Law Directive.⁹⁸ There are service contracts awarded to a service provider affiliated with the contracting entity, and there are service contracts awarded to a service provider affiliated with a contracting entity participating in a joint venture, formed for the purpose of carrying out an activity covered by the Directive. The explanatory memorandum accompanying the text amending the Utilities Directive states that this provision relates, in particular, to three types of service provisions within groups.⁹⁹ These categories, which may or may not be distinct, are: (i) the provision of common services such as accounting, recruitment, and

⁹⁵ See Case C-26/03, *Stadt Halle and RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*, [2005] ECR I-00001, ¶ 48.

⁹⁶ This practice resembles the market testing process often employed in the United Kingdom between a contracting authority and an in-house team. See I. Harden, *Defining the range of application of the public sector procurement Directives in the United Kingdom*, 1 PUBLIC PROCUREMENT LAW REVIEW 362 (1992).

⁹⁷ See Article 13 of Directive 2004/17, OJ L 134, 30.4.2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

⁹⁸ See Directive 83/349/EEC as regards the valuation rules for the annual and consolidated accounts of certain types of companies as well as of banks and other financial institutions as amended by Directive 2001/65/EC of the European Parliament, OJ L283 of 27.10.2001.

⁹⁹ See Directive 90/531, O.J.1990 L 297 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.(COM (91) 347-SYN 36 1.

management; (ii) the provision of specialized services embodying the know-how of the group, and; (iii) the provision of a specialized service to a joint venture.¹⁰⁰

The exclusion from the provisions of the Directive is subject, however, to two conditions: first, the service provider must be an undertaking affiliated with the contracting authority and, second, at least 80 per cent of its average turnover arising within the European Community for the preceding three years, must be derived from the provision of the same or similar services to undertakings with which it is affiliated.¹⁰¹ The Commission is empowered to monitor the application of this Article and require the notification of the names of the undertakings concerned and the nature and value of the service contracts involved.

Dependency, in terms of overall control of an entity by the state or another contracting authority presupposes a control similar to that which the state of another contracting authority exercises over its own departments. The “similarity” of control denotes lack of independence with regard to decision-making. The Court in *Teckal*, concluded that a contract between a contracting authority and an entity, which the former exercises control similar to the control that it exercises over its own departments, and at the same time that entity carries out the essential part of its activities with the contracting authority, is not a public contract, irrespective of that entity being a contracting authority or not.¹⁰² The similarity of control as a reflection of dependency reveals another facet of the thrust of contracting authorities: the non-applicability of the public procurement rules for in-house relationships.

b. Similarity of Control

Teckal provided flexibility in determining the concept of “contracting authorities” and established the non-applicability of the procurement rules to in-house relations.¹⁰³ The first criterion of *Teckal* is present when “control similar to that which the contracting entity exercises over one of its own departments” is evident.¹⁰⁴ The notion of control and the *similarity* requirement merit a comprehensive approach, which should not be based solely on either company law features or on the level of the contracting authority’s shareholding. Normally, corporate control indicates decisive influence over management actions, operational, and strategic decisions in a similar manner to the concept of majority shareholder control found in company laws of Member States. Nevertheless, any appraisal of the legal position of a majority shareholder in order to assert control must be

¹⁰⁰ *ibid*.

¹⁰¹ *ibid*.

¹⁰² See Case C-107/98, *Teckal Srl v Comune di Viano* [1999] ECR I-8121.

¹⁰³ *ibid*.

¹⁰⁴ The *Teckal* first criterion is present when *control similar to that which the contracting entity exercises over one of its own departments* is evident. The notion of control and the *similarity* requirement merit a comprehensive approach, and not one solely based on company law features or one which is based on the level of the contracting authority’s shareholding (or, conversely, that of the minority shareholder). Normally, corporate control indicates decisive influence over management, operational and strategic decisions, in a similar fashion to the concept of majority shareholder control found in various company laws of the Member States. Nevertheless, any appraisal of the legal position of a majority shareholder in order to assert control must be taken in conjunction with the statutes governing the relevant entity over which the control is exercised and not by sole reference to national company law provisions, as often minority shareholdings give rights of decisive influence, such as specific oversight and blocking rights. See Christopher H. Bovis, *Public Procurement in the EU: Jurisprudence and Conceptual Directions*, *Common Market Law Review* 49: 1–44, (2012).

Formatted: Italian (Italy)

Formatted: Italian (Italy)

Formatted: Italian (Italy)

taken in conjunction with the statutes governing the relevant entity over which the control is exercised and not by sole reference to national company law provisions, as often minority shareholdings provide for rights of decisive influence, such as specific oversight and blocking rights.

The notion of control for the purposes of in-house contracts, as developed by the Court, entails much more than the ingredients of “dominant influence” as a company law notion, or as a public procurement notion, which defines certain bodies as contracting authorities. In particular, control is extended beyond the “dominant influence” notion found in the Utilities Directive.¹⁰⁵ For the purposes of in-house relations, the object of such control should not be confined to strategic market decisions or procurement decisions, but should embrace individual management and operational decisions as well. Corporate control is exercised by conclusive influence on both strategic objectives and significant decisions.

In *Parking Brixen*, the Court stated that the important point in relation to the control criterion is that there should be “a potential power of decisive influence over both strategic objectives and significant decisions.”¹⁰⁶ With respect to the means of control, the ability to possess rights to give instructions and rights to make appointments, as well as evidence of supervisory powers, reflect upon a guiding principle which is *de facto* conclusive of the power to influence corporate behavior and is not emanating from legislative provisions alone.

In *Cabotermo* it was maintained that joint-stock public companies exhibit similarity of control where a contracting authority holds, alone or together with other public authorities, all of the share capital in an entity.¹⁰⁷ However, if the board of management of that entity is vested with the broadest possible powers, and in the absence of any control or specific voting powers for restricting the board’s freedom of action, the similarity of control is not present. If control exercised by a contracting authority over an entity could be viewed as consisting essentially of the majority shareholders’ rights conferred by company law, such control cannot be deemed as similar to that exercised upon the contracting authority’s own departments. Moreover, if control is exercised through an intermediary, such as a holding company, the intervention of such an intermediary may render the similarity of control requirement irrelevant, or it may weaken any control exercised by the contracting authority over a joint-stock company merely because it holds shares in that company. Nevertheless, if an entity is jointly controlled by several contracting authorities, the control criterion is satisfied provided that all of the contracting authorities exhibit control over the relevant entity that is similar to that over their own departments.¹⁰⁸ In such situations, as in the case of inter-municipal co-

¹⁰⁵ See Utilities Directive 2004/17, OJ L 134, 30.4.2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and in particular Art. 2(1)(b) (in relation to public undertakings). A public undertaking is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules that govern it. Contracting authorities exercise dominant influence over public undertakings when, directly or indirectly, in relation to an undertaking, they hold the majority of the undertaking’s subscribed capital, control the majority of the votes attaching to shares issued by the undertaking, or can appoint more than half of the undertaking’s administrative, management, or supervisory body.

¹⁰⁶ See Case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG*, [2005] ECR I-8612, ¶ 65.

¹⁰⁷ See Case C-340/04, *Carbotermo SpA, Consorzio Alisei v. Comune di Busto Arsizio, AGESP SpA*, [2006] ECR I 4137.

¹⁰⁸ See *id.* at ¶ 37; see also, Case C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v. Transformación Agraria SA (Tragsa) and Administración del Estado* [2007] ECR I-2999, ¶ 57.

Formatted: Italian (Italy)

operative societies, whose members are contracting authorities themselves, if joint control is exercised by the majority of controlling contracting authorities, the similarity of control criterion is met.¹⁰⁹

Therefore, the concept of control must be understood in functional, not formal terms. There is nothing to prevent it from being applied to the relationship between a contracting authority and legal persons governed by private law, such as a limited liability company. The use of the term “departments” derives from the original reason for setting up autonomous bodies, which was to entrust particular departments with a function or the delivery of a specific public service.¹¹⁰ The control exercised over an entity or an undertaking by a public authority must be similar to that which the authority exercises over its own departments, but not identical in every respect and must be effective. But, it is not essential that it be exercised individually.¹¹¹

However, the existence of private capital, participating in an entity which has corporate links with a contracting authority, negates the similarity of control requirement. *Stadt Halle* held that private sector participation cannot emulate the pursuit of public interest objectives entrusted to public sector entities.¹¹² The relationship between a public authority, which is a contracting authority, and its own departments is governed by considerations and requirements proper to the pursuit of objectives in the public interest. Any private capital investment in an undertaking follows considerations appropriate for private interests and pursues objectives of a different kind.¹¹³ The participation, even as a minority, of a private undertaking in the capital of a company in which the awarding public authority is also a participant excludes the possibility that the public authority will exercise control that is similar to that which it exercises over its own departments over such a company.¹¹⁴

The category of semi-public entities or undertakings, which in their own rights are regarded as contracting authorities, could not be viewed as entities upon which a contracting authority can exercise similar control to that over its own departments. In *Mödling*, the Court followed the *Stadt Halle* reasoning and interestingly held that if the award of an in-house public contract took place in accordance with the *Teckal* criteria, and within a very short period the controlling contracting authority transferred shares in the controlled entity to a private undertaking, then this is considered a device designed to conceal the award of public service contracts to semi-public companies. As a result, such a device would prejudice the effectiveness and the principles of the public procurement Directives.¹¹⁵

Parking Brixen prevents similarity of control in situations where there is visibility of imminent participation of private capital in a wholly owned public undertaking or entity. Interestingly, although *ANAV* extends the *Teckal* criteria to companies limited by shares, it appears to link prospective privatizations as grounds for not meeting the *Teckal*

¹⁰⁹ See Case C-324/07, *Coditel Brabant SA v. Commune d’Uccle, Région de Bruxelles-Capitale*, [2009] 1 CMLR 29.

¹¹⁰ See Christopher H. Bovis, *Public Procurement and Public Services in the EU* in *REGULATING TRADE IN SERVICES IN THE EU AND THE WTO: TRUST, DISTRUST AND ECONOMIC INTEGRATION*, Lianos and Odudu Eds, 287 Cambridge University Press (2012).

¹¹¹ See Case C-458/03, *Parking Brixen*, *supra* note 111, ¶ 62.

¹¹² See Case C-26/03, case C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall und Energieverwertungsanlage TREA Leuna*, [2005] ECR I-1.

¹¹³ See *id.* ¶ 50.

¹¹⁴ See *id.* ¶ 49.

¹¹⁵ See Case C-29/04, *Commission v. Austria* [2005] ECR I-563.

exception.¹¹⁶ The Court held that if, for the duration of a contract, the capital of the controlled entity, which has been awarded the contract based on the *Teckal* in-house criteria, is open to private shareholders, then this would constitute an award of a public contract to a semi-public company without any call for competition. This, in turn, would interfere with the objectives pursued by the Procurement Directives and the principles of Community law.¹¹⁷

The combination of inferences found in *Parking Brixen* and *ANAV* should be viewed as defense mechanisms in order to prevent abuse of the *Teckal* exception, even when, at the time of the award of an in-house public contract, there is no private sector participation in the capital of the controlled entity. One could question this logic, as the Court reflected on situations where it invited national courts to pay consideration to future privatization exercises or to open up wholly owned public undertakings' capital to private investors, dictated by either law or regulation or selected as policy choices by the contracting authority.¹¹⁸ Emphasis was drawn upon the concept of institutional public-private partnerships, where contracting authorities entrust the delivery of public services. Additionally, prospective privatizations could cause problems with the actual contractual arrangements, if *ANAV* is to apply to in-house relations once a contract is well into its delivery.

Sea appears to correct the potential problems stemming from *ANAV*. As a general rule, the existence of a private holding in the capital of the company to which a public contract is awarded must be determined at the time of that award.¹¹⁹ Account should be taken in cases when national applicable legislation provides for the compulsory opening of that company whose entire capital it holds, in the short term, to other capital.¹²⁰ However, when shares in the contracting entity, which were previously wholly owned by the contracting authority, are transferred to a private undertaking shortly after the award of a contract to that undertaking, the in-house exemption is not possible because the transfer is viewed as an artificial device to circumvent public procurement rules.¹²¹ Nevertheless, shares in a public company could be sold at any time to third parties. It would be inconsistent with the principle of legal certainty not to apply the in-house exemption on the mere possibility that the capital structure of a publicly controlled company might change in the future.

c. *The Capital Holding of An In-House Entity*

According to the case law, a contracting authority cannot exercise in-house control over an entity when one or more private undertakings also participate in the ownership of that entity.¹²² That is the case even if the contracting authority is able to

¹¹⁶ See Case C-410/04, *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v. Comune di Bari, AMTAB Servizio SpA*, [2006] ECR I-3303.

¹¹⁷ See *supra* note 120, ¶ 48.

¹¹⁸ See Case C-573/07, *Sea Srl. v. Comune di Ponte Nossa* ECR [2009] I-8127, ¶ 24.

¹¹⁹ See Case C-573/07, *Sea Srl. v. Comune di Ponte Nossa* ECR [2009] I-8127; see also Case C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall und Energieverwertungsanlage TREA Leuna*, [2005] ECR I-1, ¶¶ 15, 52.

¹²⁰ See Case C-458/03, *Parking Brixen* [2005] ECR I-8612, ¶¶ 67, 72.

¹²¹ See Case C-29/04, *Commission v. Austria* [2005] ECR I-9705, ¶¶ 38–41.

¹²² “By contrast, the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility that the contracting authority exercising over that company a control similar to that which it exercises over its own departments. See *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall und Energieverwertungsanlage TREA Leuna*, [2005] ECR I-1 ¶ 49.

Formatted: Italian (Italy)

Formatted: Italian (Italy)

Formatted: Italian (Italy)

Formatted: English (United Kingdom)

independently make all decisions regarding that entity, regardless of the private holding. The Court reasoned that the relationship between a contracting authority and its own departments is governed by considerations and requirements proper to the pursuit of objectives in the public interest.

By contrast, any private capital investment in an undertaking follows considerations proper to private interests and pursues objectives of a different kind. This is also relevant for pure capital injections by a private company into the in-house entity (e.g., the buying of shares, not the provision of standard loans), even if this does not involve any operational contribution. As a general rule, the determination of the existence of a private holding in the capital of the company to which the public contract at issue is awarded must be undertaken at the time of the award.¹²³ Exceptionally, special circumstances may require events occurring after the date on which the contract was awarded to be taken into consideration. Such is the case, in particular, when shares in the contracting company, previously wholly owned by the contracting authority, are transferred to a private undertaking shortly after the contract at issue has been awarded to that company by means of an artificial device designed to circumvent the relevant EU rules.¹²⁴ The future opening of the company's capital is taken into account only if there is a real prospect of such opening in the short term at the time of the award of a contract to the company.¹²⁵

The mere theoretical possibility of a private party participating in the capital of an in-house entity does not in itself undermine the in-house relationship between the contracting authority and its company. However, if a contract were to be awarded to the company without being put out to competitive tender on the basis of the in-house exception, the subsequent acquisition of a stake in the company by private investors at any time during the period of validity of the contract would constitute an alteration of a fundamental condition of the award of the contract. Under these circumstances, the contract has to be put out to competitive tender. Conversely, the sole ownership by contracting authorities should be regarded as an indication of the existence of the control required for the in-house exception, but not as a factor that is decisive *per se*.¹²⁶ This indication is rebutted where contracting authorities establish a profit-making company that is fully independent of them. This is also illustrated by the *Parking Brixen* case, in which the entity was, at the time of the award, owned by one contracting authority but enjoyed a degree of independence, which led the Court to deny the in-house status.¹²⁷

If a company's capital is wholly owned by the contracting authority, alone or together with other public authorities, when the contract in question is awarded to that company, the potential opening of the company's capital to private investors may not be taken into consideration unless there exists a real prospect in the short term of such an opening. Therefore, when the capital of the contracting company is wholly public and in which there is no actual sign of any impending opening of that company's capital to private shareholders, the mere fact that private undertakings, at some point in time, may

¹²³ See Case C-29/04, *Commission v. Austria* [2005] ECR I-9705, ¶¶ 24-26.

¹²⁴ See Case C-29/04, *Commission v. Austria* [2005] ECR I-9705, ¶¶ 38-41.

¹²⁵ This position has meanwhile been confirmed by the ECJ in Case C-371/05, *Commission v. Italy*, [2008] ECR I-00110, ¶ 29.

¹²⁶ See Case C-340/04, *Carbotermo SpA and Consorzio Alisei v. Comune di Busto Arsizio and AGESP SpA*, [2006] ECR I-04137, ¶ 37, (the fact that the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer tends to indicate, without being decisive, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments.").

¹²⁷ See Case C-458/03, *Parking Brixen GmbH v. Gemeinde Brixen and Stadtwerke Brixen AG*, [2005] ECR I-08585, ¶ 70.

hold capital in the company does not support the conclusion that the condition relating to the control by the public authority over that company is not present. That conclusion is not contradictory to *Coname*, which indicated that the fact that a company is open to private capital prevents it from being regarded as a structure for the “in-house” management of a public service on behalf of the municipalities that form part of it.¹²⁸ In this case, a public service was awarded to a company in which not all, but most, of the capital was public at the time of that award. *Sea* clarifies that when a contract is awarded to a public capital company, without subjection to competitive tender, the fact that subsequent to the award but during the contract’s period of validity, private shareholders were permitted to hold capital in the company constitutes an alteration of a fundamental condition of the contract. This scenario does not regard the contract as an in-house arrangement. It therefore requires the full applicability of the Public Procurement Directives.

d. Operational Dependency

The second *Teckal* criterion specifies that an essential part of the controlled entity’s activities must be carried out for the benefit of the controlling contracting authority or authorities.¹²⁹ *Sea* held that the control exercised over that company by the shareholder authorities may be regarded as similar to that which they exercise over their own departments when the company’s activity is limited to the territory of those authorities and is carried on essentially for its benefit.¹³⁰ The Court maintained, in *Parking Brixen*, that the essential part of the controlled entities’ activities cannot be carried out for the benefit of the controlling public authority if the geographical area has been extended to the entire country and abroad.¹³¹

The “essential part” criterion relates to a certain minimum proportion of the total activities performed by the controlled body.¹³² However, not only quantitative elements must be taken into account in determining the term “essential.” While it could be convenient to define the essential part criterion in line with a provision governing awards to undertakings affiliated with the contracting authority, namely the 80% criterion, the Court has rejected such an approach on the grounds that a transposition of an exceptional provision from the Utilities Directive to the Public Sector Directive is of questionable *vires*.¹³³ *Cabotermo* revealed interesting insights on operational dependency.¹³⁴ The Court declared that the 80% rule of affiliated operational dependency cannot be imported into the public sector procurement because such provision is regarded as being a restrictively interpreted exception applicable only to supply contracts covering affiliated undertakings. Supply contracts covering affiliated undertakings are distinctively different from public sector procurement entities because they are subject to a procedural notification regime, which cannot be implemented in public sector procurement Directives. Finally, supply

¹²⁸ See Case C-231/03, *Coname* [2005] ECR I-7287, ¶¶ 5, 28.

¹²⁹ See Case C-107/98, *Teckal Srl v Comune di Viano* [1999] ECR I-8121.

¹³⁰ See Case C-573/07, *Sea Srl v. Comune di Ponte Nossa* ECR [2009] I-8127.

¹³¹ See Case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG*, [2005] ECR I-8612, ¶ 65.

¹³² See Christopher H. Bovis, *Public Procurement in the EU: Jurisprudence and Conceptual Directions*, *Common Market Law Review* 49: 1–44, (2012).

¹³³ See Directive 2004/18, OJ L 134, 30.4.2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Also, see Directive 2004/17, OJ L 134, 30.4.2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

¹³⁴ See Case C-340/04, *Carbotermo Spa v. Comune di Busto Arsizio*, [2006] ECRI 4137.

Formatted: Italian (Italy)

Formatted: Italian (Italy)

Formatted: Italian (Italy)

contracts covering affiliated undertakings were explicitly ignored by the Community legislature during the 2004 reform of the Public Procurement Directives from incorporation into the public sector Directive 2004/18.¹³⁵

So, although an “essential part” indicates a quantitative measure in relation to turnover or financial quantum of the volume of activities performed by the controlled entity, qualitative factors such as strategic services, organizational planning, market analysis, the profitability of the entity in pursuit of the activities for the controlling authority, and also the market dynamics under which the controlled entity operates should be taken into account. *Cabotermo* also ruled that to determine whether an undertaking carries out the essential part of its activities with the controlling authority account must be taken of all the activities that the undertaking carries out on the basis of an award made by the contracting authority, regardless of who pays for those activities.¹³⁶ The Court reiterated that the territory where the activities are carried out is highly relevant for determining the essential feature of the *Teckal* exception.

If the public authority that receives an essential part of an entity’s activities controls that entity through another company, the control criterion is still present, provided that control is demonstrable at all levels of the contracting authority’s corporate interface.

e. Public–Public Partnerships

A public authority may perform public interest tasks conferred to it by using its own administrative, technical, and other resources, without being obliged to call on outside entities that are not a part of its own departments.¹³⁷ The possibility for public authorities to use their own resources to perform the public interest tasks conferred on them may also be exercised in co-operation with other public authorities.¹³⁸

Commission v. Germany provided a superb demonstration of flexibility in the hands of contracting authorities in relation to their freedom to organize and deliver public services.¹³⁹ Co-operation between independent contracting authorities in the form of establishing an entity upon which no similar control is exercised to that over their own departments, resulting in the entrustment of a contract on behalf of the participant contracting authorities, can be deemed to meet the criteria for an in-house exception. Such a classification is warranted provided a variety of conditions are satisfied: (i) the remit of such public co-operation exists in relation to a public task or service specified under Community law, (ii) there is no intention to circumvent public procurement rules, and (iii) the contractual relation is based on neither a pecuniary interest consideration nor payments between the entity and the participant contracting authorities. The Court used an analogy with *Coditel Brabant* where contractual relations between inter-municipal co-

¹³⁵ See the proposal from the European Commission OJ C 29 E, 30.1.2001, p. 11 and OJ C 203 E, 27.8.2002, p. 210; the opinion of the Economic and Social Committee OJ C 193, 10.7.2001, p. 7; the opinion of the Committee of the Regions OJ C 144, 16.5.2001, p. 23; the opinion of the European Parliament of 17 January 2002 (OJ C 271 E, 7.11.2002, p. 176), Council Common Position of 20 March 2003 (OJ C 147 E, 24.6.2003, p. 1) and Position of the European Parliament of 2 July 2003. See also the Legislative Resolution of the European Parliament of 29 January 2004 and Decision of the Council of 2 February 2004.

¹³⁶ See Case C-340/04, *Carbotermo SpA, Consorzio Alisei v. Comune di Busto Arsizio, AGESP SpA*, [2006] ECR I-4137.

¹³⁷ See Case C-26/03, *Stadt Halle and RPL Lochau* [2005] ECR I-1, ¶ 48.

¹³⁸ See Case 295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v. Transformación Agraria SA (Tragsa) and Administración del Estado*, [2007] ECR I-2999, ¶ 65.

¹³⁹ See Case C-480/06, *Commission v. Germany*, [2009] ECR I-04747.

operative societies whose members are contracting authorities and a jointly controlled entity can be deemed in-house.¹⁴⁰

The Court also accepted public-public cooperation outside the concept of jointly controlled in-house entities. The Court stressed that EU law does not require contracting authorities to use any particular legal form in order to jointly carry out their public service tasks. For the purposes of this document, this type of cooperation is qualified as “non-institutional” or “horizontal,” involving different contracting authorities. Until now this has been the only judgment of the Court on public-public cooperation that has not involved jointly controlled in-house entities. The Court appears to have relied on many individual circumstances that were relevant to this particular case in order to arrive at its conclusion.¹⁴¹ Nevertheless, considering the aspects of the judgment that could be of general relevance, it appears reasonable to conclude that contracting authorities may establish horizontal co-operation among themselves (without creating a jointly controlled “in-house” entity). In order to do so, they must conclude agreements not covered by EU public procurement law. Such a conclusion is reasonable only if, at a minimum, the following conditions are met: (i) the arrangement involves only contracting authorities, and there is no participation of private capital; (ii) the character of the agreement is that of real co-operation aimed at the joint performance of a common task, as opposed to a normal public contract; and (iii) their cooperation is governed only by considerations relating to the public interest.¹⁴²

The aim of public-public cooperation is to jointly ensure the execution of a public task that all of the cooperating partners have to perform. Such joint execution is characterized by the participation and mutual obligations of the contractual partners, which lead to mutual synergy effects. This does not necessarily mean that each of the cooperating partners participates equally in the actual performance of the task—the cooperation may be based on a division of tasks or on a certain specialization. Nevertheless, the contract needs to address a common aim, namely the joint performance of the same task. Case law also suggests that the character of the agreement needs to be that of real co-operation, as opposed to a normal public contract where one party is performing a certain task against remuneration.¹⁴³ Such a unilateral assignment of a task by one contracting authority to another cannot be considered as cooperation.

Cooperation is governed by considerations relating to the pursuit of objectives in the public interest. Thus, while it may involve mutual rights and obligations, it must not involve financial transfers between the public cooperating partners, other than those corresponding to the reimbursement of actual costs of the works/services/supplies: service provision against remuneration is a characteristic of public contracts subject to the EU public procurement rules.

f. *Restrictions on Public–Public Co-operation*

¹⁴⁰ See Case C-324/07, *Coditel Brabant SA v. Commune d’Uccle, Région de Bruxelles-Capitale*, [2009] 1 CMLR 29.

¹⁴¹ The Court eluded that public-public cooperation does itself reflect no similarity of control, rather the remit of such relation to deliver a public task or service specified under Community law; the ultimate tests are no intention to circumvent public procurement rules and not pecuniary contractual relation. See Case C-480/06, *Commission v Germany*, [2009] ECR I-04747; the Court also inferred to inter-municipal cooperative societies whose members are contracting authorities and a jointly controlled entity as a benchmark feature of specific criteria of public-public co-operation. See Case C-324/07, *Coditel Brabant SA v Commune d’Uccle, Région de Bruxelles-Capitale*, [2009] 1 CMLR 29.

¹⁴² See Case C-480/06, *Commission v Germany*, [2009] ECR I-04747.

¹⁴³ See Case C-324/07, *Coditel Brabant SA v. Commune d’Uccle, Région de Bruxelles-Capitale*, [2009] 1 CMLR 29.

Formatted: French (France)

Formatted: French (France)

Formatted: French (France)

The Court stated that the cooperation should only be governed by public interest considerations. Thus, it would not be exempt if it were guided, i.e., principally determined, by other considerations, especially commercial ones. Therefore, in principle, the cooperating partners should not perform activities on the market as part of the cooperation. In other words, the cooperation agreement should not include activities to be offered on the open market.

Commented [KF6]: In Which Case?

It can be established that normal public contracts between contracting authorities continue to be subject to the procurement obligations (e.g., the purchase of certain services from another contracting authority). However, contracting authorities can establish structures to cooperate with each other, whether they are institutional or not. It has been argued that the entry into force of the Lisbon Treaty puts this case law of the Court into a different light.¹⁴⁴ It is true that the Lisbon Treaty caused major changes to the EU legal system as a whole, which should be taken into account also when interpreting secondary EU legislation.

One of the relevant modifications introduced by the Lisbon Treaty is the acknowledgement of local and regional self-governance.¹⁴⁵ Furthermore, Article 1 of Protocol (No. 26) on Services of General Interest of the Lisbon Treaty on the Functioning of the EU acknowledges the essential role, and wide discretion, of national, regional, and local authorities in providing, commissioning, and organizing services of general economic interest as closely as possible to the needs of the users.¹⁴⁶ These provisions confirm authorities' right to decide how to execute the services that they are obliged to provide to the public. On the other hand, while the existence of this right was not disputed, even in the past, it is clear that it needs to be exercised in accordance with other provisions of EU law. Accordingly, certain choices made by contracting authorities might imply the need to comply with EU public procurement law. EU law does not force contracting authorities to externalize, but to ensure that if contracting authorities decide to involve a separate entity—public or private—on a commercial basis, this is done in a transparent and non-discriminatory manner. In view of the Commission services, the two forms of vertical and horizontal public-public cooperation are two equally available means for contracting authorities to organize the performance of their public tasks outside the scope of application of EU public procurement law. The Court clearly confirmed that EU law does not require contracting authorities to use any particular legal form in order to carry out jointly their public service tasks. While there are structurally two different types of public-public cooperation outside EU public procurement law, they share some common characteristics.

A contracting authority may perform the public interest tasks with its own resources, without recourse to entities outside its own departments, and it may do so in cooperation with other contracting authorities, either in an institutional cooperation through a jointly controlled in-house entity or without establishing such an institutional form. Second, it seems clear from the case law of the Court that in order to be exempted

¹⁴⁴ Drijber and Stergiou, *Public Procurement Law and Internal Market Law*, 46 CMLRev, 2009, 805-846; See Christopher H. Bovis, *Public Procurement and Public Services in the EU* in REGULATING TRADE IN SERVICES IN THE EU AND THE WTO: TRUST, DISTRUST AND ECONOMIC INTEGRATION, Lianos and Odudu Eds, 287 Cambridge University Press (2012),

¹⁴⁵ See Article 4(2) TFEU.

¹⁴⁶ See Article 1 of Protocol (No. 26) on Services of General Interest. This Protocol provides that services of general economic interest are subject to the rules of the internal market while noting users' preferences may differ, taking into consideration different geographical, social or cultural situations. Non-economic services are not covered by the rules of the single market and competition, and are not subject to specific EU legislation. Further information can be found in Chapter 11 on "The Union's Internal Policies".

from the application of the EU public procurement rules, any public-public cooperation must remain purely public.¹⁴⁷ The participation of private capital in one of the cooperating entities will thus prevent the cooperation from being exempted from public procurement rules.

If the cooperating entities are market oriented, they are in direct competition with private operators having the same or similar commercial objectives and instruments. Cooperation which is exempt from the procurement rules and aimed at fulfilling a public task should only involve entities which are principally not active on the market with a commercial purpose. This results primarily from the fact that the co-operation partners must be contracting authorities. The status of public authorities entails limits to their activities, while bodies governed by public law have to be "established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character."¹⁴⁸ Furthermore, in vertical co-operation, the in-house entity has to perform the essential part of its activities for the contracting authorities that control it. Any activity performed on the market has to remain incidental to these core activities, because a possible market orientation would weaken the joint control required in vertical cooperation.

In relation to horizontal cooperation, the Court stated that, where cooperation between public authorities is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest, it does not undermine the principal objective of the EU rules on public procurement, namely the free movement of services and the opening-up of undistorted competition in all the Member States. This is the case if the cooperation does not involve any commercial considerations. The Court stressed that EU law does not require contracting authorities to use any particular legal form in order to carry out jointly their public service tasks. Although there is no such requirement, looking at the two forms of vertical and horizontal public-public cooperation it should be noted that the type of connection between the cooperating entities is different and needs to be addressed.

In an institutional cooperation, it is the presence of a (joint) in-house control that could lead even an agreement to being exempted from the scope of the procurement regime that would normally be covered by it. In other words, the in-house exception relates to an otherwise covered public procurement contract for the performance of a task against remuneration. By contrast, in the case of non-institutional cooperation, in order to distinguish it from a normal public contract, it seems to be important that the character of the former is that of cooperation involving mutual rights and obligations going beyond "performance of a task against remuneration" and that the aim of the cooperation is not of a commercial nature.¹⁴⁹

IX. Conclusions

The phenomenon of public-private partnerships and the recent developments in public-public cooperation represent a genuine attempt to revolutionize the delivery of

¹⁴⁷ See Cases C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 48; C295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado*, [2007] ECR I-2999, paragraph 65; C-480/06, *Commission v Germany*, [2009] ECR I-04747; C-324/07, *Coditel Brabant SA v Commune d'Uccle, Région de Bruxelles-Capitale*, [2009] I CMLR 29.

¹⁴⁸ See Christopher H. Bovis, *Developing public procurement regulation: Jurisprudence and its influence on law making*, 43 *CML Rev.* (2006), 461–495.

¹⁴⁹ *Ibid.*

public services by introducing the private sector as a strategic investor and financier of public services.¹⁵⁰ First, the private sector assumes a direct responsibility in serving the public interest, as part of its contractual obligations *vis-à-vis* the public sector. The motive and the intention behind such an approach focuses on the benefits that would follow as a result of the private sector's involvement in the delivery of public services. Efficiency gains, qualitative improvement, innovation, value-for-money, and flexibility appear as the most important ones, whereas an overall better allocation of public capital resources sums up the advantages of engaging with the private sector in delivery of public services. Public-private partnerships as a concept of public sector management have changed the methodology of assessing delivery of public services both in qualitative and quantitative terms.

The case for PPPs rests on the relative efficiency of the private sector. However, this efficiency must demonstrate itself in a dynamic mode, reflecting the need for competition in the provision of the relevant services through the PPP. In traditional corporatism, public procurement through tendering secured the repeated competition for a market that is inherently monopolistic, yet still contestable, by new entries or offerings. However, the scope for competition in the activities undertaken by PPPs is more limited, because they tend to be less contestable for reasons involving the longevity of the engagement between public and private sectors, and the fact that social infrastructure is undervalued, and economic infrastructure involves large sunk costs.¹⁵¹

For PPPs to operate in a competitive environment globally, safeguard the principles of transparency and accountability in public sector management, incentive-based regulation is paramount. Where a private sector operator can sell public services to the public, but there is little scope for competition, the public sector must regulate prices. However, the challenge is to design well-functioning regulation that increases output towards the social optimum, stabilizes prices in a sustainable manner, and limits monopoly profit, while preserving the incentive for private sector to be more efficient and reduce costs.

The Commission announced its intention to introduce a legislative framework on concessions.¹⁵² The Europe 2020 strategy highlights the importance of PPPs for accelerating growth and boosting innovation.¹⁵³ In addition, the Single Market Act announced the adoption of a legislative initiative on concessions in 2011 in order to promote PPPs and to help deliver better value for money for users of services and for contracting authorities, while improving market access for EU undertakings by ensuring transparency, equal treatment, and a level playing field across the EU.¹⁵⁴ The

¹⁵⁰ See Christopher H. Bovis, *The Conceptual Links between State Aid and Public Procurement in the Financing of Services of General Economic Interest*, in *THE CHANGING LEGAL FRAMEWORK FOR SERVICES OF GENERAL INTEREST IN EUROPE, BETWEEN COMPETITION AND SOLIDARITY* 149–171 (Krajewski, Neergaard and van de Gronden eds., 2009).

¹⁵¹ See M. Bult-Spiering and G. Dewulf, *STRATEGIC ISSUES IN PUBLIC-PRIVATE PARTNERSHIPS: AN INTERNATIONAL PERSPECTIVE* (2007).

¹⁵² See Commission Communication, *The Single Market Act Twelve levers to boost growth and strengthen confidence* of 13 April 2011, COM/2011/0206 fin.

¹⁵³ See Commission Communication, *Europe 2020, A strategy for smart, sustainable and inclusive growth*, COM (2010)2020 final.

¹⁵⁴ See Commission, *Guide to the application of the European Union rules on State aid, public procurement and the internal market to services of general economic interest, and in particular to social services of*

Commission considers a legislative proposal in the field of concessions as one of the key measures that will facilitate the setting up of PPPs and as such, considers it a means of stimulating economic recovery in the context of the current economic downturn. PPPs are also important for accomplishing structural reforms and could play an increasing role in accompanying EU policies in the context of the multiannual financial framework.

The main reasons for the adoption of a set of rules on concessions, which are separate from the framework of the substantive Public Procurement Directives, is to reflect the differences of the objectives pursued, as well as the very nature of the envisaged rules on concessions. The purpose of the new directive on concessions envisages a comprehensive, clear, and unambiguous set of provisions in an economic area of the Member States, which so far has been characterized by a continuous uncertainty and erroneous interpretation, often leaving room for unlawful practices. Further, concession contracts display a number of distinct characteristics as compared to public contracts. These include the exposure of the contractor to the economic risk of providing the services, much longer contractual duration in comparison to traditional public contracts, greater structural complexity, and higher contract value. The most distinctive feature of service concessions reveals a plethora of national rules determining the status of concessions in Member States. The proposal provides for an extension of the scope of the Remedies Directives to all concession contracts above the threshold in order to guarantee effective channels for challenging the award decision in court and provide minimal judicial standards that must be observed by contracting authorities or entities.¹⁵⁵

general interest, SEC(2010)1545 final. See Commission, *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement*, SEC(2010)1258, fin.

¹⁵⁵ See Directive 2007/66/EC of 11 December 2007, OJ L335/31.