

**UNICE RECOMMENDATIONS FOR PROMOTING  
PUBLIC / PRIVATE PARTNERSHIPS (PPP)**

Today more and more countries are turning to private financing for infrastructure and service projects in order to overcome the lack of public funds or to reserve public funding for other priority areas. In the current public deficit situation of most developed and developing countries, private financing becomes a means for public action. PPP is also an alternative to privatisation for dismantling infrastructure or service monopolies. PPP constitutes a mechanism for having a range of suppliers delivering public services, bringing new sources of innovation and management and creating a healthy competitive pressure on all providers to improve their performance.

Private participation in public infrastructure projects is not an innovation; it has existed for several centuries and was particularly used during the 19<sup>th</sup> century in railways. But operators face more and more difficulties in Europe when they try to set up PPPs, and they are convinced that these difficulties come in part from an uncertain legal and financial environment and from the lack of knowledge and skill of some public authorities, this second reason being partially a consequence of the first.

For these reasons several members of the UNICE Public Procurement Working Group have been asked by their organisations to discuss the issue within UNICE and with the European institutions.

The UNICE PPP Task Force ("TF") was set up at the beginning of 2001 with the objective of promoting concessions and other public-private partnerships as one of the means to liberalise some sectors, services in particular, and to examine whether or not the existing legal environment is favourable for the development of these schemes in Europe.

The TF has interviewed several experts listed in the annex.

A large majority of these experts have expressed the view that the lack of consistent rules in Europe can hinder or slow down the setting up of PPPs; major and significant public infrastructure projects are thus postponed, to the detriment of citizens.

For instance, in the area of European transport networks the lack of financing is estimated at between € 40 and 50 billion. The delay in implementation of projects, in particular transborder infrastructure projects, is regularly pointed out by the EU Commission's Transport Directorate General<sup>1</sup>.

For the candidate countries facing the *acquis communautaire*, the need for investment is huge. As stated in the Communication from the Commission "The challenge of environmental

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<sup>1</sup> Draft proposal from the Council and the EP on the development of the Trans-European transport network (2001).

financing in the candidate countries”: “Even if recent estimations place the total cost of compliance for the ten Central and Eastern European Countries lower than initially estimated – between € 79 and € 110 billion instead of € 120 billion - the need for investment planning remains crucial. The new legislation adopted in 2000 and expected in 2001 will add to the financing needs, since it includes some investment heavy pieces of law, such as a new directive on power plants”<sup>2</sup>. This evaluation for the environmental and energy sectors confirms the potential of PPP as a tool, among others, for the development of infrastructure and services of general interest.

The results of interviews with experts and discussions in TF meetings lead UNICE to the following observations:

- PPPs are complex and take various forms but characteristics common to all PPPs constitute a basis on which common principles can be formulated. Hence, for example, the United Nations Commission on International Trade (UNCITRAL) recently adopted a Legislative Guide to Privately Financed Infrastructure projects (Part I).
- The current legal status of PPPs in Europe does not allow the proper development of PPP projects and the EU needs to examine the means for facilitating PPP transactions. (Part II).

In conclusion, UNICE will add a few recommendations based on points which have been raised regularly during the TF discussions (Part III).

### **I. Various forms of PPP with common elements**

Public-Private Partnerships (PPP) may take different forms, depending on countries, sectors and the parties' preferences. More and more sectors are now becoming involved; not only the infrastructure sector, but also services sectors such as transport, water, waste, municipal services, electronic delivery of public services, prisons, hospital-building, etc.

PPP agreements may cover all or part of a very large range of tasks relating to a public service or an infrastructure: design, building, operating, financing, management and customer care.

Concessions, Build-Operate-Transfer, Build-Own-Operate, PFI and others are all variations of the same basic scheme: an agreement between a public authority and a private entity for the implementation of a project relating to an economic activity. There are different levels in the transfer of management, responsibilities and asset ownership, but the operating risk is always assumed by the private entity. In some cases, the end-user funds or partly funds the cost through direct user charges. In other cases, the public sector client pays – sometimes taking on volume or demand risk and sometimes not.

UNICE does not intend to describe all these forms of PPP in detail. Appropriate definitions and descriptions can be found in many relevant books, guides and regulations.

However, it seems important to underline the following key points:

- 1. Current Public Procurement rules are not adapted to the requirements of PPP,** in that PPPs are based on long-term and complex agreements involving three or four parties: the public authority, the private entity, possibly the provider of finance and the

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<sup>2</sup> Commission Communication 501PC0304

end-user. Moreover, current public procurement rules concern only the award phase of the contract while PPPs and concessions include the award and execution of the contract.

2. PPP schemes are not the same as privatisations in which the public authority transfers all duties and ownership of the asset to the private entity.

3. All PPPs **have the following common elements:**

1. they are based on a contract between a public authority and a private entity,
2. they generally provide for long-term commitment,
3. the duties are shared between the public authority and the private entity,
4. the private entity operates, invests and assumes financial risk,
5. the public authority defines requirements, manages the relationship with the private provider and holds the provider to account for delivering the agreed outputs under the agreed terms. In some cases, the public authority also regulates.

4. PPPs have **advantages** for the parties involved:

- For the public entity :

- PPP may be the best response to a public need for a long period of time,
- it may be a means to provide a better quality of service,
- it requires a “best value for money” approach,
- it constitutes a means for the better use of the public budget,
- the public entity does not bear the major risks of a project because they are transferred to the private entity; and
- the public entity is thereby able to control its costs better.

- For the private entity :

- it is intended to be profitable;
- it provides a long-term source of income;
- it can be a means to diversify activities; and
- it is a means to export know-how.

- For the user:

- it may be the only means to obtain a missing infrastructure or service, and to benefit from a better infrastructure or service.
- development of PPPs should diminish the overall tax burden; and
- it may also reduce the prices paid by the end-user as a result of the introduction of competition in sectors where monopolistic conditions prevailed before.

5. But PPPs may also raise **difficulties and criticisms:**

(a) In the opinion of the public, PPPs can suffer from a poor image, frequently because of bad public relations. PPPs are sometimes criticised as being a means to transfer public service to private management with a negative impact on quality, employment, social protection or environment. In such cases, political and ideological reasons can lead to the wrong economic decision that the project should be abandoned, or that it should be financed by the public authority, thereby finally putting an additional burden on taxpayers.

- (b) For the parties involved, PPPs are often unduly complex because, in addition to the project and its technical difficulties, many other elements are involved including social, environment, financial and legal aspects. The drafting of the agreement may sometimes require negotiations over several years. The lack of clear rules, combined with a lack of knowledge from some public authorities, contributes to this unnecessary complexity.

Better communications and proper rules on transparency, economic balance between the parties and political certainty should help to overcome these difficulties.

## **II. Legal status**

(a) **Some EU Member States** have specific rules, regulations or systems applicable only to some kinds of PPPs. For example, in France, concessions were developed in many sectors during the 19<sup>th</sup> and 20<sup>th</sup> centuries and are regulated by statute and detailed case law. The UK has recently developed a successful tool for attracting investors: the Private Finance Initiative (PFI). PFI deals are also expanding in Ireland, Finland, Norway and Denmark.

(b) **At EU level** there is no global and coherent approach to PPPs. The only provision can be found in the Works Directive 93/37, which concerns publicity before award of a public works concession. There is no provision relating to service concessions.

The Interpretative Communication on Concessions of 26 April 2000 was a first attempt by the EU Commission to clarify the legal regime, but covered only concessions and did not give practical information to operators.

Further articles, reports and seminars have been added to the debate. The following publications have more particularly attracted UNICE's attention:

- Mr A. Mattera's article "La communication interprétative de la commission sur les concessions de services d'utilité publique: un instrument de transparence et de libéralisation" published in issue 2/2000 of the "Revue de Droit de l'Union Européenne".
- The EU Economic and Social Committee Report of 16 January 2001 "Strengthening the law on concessions and PPPs".
- The EU Commission Questionnaire on PPPs to the Consultative Committees (June 2001).

(c) **At International level** organisations like the World Bank or UNCITRAL have adopted rules or guidelines which are useful tools for operators and states and which constitute a framework suitable for privately financed infrastructure projects.

The recent UNCITRAL Guide, adopted in July 2001 after four years of work, constitutes the most interesting set of recommendations because, rather than proposing a model law, it contains recommended legislative principles intended for use as a reference to assist national authorities and legislative bodies when preparing their own laws and regulations.

## **III. UNICE recommendations**

As mentioned above, several international organisations have acknowledged the economic benefit that PPPs can bring to countries and have adopted modern rules or guidelines in order to encourage and promote PPPs. But in Europe, public authorities sometimes mistrust

PPPs or are not aware of the benefits they can bring. They often lack the skills to feel comfortable negotiating on an equal level with experienced operators. PPP programmes often take too long to develop and individual contracts often take too long and cost too much to establish.

This is why UNICE believes that some action at EU level would help to:

- 1) clarify the issues through **definitions and descriptions of the different PPP schemes**: project agreements, concessions, BOT, Build-Rent-Operate-Transfer (BROT), Build-Own-Operate-Transfer (BOOT), etc. This work would simply consist of collecting the definitions which have been published by several organisations and are used by operators. Collection of these definitions would be very helpful to create a common language and improve communication between interested parties.
- 2) introduce more transparency in the process leading to these deals and on their technical, legal and financial aspects through the setting-up of **an information exchange system**, for example a website including data about these contracts.
- 3) ensure **flexibility, transparency and fair treatment in the awarding of PPPs**.

(a) flexibility because many provisions must be decided by the parties according to the nature of the project and should be adapted to the evolution of the project or of its environment. A freedom of contract approach to the content of the PPP contract is essential in order not to discourage privately financed infrastructure projects.

(b) transparency and fair treatment must be present at all stages of organising a PPP: bidding, negotiation, contract, economic balance and review.

Setting up a mechanism for the exchange of good practice would help to accelerate learning across Europe, without jeopardising innovation or slowing down the inevitable and desirable evolution of new models of PPP. The Commission's approach must recognise that PPPs are typically based on contracts which must be adapted to the specific nature of each project.

- 4) **Introduce the following principles** which have been identified in most of the case studies and presentations as being particularly important.

- The PPP agreement should be set up in a written contract.
- The PPP should be awarded through a transparent and a fair procedure, according to clear selection criteria.
- Ample room for negotiation should be left to the parties because PPPs are based on contracts which must be adapted to the specific nature of each project. Negotiations must respect each party's interest.
- Allocation of risks is an important part of the negotiation: as the UNCITRAL Guide recommends, unnecessary regulation should not limit the ability of the contracting parties to allocate risks as they best see fit.
- It must be possible to modify the PPP contract according to the evolution of the project or of the context. For example, a road concession contract should include a clause providing for the revision of the agreement in case of traffic reduction.
- The parties must be free to set the duration of the contract, the conditions for its extension, its termination and the consequences of termination.
- Mechanisms for settlement of disputes should be part of the recommendations to the negotiator and left to the parties to decide according to the needs of the project.

- In order to ensure the stability of the contract, no change of the legal and regulatory framework by the public authority without agreement of the private entity should be possible.

We recommend that **the EU Commission sets up a panel of specialists** including representatives of operators, public authorities and experienced international organisations to promote the exchange of good practice. In this exercise, particular care is needed to involve practitioners and Government experts from across Europe and to avoid taking any action that would inhibit the evolution of PPPs. It must be recognised that this evolution will occur at different speeds and in different directions across Europe, depending on each country's needs and procurement strategies. The Commission's approach should recognise the benefits of such evolution and aim to accelerate learning.

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## Annex

### HOW UNICE PPP TASK FORCE HAS PROCEEDED

UNICE had adopted an earlier position, on 23 June 1999, in which it expressed the wish to see a consistent approach to all forms of concessions and PPPs and the need for further regulation on this matter.

A new UNICE PPP Task Force (“TF”) has been set up at the beginning of 2001 with the objective of promoting concessions and other public-private partnerships as one of the means of liberalising some sectors, services in particular, and of examining whether or not the existing legal environment is favourable for the development of these schemes in Europe.

Presentations on case studies in different countries and sectors and presentations of the work done in other international organisations have enabled the TF to understand better the difficulties which arise when PPPs are being organised.

The TF work programme included the following presentations:

- the World Bank guidelines and experience by Pierre Guislain, World Bank;
- the French system of concession by Xavier Bezançon, Entreprises Générales de France-BTP;
- the UK Private Financing initiative (“PFI”) system, by Timothy R. Steadman;
- the work completed by the Syndicat des Entrepreneurs Français Internationaux (SEFI) “For new public-private partnerships in infrastructures and public facilities” by Roger Fiszelson, VINCI;
- ONDEO’s experience and case studies by Jack Moss, ONDEO;
- Hochtief’s experience and case studies by Bernard Kulle, Hochtief;
- public-private competition in the waste sector in Europe by Paul Huggard, SITA Group;
- the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Privately Financed Infrastructure Projects by Mark Reichel, consultant for the World Bank.