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1. Introduction

Over the recent years, the phenomenon of Public-Private Partnerships (PPPs) has gained in popularity in the field of waste management and more specifically in waste treatment and EFW (Energy from Waste). Governments are more and more attracted by private capital injections and technical know-how for the construction, operation and management of waste projects. While private-public ventures do not always stand for a success story and often go together with long-term and costly investments, some of them have shown to provide effective ways to deliver infrastructure projects, provide services to the public and finance innovation, hereby contributing to economic growth and job creation.

Until today there is still legal uncertainty regarding the use of PPPs, often due to a lack of specific rules on Public-Private Partnerships and wide disparities among the different national legislations. The ISWA Working Group on Legal Issues (WGLI) therefore decided to focus on the legal dimension of PPPs, in particular with regard to waste management1.

As PPPs face comparable questions and issues all over the world, this discussion paper decided to study the legislative context of the European Union as a starting point. This approach has the benefit of not only being of interest to all EU Member States, but also to non-EU countries, especially in terms of transcontinental or multi-national Public-Private Partnerships and comparative law studies.

2. What is meant by a Public-Private Partnership?

Mainly two types of Public-Private Partnerships (PPPs) can be identified:

- **Public-Private Partnerships of a purely contractual nature (PPPs)**
  
  In this case, the partnership is based solely on contractual links.

- **Public-Private Partnerships of an institutional nature (IPPPs)**
  
  These PPPs involve cooperation within a distinct entity and may lead to the creation of an ad hoc entity held jointly by the public sector and the private sector or the control of a public entity by a private operator.

2.1 PPP

The phenomenon of PPP can be characterised by:

- the duration of the relationship between the public and private partners;
- the method of funding the project which is subject to the PPP;
- the role of each of the partners in the definition of objectives, design, completion;
- implementation and funding;
- the distribution of risks between the partners.

A PPP can be described as a form of cooperation between the public authorities and private economic operators. The primary aims of this cooperation are to fund, construct, renovate or operate an infrastructure or to provide a service. PPPs are used in sectors such as waste management, water and energy distribution, transport, public health, education and national security.

The hallmark of this form of cooperation is the role of the private partner. He is not only involved in the various phases of the project, but often contributes to financing the project. Moreover it is intended that the private partner also bears risks that are traditionally borne by the public sector.

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1 Other aspects such as organisational and financial elements linked to PPPs are beyond the scope of this discussion paper. In this respect see Public-Private Partnership Study by Dr. eng. Cornel Florea-Gabrian
Compared to traditional public contracts, more risks are borne by the private partner in the framework of a PPP. This being said, the public partner also bears several risks in the framework of a PPP.

The risks linked to a PPP can be divided in:

- **Organisational risks**: linked to the project/risk management of the PPP;
- **Legal risks**: linked to the regulatory compatibility of the PPP, the interpretation/enforcement of contractual provisions constituting the PPP;
- **Financial risks**: linked to the long-term and costly private investments and the return on investment, the insolvency/bankruptcy of private partners and their subcontractors and the under- or overestimation of financial means and effective use of the PPP-infrastructure;
- **Technical risks**: linked to side-effects of the use of complex and innovative methods and techniques;
- **Political risks**: linked to the necessary modifications due to changes in the regulatory and political landscape after the constitution of the PPP.

### 2.2 IPPP

An institutionalised PPP (or IPPP) can be put in place either by creating an entity held jointly by the public sector and the private sector, or by the private sector taking control of an existing public undertaking.

IPPP can be described as a co-operation between public and private parties involving the establishment of a mixed capital entity which performs public contracts or concessions. IPPPs are subject to different terminologies and schemes (for instance “Kooperationsmodell”, “Joint Ventures” “Sociétés d’Economie Mixte”, “Società miste Pubblico-Private”).

Apart from the contribution of private capital or other assets, the private input in an IPPP consists of the active participation in the operation of the contracts awarded to the public-private entity and/or the management of the public-private entity. Conversely, simple capital injections made by private investors into publicly owned companies, do not constitute an IPPP.

### 3. Legal framework on PPPs in the European Union

#### 3.1 Introduction

Given the diversity among the EU Member States as well as the tendency of the EU Legislator to evolve towards a harmonization of the national legislations of the EU Member States, the European legal framework is an interesting starting point to examine PPPs from a worldwide comparative perspective.


3 An IPPP can also be understood by the formation of a Special Purpose Vehicle (SPV) by a private sector consortium to develop, build, maintain and operate the asset for the contracted period. This SPV then signs the contract with the public authority to build the facility and maintain it.

4 Overview of relevant EU legislative documents related to PPPs:
   - In 2011, the EC announced its intention to adopt a legislative initiative on concession contracts, whereby PPPs were singled out in view of creating a supportive EU legal framework. By the end of 2011, the Commission therefore drafted a proposal for a European Directive on the award of concession contracts (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0897:FIN:EN:PDF).
In order to kick-off a worldwide examination of the legal framework of PPPs among ISWA members, this discussion paper will therefore highlight some recent developments under EU Law (Point 3.2) as well as the correlation between PPPs and public procurement rules (Point 3.3). Furthermore, a selection is proposed of interesting case law from the Court of Justice of the European Union (CJEU) regarding PPPs/IPPPs, concessions and the award of public contracts.

3.2 Recent EU Law developments

In its Resolution on Public-Private Partnerships of 26 October 2006, the European Parliament acknowledged that clarity is needed about the application of EU Procurement Law to PPPs in connection with the award of a contract or concession to a private entity.

Very recently, the EU therefore adopted a legislative package for the modernisation of public procurement in the EU, including a European Directive on the award of concession contracts, a European Directive on public procurement (replacing directive 2004/18/EC) and a European Directive on procurement by entities operating in the utilities sectors (water, energy, transport and postal services). Although this legislative package does not specifically concern PPPs/IPPPs, it does have consequences on the application of public procurement rules when awarding a public contract to a PPP (see below, Point 3.3). The EU Member States have until April 2016 to transpose this legislative package into their national laws.

3.3 PPPs and public procurement rules in the EU

3.3.1 General

In the EU, the general rule applies that public authorities are free to pursue economic activities themselves or to assign these activities to third parties. These third parties can be purely private entities, but also mixed capital entities founded in the context of a PPP. However, if public authorities decide to involve third parties in economic activities and if this involvement qualifies as a “public contract” or a “concession”, the European provisions on public procurement and concessions must principally be complied with.

The aim of the EU rules on public procurement is to enable all interested economic operators to tender for public contracts and concessions on a fair and transparent basis, thereby enhancing the quality of such projects and cutting their costs by means of increased competition.

In the field of public procurement and concessions, the principle of equal treatment of market players and the specific expressions of that principle, namely the prohibition of discrimination on grounds of nationality, on freedom of establishment and on the freedom to provide services, are to be applied in cases where a public authority entrusts the supply of economic activities to a third party.

More specifically, the principles arising from Article 49 of the Treaty on the Functioning of the European Union (‘TFEU’) (ex Article 43 Treaty on the European Community or ‘TEC’) and Article 56 TFEU (ex Article 49 TEC) include not only non-discrimination and equality of treatment, but also transparency, mutual recognition and proportionality.

10 Cf. Article 56 TFEU (Treaty on the Functioning of the EU) (ex-Article 49 Treaty on the European Community).
3.3.2 Award of public contract to PPPs exempted from procurement rules

Following the case law of the Court of Justice of the European Union (‘CJEU’) on ‘in-house’ contracts (see below, Point 3.4), the new EU legislative package (2014) allows public authorities to award a public contract to a private undertaking or PPP (e.g. a municipal utility company or a public waste management provider) without applying a procurement procedure, if three conditions are met:

- The public authority must exercise control over the undertaking which is similar to that which it has over its own departments.
- The controlled undertaking must do business predominantly for the controlling public authority: more than 80% of its activities must consist of the performance of tasks entrusted to it by the controlling public authority.
- There must be no direct private participation in the capital of the controlled undertaking.\(^\text{11}\)

The control can be exercised by:

- one public authority alone or
- as joint control by several public authorities acting together, for instance in the case of public service associations controlled by all municipalities in a given geographical area. If the control is exercised jointly, it must be ensured that:
  - all controlling public authorities are represented in the decision-making bodies of the controlled undertaking;
  - the controlled undertaking does not pursue interests that are contrary to those of the controlling public authorities.

3.4 Selection of relevant case law of the CJEU

Over the years, the CJEU issued a wide range of relevant decisions in the framework of PPPs/IPPPs, concessions and the award of public contracts. The ISWA WGLI therefore made a selection of some judgments of the CJEU which should be taken into account when deploying a PPP or IPPP in the field of waste management\(^\text{12}\).

- **Case C-107/98, Teckal Srl\(^\text{13}\)**
  In the Teckal-case, the CJEU determined two cumulative criteria in order for a Public-Private Partnership (‘in-house’ concept) to be exempted from EU public procurement rules:
  1. the contracting authority should exercise over the private party a control which is similar to that which it exercises over its own departments and,
  2. the private party carries out the essential part of its activities with the controlling contracting authority.

- **Case C-324/07, Coditel Brabant\(^\text{14}\)**
  In the Coditel-Brabant-case, the CJEU specified that the Teckal-criteria also apply for Public-Public Partnerships, and thus that said criteria can also be fulfilled by two contracting authorities. In this

\(^{11}\) The only exception is in cases where the participation of a private undertaking is required by law, provided that it does not give the private partner blocking or controlling rights or any other form of decisive influence on the undertaking.

\(^{12}\) The case law of the CJEU often contains legal interpretations and general principles which are binding for the EU Member States national judges. Even though the selected case law under this Point 3.4 does not always directly relate to the waste management sector, the principles and interpretations stated herein can be considered as applicable to PPPs and IPPPs in the field of waste management.

\(^{13}\) [Link](http://curia.europa.eu/juris/document/document.jsf?text=&docid=44852&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=93124)

sense, the CJEU established that “if a public authority becomes a minority shareholder in a company limited by shares with wholly public capital for the purpose of awarding the management of a public service to that company, the control that the public authorities which are members of that company exercise over it may be classified as similar to the control they exercise over their own departments when it is exercised by those authorities jointly”.

- **Case C-573/07, Sea**
  In the Sea-case, the court examined in detail the specific powers of contracting authorities allowing them to control the managing bodies of an in-house entity and which go beyond the normal rules applicable to such control in a company limited by shares.

- **Joint Cases C-285/99 and C-286/99, Impresa Lombardini SpA; Case C-315/01, Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT)**
  The CJEU was of the opinion that, as an IPPP is usually set up to provide a service over a fairly long period, it must be able to adjust to certain changes in the economic, legal or technical environment. EU provisions on public procurement and concessions do not rule out the possibility of taking into account these developments as long as the principles of equal treatment and transparency are upheld.

- **Case C-507/03, European Commission v Ireland**
  The CJEU held that if the task assigned to the public-private entity is a public contract fully covered by the EU Public Procurement Directives, the procedure for selecting the private partner should be in accordance with the EU Public Procurement Directives. If the task is a public contract that is only partially covered by the EU Public Procurement Directives, the fundamental principles derived from the EC Treaty (now the TFEU) apply in addition to the relevant provisions of the Directives. Finally, the CJEU stated that if it is a service concession or a public contract not covered by the EU Public Procurement Directives, the selection of the private partner has to at least comply with the principles of the EC Treaty (now the Treaty on the Functioning of the European Union).

- **Case C-26/03, Stadt Halle**
  In the Stadt Halle-case, the CJEU observed that a private party and a public authority acting as contracting entity co-operate within a public-private entity, cannot serve as a justification for the contracting entity not having to comply with the legal provisions on public contracts and concessions when assigning public contracts or concessions to this private party or to the respective public-private entity. The CJEU held that the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting entity in question is also a participant, excludes in any event the possibility of an in-house relationship — to which, in principle, public procurement law does not apply — between that contracting entity and that private undertaking.

- **Case C-231/03, Consorzio Aziende Metano (Coname); Case C-410/04, Associazione Nazionale Autotrasporto Viaggiatori (ANAV)**
  In this case, the CJEU was of the opinion that public-private companies, which are open, even in part, to private capital, are precluded from being regarded as structures for the ‘in-house ma-

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nagement’ of public services on behalf of the contracting entities which form part of them. In this sense, the participation, even as a minority, of a private undertaking in the capital of a company in which the concession-granting public authority is also a participant excludes in any event the possibility of that public authority exercising over such a company a control similar to that which it exercises over its own departments.

This means that concession and public procurement rules, whether derived from the TFEU or from the EU Public Procurement Directives, must also be respected when awarding to the public-private entity public contracts or concessions, other than those public contracts and concessions that have already been subject to competition in the tender procedure for the founding of the public-private company in question.

In other words, the public-private entity (IPPP) must remain within the scope of its initial object and can as a matter of principle not obtain any further public contracts or concessions without a procedure respecting EU law on public contracts and concessions.

- **Case C-29/04, European Commission v Austria** 22
  
  The CJEU was of the opinion that the award of a public contract to a semi-public company without calling for tenders interferes with the objective of free and undistorted competition and the principle of equal treatment, as such a procedure would offer a private undertaking having a capital presence in that semi-public company with an advantage over its competitors. The CJEU therefore declared that the contract for the disposal of the town of Mödling’s waste was entered into without complying with the procedural and advertising rules laid down by Article 8, in conjunction with Articles 11(1) and 15(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and that the Republic of Austria had failed to fulfil its obligations under that directive.

4. **Recommendations of the ISWA WGLI**

In light of the above, the ISWA Working Group on Legal Issues believes that when used in a fair and transparent manner, a PPP/IPPP can contribute to sustainable waste management.

The ISWA WGLI would however like to make the following **general recommendations:**

- Although some legislators (like in the EU) are working on a better framework for concessions and public procurement, there is still a margin of legal uncertainty and a worldwide lack of harmonized legal framework on the use of PPPs and IPPPs. This should be resolved within the best delays.
- The use of a PPP or IPPP should at all times respect the principle that municipal solid waste management is and remains a service of public interest.
- The focus of national legislations should be shifted towards target achievement, rather than profit achievement. Therefore, it is essential that the decision making process leading to a PPP or IPPP is designed in an objective and transparent manner.
- At all time, the principles of equality and transparency should be ensured when deploying a PPP/IPPP.
- PPPs/IPPPs should be used with caution and in a non-discriminatory manner in order to not cause market distortions.
- National, regional and local authorities should maintain their discretionary power to define and specify the characteristics of the works/services to be provided under a PPP/IPPP in order to pursue their public policy objectives.

• National, regional and local authorities should maintain their discretionary power to choose the best way to provide, commission and finance services of general economic interest (such as waste treatment) in accordance with the legal provisions.

The ISWA WGLI would like to make the following specific recommendations to parties wishing to enter into a PPP/IPPP:

• Always consult experienced financial, technical and legal professionals before entering into a contract for a PPP/IPPP.
• Always take into account all applicable rules related to anti-bribery, anti-corruption, anti-trust & competition law, public procurement law and general contract law.
• Always have a legal check done of your national/supranational legal framework, especially on applicable competition and public procurement rules, before entering in a PPP/IPPP. If no legal framework exists in your country or the countries involved in the PPP/IPPP, the EU legislation and case law of the European Court of Justice on public procurement, concessions, PPPs and IPPPs, may serve as legal best practises.
• Always include clear rules about the duration, renewal procedures, eventual decommissioning of equipment and installations in the agreements and binding documents related to the agreements and/or regulatory acts related to a PPP/IPPP.

With the support of the ISWA members, the ISWA WGLI would like to see the following future work carried out on the theme of PPPs and IPPPs:

• Compilation of data from a substantial amount of ISWA members regarding the use of PPPs and IPPPs in the field of waste management.
• Drafting of a comparative study and a risk assessment for a substantial amount of ISWA members on the use of PPPs and IPPPs in the field of waste management.
• Extend the scope of this paper to non-European countries.
This Key Issue Paper was prepared by the

**Working Group on Legal Issues**

The Working Group on Legal Issues (WGLI) serves as a platform for knowledge exchange and as the principal resource to ISWA on legal issues related to waste and resource management. The overall interest for the Working Group is the exchange of information and views on legal aspects concerning hot topics in waste management. Currently there is much focus on EU-waste legislation, environmental responsibility and the legal aspects of different kinds of public private partnership.
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