



PPPs in Infrastructure

Day 1
Session 5.2

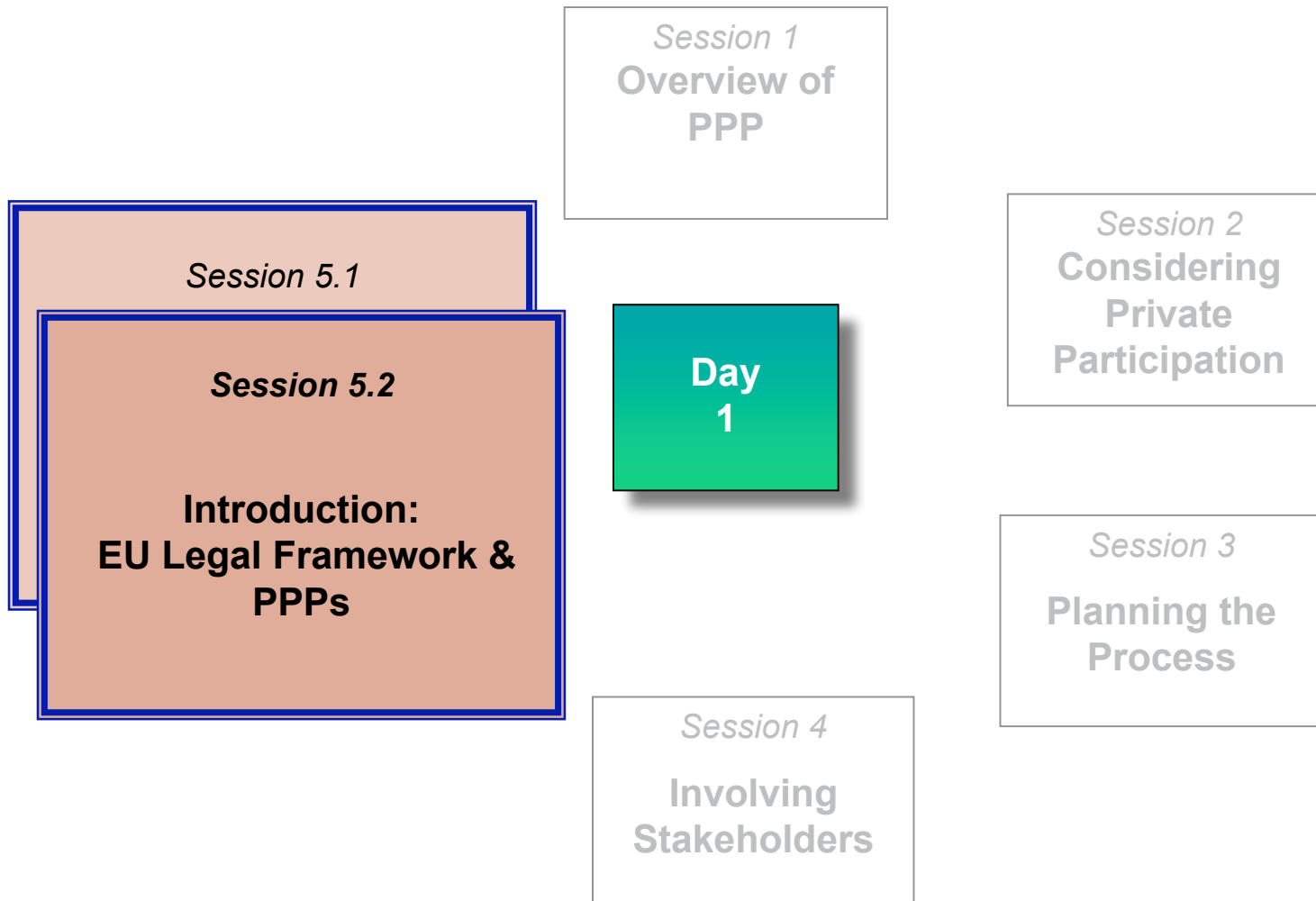
Setting Upstream Policy: The EU Legal Framework and its implications on PPPs

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Session 5.2



EU legal framework principles

ALLOCATE

Responsibilities to different levels of Government

DETERMINE

Market Structure

ESTABLISH

Competition Rules

EU law sets out guiding principles to which National legislations should adhere to. Thus, allocation of responsibilities is up to each country defining legal responsibilities and institutions with a view to:

- Decide which level of Government will be *responsible for each sector* of infrastructure eg Ministry of Water – relationship with Ministry of Environment
- Decide level of Government responsible for issues such as *tariff setting, quality for each sector*
- Create *legal instruments* that allow this to happen, and adequate power to each level of Government

But in the EU, case law (jurisprudence) has also an impact on how the law is applied and thus develops

EU Policy on PPPs: Main Principles

- Member Countries are increasingly interested in developing specific arrangements for cooperation with the private sector
- PPPs are one of the methods available which can have various contractual forms
- Choice of form of PPP is dependent on what a public authority seeks to achieve
- Community law: no prescriptions at law for such relationships nor in fact, whether a public authority should enter into a PPP
- Decision on how to provide an economic activity is squarely in the hands of the public authority

EU Policy on PPPs: Definitions

- No agreed EU PPP Definition
- Suffice it to say that:
 - PPP seeks better value for money
 - Acknowledges public and private sector have certain advantages relative to each other (better risk allocation)
 - Help deliver public services
 - Lon-term nature
 - Public sector plays a key role as a purchaser of services
 - Combines public and private sources of funds

EU key principles for PPP

- Any delegation of responsibility may be the subject of Community law eg procurement, competition, etc
- In view of the *heterogeneity* of national laws: are uniform provisions needed to safeguard transparency and effective competition between market participants??
- Prior to 2007 there were no specific provisions but given increasing use of PPP instruments EU commission decided specific regulation was needed

.... So lets look at the evolution of EU's framework for PPP's.....

Evolution of EU legal framework for PPP

1 of 2

Date	Action	Source
1993	White Paper on Growth, competitiveness and employment	COM(93) 700
1997	High Level Group on PPP Financing of TEN-T projects (Kinnock Report)	COM(97) 458
2000	Commission's Interpretative Communication on Concessions under Community Law	OJEC (2000/C 121/02)
2000	Proposal for a Regulation of the Council and Parliament concerning the granting of aid for the coordination of the transport by rail, road and inland waterways	COM(2000) 5
2001	White Paper on European Transport Policy for 2010: time to decide	COM(2001) 0370
2002	Building a Valuable Approach to PPPs Working session on the draft guidelines	COM(2001) 0370
2003	Guidelines for successful Public Private Partnerships – DG Regio and dissemination at a series of international conferences	DG Regional Policy
2003	A European Initiative for Growth – Investing in Networks and Knowledge for Growth and Jobs	COM(2003) 690 final
2003	Proposal for a Decision of the European Parliament and of the Council amending Decision No 1692/96/EC on Community guidelines for the development of the trans-European transport network	COM(2003) 584 Adopted on 21 April 2004
2003	Regulation amending Council Regulation (EC) No 2296/96 laying down general rules for the granting of Community financial aid in the field of trans-European networks	Adopted on 30 March 2004 – awaiting publication in OJEC COM(2003) 581
2003	Communication from the Commission: Developing the trans-European transport network: Innovative funding solutions & Proposal for a Directive on the widespread introduction and interoperability of electronic toll collection systems	COM (2003) 192 final
2003	High level Group Report on the TEN-T network (van Mier Report)	DG Transport
2004	Eurostat proposals on accounting treatment of PPPs	CMFB and Eurostat news release (STAT/04/18) February 2004
2004	New Procurement Directives – Including Introduction of Competitive Dialogue	Adopted in February and awaiting publication in OJEC
2004	Green Paper – EU consultative paper on PPPs and Community Law on Public Contracts and Concessions	COM (2004) 327 final May 2004

Source: Pricewaterhouse
Coopers: Developing PPP
in New Europe, 2004

Evolution of EU legal framework for PPP

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- **Mar 2003** - DG REGIO, *Guidelines for Successful Public-Private Partnerships*
- **Jun 2004** – DG REGIO, *Resource Book on PPP Case Studies*
- **Nov 2005** – Johnson & Kramarik, *The application of Public Private Partnerships (PPP) to the financing of transport projects from EU funds*
- **Jan 2006** - PwC/PPIAF, *Hybrid PPPs: Leveraging EU Funds and private capital*
- **May 2006** – Deloitte et al., *Application of the PPP Principle on the Economic and Social Cohesion Policy*
- **Jul 2006** – Council Regulation (EC) 1083/2006
- **2006** - Commission Regulation (EC) 1828/2006 implementing Council Regulation 1083/2006

Summary of EU evolution on PPPs

- Despite initially not requiring a specific PPP law, EU decides to regulate through the use of the **Jul 2006** – Council Regulation (EC) **1083/2006** and its implementing vehicle Commission Regulation (EC) **1828/2006** implementing Council Regulation 1083/2006
- However, key principles remain:
 - PPPs must respect Community law on public procurement which creates an ‘internal market’ (i.e. ensure right of establishment and right to provide services (Art 43 Article 49 EC Treaty))
 - Equal treatment, transparency and mutual recognition must be assured (Art 48)
 - Value for money must also be obtained when a public authority buys products or mandates third parties with performing services and/ or works
 - Relevant EU Directives e.g. EU Utilities Directive, Water Framework Directive etc

EU's definition on PPPs

- 'PPP' is a blanket term for agreements between public authorities and private industry. Such agreements may concern public infrastructure projects or public services and are categorised as:
 - *Purely Contractual PPP* is a partnership based solely on contractual links between different players. Covers a variety of set-ups where one or more tasks are assigned to the private partner, and which can include the design, funding, execution, renovation or exploitation of a work or service.
 - *Institutionalised PPPs* refer to the establishment of an entity held jointly by the public partner and the private partner. The joint entity has the mandate to deliver work or a service for the benefit of the public.
 - *Cooperation agreements*: these are usually between local authorities

We are concerned with Institutionalised PPPs (IPPPs) and the rules associated with them

Public authorities and PPPs

- Community law: ‘public authorities are free to pursue economic activities themselves or assign them to third parties’
- If shared ownership (i.e. mixed capital entity) **and** private input (apart from financial contribution) is active participation in operation and/or management of the public-private entity, then it is an IPPP (Ref: Commission Interpretative Communication 05 Feb 2008)
- NB simple capital injections by private investor into publicly owned companies do not constitute an IPPP

Council Regulation 1083/2006 (July 2006) – Main Principles

- Regulation sets out the use of European funds, namely:
 - European Regional Development Fund (ERDF) = Structural Funds
 - European Social Fund (ESF)
 - Cohesion Fund

- Clarifies use of funds to ‘reduce disparities between levels of development of various regions..’
- Supports actions leading towards convergence of member states
- Identifies priority recipient MS as those with a purchasing power parity of less than 75% of the community average
- Is *not* intended to replace public expenditure (principle of additionality)

Council Regulation 1083/2006: Key provisions related to PPPs

Main linkage to PPPs and their impact can be found in the following provisions:

- Major projects (Art 39)
- Financial engineering instruments (Art 44)
- Modulation of contribution rates (Art 52(d))
- Source of national contribution (Art 53(1))
- Revenue generating projects (Art 55(1)):
- Eligible expenditure under revenue generating project (Art 55(2))
- Ex-ante calculation of net revenue (Art 55(2))
- Ex-post deduction of net revenue (Art 55 (3))
- Refund for undeclared new revenue (Art 55 (4))
- Automatic decommitment (Art 93)

CR 1083 / 2006 – Major Projects

- **Major projects (Art 39)**
 - Projects > Euro 25 mln in environment
 - Projects > Euro 50 mln in other sectors
 - Funded by ERDF and Cohesion Fund

- Detailed dossier to be provided to the EC on a project by project basis, including cost-benefit analysis, environmental impact and financing plan and amount to which the financing rate for the priority axis applies

CR 1083/2006 – Financial engineering instruments 1 of 5

■ Financial engineering instruments (Art 44)

- Structural funds (ie ERDF and ESF) may finance financial engineering instruments investing in enterprises (including SMEs) and urban development funds investing in PPPs and other urban development projects

- When such operations are organized through holding funds (ie funds investing in several venture capital funds, guarantee funds, loan funds or urban development funds), they should be implemented through award of public contract (unless not a public service contract within the meaning of the procurement law)

CR 1083/2006 – Financial engineering instruments 2 of 5

- FEI to be established as
 - independent legal entity between co-financing partner and shareholders
 - separate block of finance within financial institution

- Separate block of finance within financial institution must have
 - specific implementation rules
 - separate accounts incl resources contributed by operational programme

- Management fees subject to specific threshold for duration of assistance from operational programme (OP) unless higher fees are necessary following competitive tender
 - 2% of capital: OP to holding fund, OP or holding fund to guarantee fund
 - 3% of capital OP or holding fund to FEI (except micro-credit)
 - 4% of capital: OP or holding fund to micro-credit FEI

CR 1083/2006 – Financial engineering instruments 3 of 5

- Funding agreement between FEI management and Member State or managing authority covers:
 - terms and conditions of contribution from OP to FEI
 - investment strategy and planning
 - monitoring of implementation
 - exit policy for contribution from operational programme out of FEI
 - winding up provisions of FEI

CR 1083/2006 – Financial engineering instruments 4 of 5

- Funding agreement between Holding Fund (HF) and Member State or managing authority includes:
 - urban development studies or evaluations of integrated development plans included in operational programmes
 - terms and conditions of contribution from OP to HF
 - call for expression of interest addressed to financial intermediaries or urban development funds
 - appraisal, selection and accreditation of financial intermediaries or urban development funds
 - monitoring of investment policy
 - reporting by HF to Member State and managing authority
 - monitoring of implementation
 - audits
 - exit policy of HF out of venture capital funds, guarantee funds, loan funds or urban development funds
 - winding up provisions of HF

CR 1083/2006 – Financial engineering instruments 5 of 5

- Co-financing partners or shareholders of FEIs including urban development funds (incl. holding funds) must submit a business plan including:
 - targeted urban projects or enterprises and criteria, terms and conditions for their financing
 - operational budget of FEI
 - ownership of FEI
 - co-financing partners or shareholders of FEI
 - by laws of FEI
 - Provisions for professionalism, competence and independence of management of FEI
 - justification for use of Structural Funds
 - policy of FEI re exit of enterprises or urban projects
 - winding up provisions of FEI

- Business plan to be assessed and monitored by Member State or managing authority

CR 1083 / 2006

Modulation of contribution rates

- Modulation of contribution rates (Art 52(d))
 - Contribution from the Funds may be modulated in light of the rate of mobilization of private financing, in particular under public-private partnerships

CR 1083/2006 – Source of national contribution

- Source of national contribution (Art 53(1))
 - Contribution from the Funds is calculated by reference to:
 - either the total eligible expenditure including public and private expenditure
 - or the public eligible expenditure

CR 1083 / 2006

Revenue generating projects 1 of 3

- **Revenue generating projects (Art 55(1)):**

- any operation involving an investment in infrastructure, the use of which is subject to charges borne directly by users; or
- any operation involving the sale or rent of land or building or any other provision of services against payment

- **Eligible expenditure under revenue generating project (Art 55(2))**

- shall not exceed the current value of the investment cost less the current value of the net revenue from the investment over a specific reference period for
 - investments in infrastructure
 - other projects for which it is possible to objectively estimate the revenues in advance

CR 1083 / 2006

Revenue generating projects 2 of 3

- **Ex-ante calculation of net revenue (Art 55(2))**
 - Reference period appropriate to the category of investment and category of project
 - **Profitability normally expected** of category of investment concerned
 - Application of polluter-pays principle
 - Consideration of equity linked to relative prosperity of Member-State

- **Ex-post deduction of net revenue (Art 55 (3))**
 - If ex-ante calculation not possible, revenue generated within 5 years of completion of operation is deducted from the expenditure declared to the EC.
 - Deduction made at partial or final closure of operational programme

- **Refund for undeclared new revenue (Art 55 (4))**
 - If net revenue has been earned but not declared under the provisions of 55(2) or 55(3), refund to EC at the latest 3 years following closure of operational programme

CR 1083/2006

Revenue generating projects 3 of 3

- **Automatic decommitment (Art 93)**
 - EC to automatically decommit any part of budget commitment for operational programme for which an acceptable application for payment has not been received by N+2, ie to years following the year of the budget commitment under the programme
 - Deadlines = N+3 in NMS
 - The part of commitments still open on 12/31/2015 will be automatically decommitted if EC has not received acceptable application for payment by 3/31/2017
 - Amounts potentially concerned by decommitments will be reduced by the annual amounts concerned by major projects

Final comments on the EU Regulation- 1

- Has certain provisions to take into account PPPs but seem to limit the scope and extent of the PPP arrangement
- Forces coordination of funds including 'complex financial schemes' and PPPs
- Funds are conditioned by:
 - Annual allocations and are limited to a ceiling
 - Need to develop as a pre-requisite a national development strategy (pre-empts the decision for PPP and may hinder future sector specific actions / strategies)
 - Joint use of funds related to Environment and Transport (seeks to avoid piece meal approach)
- Allows for placement of EU funds as a 'national reserve for rewarding performance' but is not clear how this can function vis a vis a PPP arrangement

Final comments on the EU Regulation- 2

- Allows the support from other European institutions eg EIB and EI Fund to provide Technical Assistance
- Definition of a revenue-generating project: in some instances it is objectively *not* possible to estimate the revenue in advance and therefore need to develop a specific methodology (but the Regulation does not say how!)
- Regulation is vague on:
 - What constitutes a 'long term investment' and under what period they can be 'written-off'
- Not an easy issue as demonstrated by the need for EU to issue Regulation (EC)1828/2006 which sets out how to 'operationalise' implementation of CR 1083/2006

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PPPs in Infrastructure



THANK YOU!

