

# EMERGING META-GOVERNANCE AS A REGULATION FRAMEWORK FOR PUBLIC-PRIVATE PARTNERSHIPS: AN EXAMINATION OF THE EUROPEAN UNION'S APPROACH

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## ABSTRACT

*This article extends previous research on public-private partnerships (PPPs), which has primarily been case study or national context oriented, by examining how these PPPs are regulated in the framework of the European Union (EU). While a number of partnership models have been identified in the academic literature, this study focuses on three significant types of PPP: the contract-PPP, the concession-PPP, and the institutional-PPP. Based on a notion of the EU as a meta-governance framework that guides, steers, and controls PPP activity at national, sector, and project level, the article draws a number of lessons on the EU's role in regulating the formation phase of PPP. The research demonstrates that this meta-governance framework provides the EU with no direct regulations for the use of the PPP model in the 27 member states, but two sets of regulations which apply if a public authority decides to sign a PPP deal. As the EU hitherto has engaged in regulation of PPP at a somewhat abstract and conceptual level, national and local public administrations are given considerable room for manoeuvre to craft regulations and policies to support or hinder uptake of PPPs. More recently, however, the Commission has raised its stakes by launching a European Partnership Excellence Centre to support policy learning, the spread of best practice, and PPP expert networks.*

## INTRODUCTION

Over the past fifteen years, governments in Europe and beyond have increasingly embraced the public-private partnership (PPP) model as a means of organising government and business relationships (cf. Osborne, 2000; Klijn & Teisman, 2003; Flinders, 2005; Hammerschmid & Angerer, 2005; Koppenjan, 2005; Ysa, 2007; Hodge & Greve, 2009; Jooste & Scott, forthcoming). The mounting interest in the new modes of governance, and PPPs in particular, has been seen as a result of the increased resource interdependency and the gradual erosion of boundaries between market and hierarchy (Kickert, Klijn & Koppenjan, 1997; Teisman & Klijn, 2002; Tenbenschel, 2005; Treib, Bähr & Falkner, 2005). As noted by Teisman and Klijn, "Partnerships are seen as the best way, in the end, to govern the complex relations and interactions in a modern network society" (2002: 198). But previous research also illustrates that partnerships are hard to achieve, and that a suitable regulation framework is a fundamental requisite for the successful formation of PPPs (cf. Van Ham & Koppenjan, 2002; Teisman & Klijn, 2002; Hodge, 2004; Johnston & Gudergan, 2007; Petersen, 2010).

The focus of this article is on the regulation of PPP as it has been instituted in the framework of the European Union (EU) for one significant type of PPP: the long-term infrastructure partnership between government and business partners (Hodge & Greve, 2005). The study thereby extends previous literature regarding regulation and governance of infrastructure PPPs, which have generally operated with national or case study research designs (though see Teisman & Klijn, 2000; Tvarnø, 2006; Mörth,

2007). Governance is understood “as broadly coordination, steering and control mechanisms encompassing both structural and procedural elements” (Koch & Buser, 2006: 551). This includes formal elements based on sanctions (hard law) as well as regulatory instruments of the soft law type (Borrás & Jacobsson, 2004). While we should not expect governance of partnerships to involve ‘less government’ (Jamali, 2004), but rather a network-based and multi-level mode of governing (Scharpf, 2001), careful examination of the EU’s regulation of PPP is timely and warranted to fully understand how PPPs are governed at local, national, and above-state level.

The purpose of the article is threefold: (i) to examine what the EU’s main initiatives have been within key PPP areas such as risk sharing, legal ownership and public procurement; (ii) to take stock of recent developments and tendencies in the EU’s regulation of these long-term infrastructure PPPs; (iii) to assess the implications of this meta-governance framework for the formation of PPP of national and sub-national administrations. While the EU-level constitutes the specific empirical setting of research, the overall aim is to contribute, both analytically and empirically, to systematic accumulation of knowledge about key PPP regulation issues such as risk sharing, competition for providers, legal ownership, and fiscal consequences of long-term contracting for public services and infrastructure.

As a theoretical framework for the analysis, the article builds on a notion of the EU as a meta-governance structure providing a general set of regulations and guidelines for employment of the PPP model in the 27 member states (on the concept of meta-governance see Jessop, 2005). Although the EU has occasionally been actively involved in large-scale PPP, such as with the Galileo satellite navigation system (Mörth, 2007), it is mainly as a regulator and facilitator that the EU’s role in PPP has been seen (European Commission, 2004). Meta-governance is broadly defined as “a regulatory framework and environment, and umbrella, for PPP networks” (Koch & Buser 2006: 548). In line with previous research (e.g. Koch & Buser, 2006; Johnston & Gudergan, 2007), governance and meta-governance are seen as constitutive elements for the realization of PPPs. The notion of meta-governance thus signifies the idea of a framework of conditions, structures, rules and guidelines - an overarching regime - which taps into and sets the general policy and regulation conditions for concrete PPP activity in all the EU’s member states.

The article details how the long-term infrastructure PPP type has recently been the focus of much attention in the EU, but also of some controversy, especially relating to questions about risk sharing, public procurement procedures, and legal ownership of the asset under a PPP scheme (Eurostat, 2004). Despite continuous appraisals in green and white papers, the Commission’s efforts to promote uptake of PPPs have largely been stalled. The analysis reveals two partly incommensurable aims within this meta-governance framework: (i) to improve efficiency and value for money (VFM) of major capital investments in roads, railways, schools, hospitals etc. by establishing a single European PPP procurement market; (ii) to safeguard the long-term fiscal stability of the Euro area when governments sign long-term contracts with a significant private borrowing element. As the Commission has so far mostly engaged in the regulation of PPP at a rather abstract and conceptual level, this gives public administrations (national, regional and local) considerable leeway to craft regulation and governance frameworks to support or hinder formation of PPPs.

The remainder of the article proceeds as follows. In *section 2*, governance and meta-governance as a framework for PPP are discussed. Subsequently, in *section 3*, a presentation of the research method and the collected data follows. *Section 4* then provides an examination of the empirical findings. In *section 5*, the lessons learnt are discussed and finally, in *section 6*, a conclusion is provided.

## **GOVERNANCE AND META-GOVERNANCE AS A FRAMEWORK FOR PUBLIC-PRIVATE PARTNERSHIPS**

The declining capacity of central government as the authoritative source of allocating and distributing resources of value to a society has been widely noted in recent literature on regulation and governance (cf. Peters & Pierre, 1998; Kooiman, 2003; Jordana & Levi-Faur, 2004). Within this literature three broad governance mechanisms have been identified (Williamson, 1996; Kooiman, 2003; Tenbensen, 2005): first, governance can take the form of hierarchy, which builds on command-and-control regulation and delivery of public services through classic bureaucratic organisation; second, governance can take the form of market-forces and resource allocation through demand and supply relations; third, a mounting strand of literature has been concerned with governance through networks with participation of various public and private stakeholders (Kickert, Klijn & Koppenjan, 1997; Kooiman, 2003).

While the distinct characteristics of the hierarchy and market were famously outlined in Ronald Coase's 'The Nature of the Firm' (1937) and further developed by the transaction costs approach in economics (Williamson, 1996), the network governance literature largely developed as a critique of the hierarchy-market dichotomy (Bell & Park, 2006). As is well-known, the network perspective asserts that the boundaries between the public and private sectors are eroded vertically as well as horizontally, and this has resulted in a poly-centric and multi-level governing system (Stoker, 1998; Scharpf, 2001). As this makes governments and the private sector increasingly interdependent, it has resulted in a search for cooperation, joint decision making and, more recently, public-private partnership (Klijn & Teisman, 2003).

The meanings of the partnership notion, however, remain controversial and diffuse, and scholars seem to disagree even about the fundamental characteristics of what a PPP is (Weihe, 2005). Hodge and Greve (2009) speak about five different 'PPP families', whereas Weihe (2005) notes the existence of various 'PPP approaches'. Another distinction has been made between PPPs that involve 'symmetrical' or 'asymmetrical' relationships (Friend, 2006). Perhaps the biggest difference in the literature can be found between scholars who view PPPs as a 'language game' aimed at giving well-known models of privatization and contracting out a new and more fashionable wrapping (cf. Linder, 1999; Hodge & Greve, 2005), and those who think of PPP as institutional arrangements between two or more autonomous partners in which various responsibilities, risks and benefits are shared (Van Ham & Koppenjan, 2002; Klijn & Teisman, 2003; Koppenjan, 2005).

Within the institutional approach, PPPs can be divided yet again into 'social type partnerships', as found in various issue networks and policy communities, and 'economic type partnerships' characterised by long-term commercial contracts between government and business for various combinations of planning, procurement,

construction, finance and operation of a construction or infrastructure facility (Hodge & Greve, 2005; Bloomfield, 2006). These commercial construction/infrastructure PPPs which have been particularly significant in the EU's transport and infrastructure policies are the exclusive focus of this article, which means that other types of partnerships are not treated here.

The notion of PPP meta-governance, as briefly discussed in the opening section, signifies the idea of the EU as an overarching regulation framework for partnership activity in the 27 member states. Meta-governance, as noted by Peters (2010: 37), is thus the analysis of "governance of governance". This theoretical approach builds on the idea of PPP as a multi-level activity involving local, national as well as international players in complex networks of interrelated decision arenas (Scharpf, 1997; Klijn & Teisman, 2003). 'Games' about PPP can thus be played in several arenas relating to various aspects of PPP including: concrete PPP projects, national policy and regulation, and meta-governance at the EU-level (the latter being the focus here). How, then, can we proceed to analyse the EU's meta-governance of PPP?

Along with many of its member states, the EU has been subject to a process of regulatory reform and re-regulation (Jordana & Levi-Faur, 2004). However, Bell and Park (2006) note that meta-governance is a relatively new concept in the governance literature and, as a consequence, "We know little about the dynamics of meta-governance, or about the relationship between governance and meta-governance." (ibid.: 64). This means that there is no prior theory or framework for the analysis of PPP meta-governance. Accordingly, with the purpose of developing a conceptual toolbox for the analysis of the EU's governance and meta-governance of PPPs, I briefly review the modes of EU governance, as discussed in the EU policy literature (cf. Scott & Trubek, 2002; Borrás & Jacobsson, 2004; Mörth, 2004; Pochet, 2005; Kerber and Eckhardt, 2007).

First, there is the hard law tradition (the classic Community Method) based upon juridical binding measures of command-and-control which member states must adopt (Scott & Trubek, 2002; Pochet, 2005). Second, the soft law<sup>1</sup> tradition marks a different and arguably broader approach to regulation by focusing on collective recommendations, review, monitoring, and benchmarking, all of which are basically of a non-legal nature (Mörth, 2004). A central discussion in the soft law debate has concerned how to interpret soft law relative to hard law. The Court has interpreted soft law as an integral part of the *acquis communautaire*, the overarching legal framework of rules, standards and policies governing the EU that all member states must adopt. Even if at the outset of a non-legal nature, the soft law tradition thus seems to have turned semi-judicial.

**Table 1. Three modes of EU governance**

	<b>Hard law 'The classic Community Method'</b>	<b>Soft law</b>	<b>The OMC</b>
<b>Regulation via</b>	Legally binding measures	Semi-legal logic (acquis communautaire)	Open procedures of coordination
<b>Central regulatory actors</b>	Commission European Court of Justice Council Parliament	Commission European Court of Justice Council Parliament	Commission Council National ministries Local and regional actors Private actors
<b>Process</b>	Legal logic	Semi-legal logic	Political logic
<b>Mechanisms of sanctions and control</b>	Formal procedures of oversight and control, European Court of Justice	Administrative review, monitoring and benchmarking at an ad-hoc basis	Political review, peer- pressure, naming and shaming and benchmarking with cyclical intervals

Third, we have the Open Method of Coordination (OMC), which was formally introduced in the conclusions to the Lisbon Summit in 2000 (European Council, 2000). The OMC has recently received a great deal of attention in the EU policy literature, and is a governance instrument based upon voluntariness, peer pressure, cyclical benchmarks, multilevel participation, and a political instead of legal logic (Borrás & Jacobsson, 2004; Pochet, 2005; Kerber and Eckhardt, 2007). Table 1 summarizes the three modes of governance in the EU.

## METHODS AND SOURCES OF DATA

The empirical work for this article followed a methodology of data triangulation (Peters, 1998). In-depth expert interviews were conducted face-to-face in Brussels and Luxembourg with key officers in the EU, including the Directorate General (DG) for Internal Market and Services, the DG for Transport and Energy, the DG for Research<sup>2</sup>, the European Investment Bank (EIB), the Statistical Office of the European Societies (Eurostat), and the Joint Assistance to Support Projects in European Regions (Jaspers). The interviews were conducted according to a semi-structured interview guide (Kvale, 1997), and were taped to facilitate further analysis and data coding. The choice of respondents was based on two criteria: 1) Commission authorities which had previously published documents or reports on PPPs were contacted; 2) identification of key respondents through introductory telephone interviews with civil servants in the Commission and in the European Parliament. Through this process, key respondents were identified. Prior to the interviews, central topics were discussed with the interviewees, and interview schemes were subsequently sent out before the interviews, as recommended by Barzelay et al. (2003).

To supplement the knowledge sourced from the expert interviews, a process of desk research resulted in the construction of a database of primary documents which were stored according to date, type of document and responsible authority. This facilitated a systematic treatment of the collected material. The empirical data collected through this process of desk research, which took place before as well as subsequent to the visits in Brussels and Luxembourg, included the following sources:

- Policy documents such as green papers, white papers, and announcements by the Commission, Parliament and the European Council
- Legislation and directives of relevance for PPP
- Rulings by the European Court of Justice (ECJ)
- Eurostat decisions about risk transfer and ownership in PPPs
- Evaluation reports and other types of PPP guidance documents produced by the Commission and the European Investment Bank (see appendix 1 for more details about the sources)

The primary documents and the interviews displayed a certain division of labour. A Commission green paper or directive provides detailed information about the EU's formal regulation and major policy initiatives for PPPs, but little about the policy processes, negotiations and informal procedures which are an essential part of regulation and policy making. The in-depth interviews facilitated an examination of the intermediate outcomes of processes and of the differences and conflicts of views among various key actors and institutions, which often do not display in the final policy documents. Both expert interviews and documents were analysed utilising the method of identifying critical events in the data set (Ragin, 1987; Barzelay et al., 2003). This resulted in the identification of three overall categories of PPP meta-governance as well as a number of sub-themes within each of these categories, as presented in the next section.

## **THE EU'S META-GOVERNANCE OF PUBLIC-PRIVATE PARTNERSHIPS**

This article is the first internationally published study to detail the common framework of EU hard and soft law under which any national, regional, and local administration can contract with a private partner for a PPP project. There are three main findings (see Table 2).

The first is the absence of any form of direct Community regulation concerning formation of PPP in the member states. Hence, as the decision to adopt the PPP model for a given project is taken exclusively by national, regional or local administrations, the EU's role in steering and guiding PPP activity is severely restricted. However, the second finding is that PPPs are indirectly regulated in the EU framework in two ways: a) through the EU Procurement Directives, which detail how national administrations must procure major public construction and works contracts by means of an EU-wide call for tenders; b) under the Stability and Growth Pact, the Commission and Eurostat have set out a fundamental set of guidelines detailing how the legal ownership to an asset under a PPP scheme is determined by the distribution of risks among the public and private partners (the so-called on/off balance sheet issue).

Third, a number of soft governance initiatives can be identified in the EU's framework for PPPs. These include the economic support of Trans-European Transport Networks (TEN-Ts), financial and legal advice to PPP projects, and the recent launch of the European Partnership Excellence Centre (EPEC).

**Table 2. EU's emerging meta-governance of PPPs**

	<b>Direct Community regulation on PPPs</b>	<b>Community regulation applying to PPPs subject to the decisions of national public authorities to award a public service or works contract to a third party</b>			<b>Soft governance initiatives to promote formation of PPPs in the member states</b>		
<b>Legal source</b>	-	The Treaties	Secondary legislation	The Treaty (Maastricht)	Indirectly	Indirectly	Indirectly
<b>Regulation</b>	-	The Treaty's Single Market provisions  Article 43 and 49	Public procurement directives  2004/EC/18 2004/EC/17	Stability and Growth Pact  Excessive Deficit criteria	White Paper on transport policies (cross-border priority transport projects)	Loans and expertise in project assessment	European Centre for Partnerships (EPEC) (launched in Autumn 2008)
<b>Policy goal</b>	-	Equal treatment of private business	Equal treatment of private business involved in public tenders	Coordination of fiscal policies and avoidance of excessive government deficits	Development of cross-border infrastructure to support the running of the Single Market	Promotion of high priority projects and expert assessment and guidance is provided	EU resource unit for PPPs. Competence building and practice exchange
<b>Responsible unit(s)</b>	-	DG MARKT	DG MARKT	Eurostat DG ECFIN	DG TREN	EIB Jaspers	EIB/DG TREN

### **PPPs in the EU's public procurement directive**

Probably the most spectacular EU meta-governance of PPP is the creation of a single European procurement market for public works and services contracts. The Single European Market embraces PPP activity in the member states through the specific provisions of the Procurement Directive (European Parliament and Council, 2004). The underlying principle is that economic considerations instead of national interests should guide the decision to award public contracts to a private consortium. Compliance is subject to rulings by the European Court of Justice, which, in two cases brought before it, stated that the Procurement Directive is:

...essentially aimed at protecting the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State and, to that end, to avoid both the risk of preference being given to national tenders or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body governed by public law may choose to be guided by considerations other than economic ones (European Court of Justice, case law, C-285/99 and C-286/99).

Therefore, when a national, regional or local public administration in a member state decides to commence a PPP project<sup>3</sup>, the project must be made subject to tenders from business in all member states, and be noted in the Official Journal of the European Community (OJEC). However, a threshold limit of approximately €5.15 million applies, which means that only projects with a total contract value above this are subject to these provisions (European Commission, 2007). Considering the size of 'standard' PPP

projects, most of these are well above the threshold limit. In the UK, for example, the HM Treasury operates with a minimum limit of £20 million for PPP relevant projects (HM Treasury, 2003: 43), and the Irish and Danish governments have set out minimum guidance limits of €20 million and €13.3 million, respectively. The rationale behind setting up these national minimum guidance limits is the argument that PPP projects, because of the complexity of the contract and the procurement process, involve high transaction costs (Williamson, 1996). Most national PPP projects would therefore in reality exceed the threshold limits and thus be procured on an EU-wide basis.

In 2004 the European Parliament and the European Council took an important decision to amend the existing procurement directives. The interviews held with Commission officials demonstrate that the rationale for initialising this process was to simplify and update the legal framework for tenders in the EU. The interviews demonstrate that the lack of a fit tender procedure for PPPs was considered an important barrier at the time (Interview DG Markt 2 July 2008). Important for PPPs, the amended Procurement Directive supplemented the three existing procurement procedures with a fourth procurement form, the so-called ‘competitive dialogue’ procedure (European Parliament and Council, 2004).

This allows the holding of discussions between public authorities and private partners over the specifications of a contract, while at the same time securing private partners open and equal access to bids for public works and services contracts. The new procedure was launched to support the procurement of so-called “particularly complex contracts” (European Parliament and Council 2004, article 29), and where the contracting authorities:

- are not objectively able to define the technical means (...), and/or
- are not objectively able to specify the legal and/or financial make-up of a project (European Parliament and Council, 2004: 18 [my emphasis]).

The competitive dialogue procedure was thus meant to facilitate procurement of PPP and other long-term and complex contracts, where procurement is based on open output specifications in order to leave room for private innovation in the process (Tvarnø, 2006). Thus, instead of choosing a preferred bidder early in the process, the competitive dialogue procedure prescribes that the public authority pre-qualifies a list of consortia that proceed into the dialogue stage. Experience with the new procurement procedure is still building up in the member states, and final conclusions should therefore be made with caution, but the early evaluations of this initiative seem to be mixed. While it is generally considered to provide a fair and equal treatment of bidders, case studies have revealed that the competitive dialogue procedure is at the same time considered to be complex and expensive for public and private partners alike (Petersen, 2010).

A further observation relating to the procurement directive is the different legal priority given to various types of PPP models in the EU’s meta-governance framework. The EU’s regulatory framework displays three different types of regulated PPP, to which different legal requirements apply: (i) *contract PPPs* (CT-PPPs); (ii) *concession PPPs* (CC-PPPs); and (iii) *institutional PPPs* (IPPPs) (European Commission, 2004). While the scholarly literature documents a high variety of different PPP models (see Weihe, 2005), what is noticeable is the different legal priority given to the CT-PPP model compared to the CT-PPP and IPPP models<sup>4</sup> in the EU framework:

- Contract-PPPs (CT-PPPs), which are defined as having priority in the legal framework, are subject to detailed Community regulation as formulated in the procurement directive (European Parliament and Council 2004). CT-PPPs are based upon a classical principal-agent relationship written into a contract. The public part pays the private part a monthly, quarterly, or annual unitary payment for the service, building or infrastructure over the long-term contract period. This model corresponds to the various PFI type PPP deals such as DBFOM, DBFO, DBF, etc.
- Concession-PPPs (CC-PPPs) are on the contrary defined as non-priority public works or public services contracts, and are only sparsely regulated in secondary legislation. CC-PPPs are also based upon a contractual relationship, but here the asset is fully transferred to a private concessioner that either collects direct charges from the users of the asset or collects unitary payments from the public partner (so-called shadow tolls). CC-PPPs are, however, subject to the general principles of the Single Market as found in the Treaty's Article 43 and 49.
- Institutional PPPs (IPPPs), which involve the shared public-private ownership of an asset or organisation, with public and private partners each holding shares. In Denmark, for example, this type of PPP has been supported by the government in a new regulation on joint public-private owned companies. Regulation of the IPPP model is considered to be a national issue, and IPPPs are therefore not covered by the EU's public procurement directives, which means that a public tender is not required whenever an IPPP is signed (see Table 3)

**Table 3. Three types of regulated PPP in the EU**

	<b>Contract PPP (CT-PPP)</b>	<b>Concession PPP (CC-PPP)</b>	<b>Institutional PPP (IPPP)</b>
<b>Economic ownership during contract period</b>	Mainly private (dependent on the distribution of risks)	Private	Split public-private ownership
<b>Allocation of finance</b>	Mainly private	Private	Split between public and private according to shares
<b>Flow of payments</b>	Regular public payments to private operator	Private partner collects direct user charges/unitary payments/shadow tolls	Split between public and private according to shares
<b>Ownership when contract expires</b>	Primary public	Primary public	Does not expire
<b>Regulation</b>	Priority Subject to the public procurement directive	Non-priority Subject to article 43 and 49 of the Treaties	Not regulated Article 43 and 49 apply if contracts are awarded
<b>Accounting</b>	On/off public balance sheet according to distribution of risks	Off public balance sheet	Ownership split between public and private partners according to shares

## **The on/off balance sheet issue: risk transfer and legal ownership of PPP projects**

While the EU has established a single European procurement market for PPP projects thus supporting economic competition for deals, the Commission's approach to another key issue has been more cautious. The private finance element which is central to various PPP/PFI schemes such as DBFOM and DBF models (see Savas, 2000) has raised a fundamental question about legal ownership of the asset and sharing of risks under PPP deals. This is what Eurostat officially refers to as the on/off balance sheet issue (Eurostat, 2004).

To see the importance of the on/off balance sheet issue in an EU perspective, we need to look to the European Monetary Union and the continuing efforts to stabilise national fiscal policies. The Excessive Deficit Criteria require that national governments keep annual current account deficits within 3 percent of gross domestic product (GDP), and gross public debt ratio at a maximum of 60 percent of GDP (Hix, 2005:315). Compliance with the fiscal balance criteria is monitored by the Commission and Eurostat, the latter in close contact with the statistical offices of each national government (Interview Eurostat 4 July 2008).

PPP activity was documented in all but a few member states when, in late 2003, the Commission became seriously concerned about the treatment of PPP projects in national budgets. The interviews conducted for the purpose of this article demonstrate that this concern was based on the observation that some member states, having difficulties meeting the Excessive Deficit Criteria, might systematically use the PPP model to place public projects on the private partners' balance sheets, whereby large-scale public investments would therefore not be included in official government accounts despite the major financial commitments being made under such schemes (Interview Eurostat 4 July 2008). The Excessive Deficit Criteria, being essentially aimed at stabilising fiscal policies in the Euro area, would thus potentially be bypassed.

Soon after, in February 2004, Eurostat launched a decision on the treatment of PPPs in national accounts (Eurostat, 2004). The Commission, wishing on the one hand to promote PPP projects, and on the other to secure compliance with the fiscal stability targets, decided that assets included under a PPP agreement may be registered off government balance sheet only if two conditions are met:

- a) The private partner bears the construction risk, and
- b) The private partner bears at least one of either availability or demand risk (Eurostat, 2004).

If both these conditions are met, the asset of a PPP is placed off the public balance sheet, and will therefore neither affect current account deficits nor general debt rates of governments. On the contrary, if none or only one of the conditions is met, the asset shall be regarded as public, and be registered on the public balance sheet.

The issue is basically about risk and who bears the actual risks involved in a concrete PPP-project from the construction phase and throughout the contract period. With the Eurostat decision, assets under a PPP scheme in any of the 27 member states will have to be allocated to the partner that bears the actual risks involved in the deal. Obviously, the recent fiscal crises of many European governments may have raised the short-term

incentives for placing asset-based investments off government balance sheets, thus further accentuating the debate about appropriate risk transfer/sharing under PPP deals (for a discussion of risks in PPPs see Bing et al., 2005).

### **Recent developments: the launch of a European Partnership Excellence Centre (EPEC)**

Supplementing the regulations found in the Procurement Directive, the Treaty and the Eurostat accounting principles, the EU has more recently launched a number of soft governance initiatives. New measures are gradually being launched whereby the regime is made subject to renegotiations and ongoing adjustments, which indicate that the regime is still in the making. Recent initiatives include various policy initiatives, economic support to PPP projects via the European Investment Bank (EIB), and perhaps most spectacular, the recent establishment of the European Partnership Excellence Centre (EPEC). The Commission has, under the auspices of DG TREN in the period 2007-2013, a budget of €8 billion to support the Transport Network initiatives (TEN-T) and other projects<sup>5</sup>. The EIB, another important actor for PPP, has supported a number of these TEN-Ts with loans and guarantees along with project assessment expertise (EIB, 2004, 2005).

The EIB and DG TREN are clearly the two most proactive actors promoting PPPs in the EU, and both have been central in the recent set-up of the EPEC, which was officially launched in September 2008. The formation of national PPP units (typically under the Ministry of Finance) has been a fundamental element of the institutional support for PPPs at the national level (see Spackman, 2002). In a similar fashion, the idea behind the EPEC is the creation of an EU PPP resource unit that can facilitate competence building and exchange of best practice among the member states. Staff are not recruited according to normal application procedures, but are open to postings by national, regional, and local administrations. The EPEC replaces a previously very informal PPP expert network centered in DG TREN that on a non-regular basis but approximately twice a year invited national experts, private business, and other relevant actors to meetings about PPP issues. The long-term impact of the EPEC is yet to be seen, but its establishment can be interpreted as an attempt to institutionalize the previously more ad hoc based and informal PPP networks at EU level.

Another central policy initiative is the establishment of the Joint Assistance to Support Projects in European Regions (Jaspers). Jaspers is an initiative by the EIB in cooperation with DG REGIO and the European Bank for Reconstruction and Development, which was launched to provide support to administrations in the EU's new member states in the preparation of construction/infrastructure projects for funding from the Structural and Cohesion Funds (Interview Jaspers 3 July 2008). These major projects can take many forms, of which PPP is only one. Jaspers was thus not formed to support PPP per se, but to support the preparation of large infrastructure projects in the new member states, and some of these projects are procured through the PPP route. In concert with the launch of the EPEC, this initiative might be seen as an indication that the EU is now gradually directing resources from the hard law sphere towards soft governance instruments such as advice services, competence building, expert networks, and policy learning (Bórras & Jacobsson, 2004).

## **DISCUSSION: EMERGING META-GOVERNANCE AS A REGULATION FRAMEWORK FOR PPPS?**

Much has been learned about the EU's meta-governance of PPPs. In this section, reflecting the broader aim of the article, I will make four observations connecting the empirical findings to a more general discussion of regulatory reform for PPP and the new modes of governance in the EU. First, the EU's Procurement Directive requires that all PPP projects above the threshold limit of approximately €5.15 million be procured within a common EU procurement market for PPP projects. By the regulatory design and enforcement of a common PPP market across the EU area, this element of the meta-governance framework embodies a regulation-for-markets logic, which signifies the idea that public regulatory bodies can promote competition by imposing market-enhancing measures (Jordana & Levi-Faur, 2004).

However, whereas privatization and traditional contracting out were intrinsically linked to what Teisman & Klijn (2000) have called a process of 'untwining' (separation of policy and production), the dynamics of policy-making for PPP appear to be somewhat different. The basic notion of partnership builds on collaborating partners that share responsibilities, risks etc. over a long time period, and the formation of PPP therefore involves a process of 'entwining' the public procurement authority and the private bidders (Teisman & Klijn, 2000). As the EU has been heavily criticized for its lack of fit procurement procedures for such PPP schemes, the competitive dialogue procedure may be seen as the solution which requires a transparent and fair competition for PPP deals, while at the same time allowing that public and private partners to some extent become entwined in the bidding process.

Second, the accounting and on/off balance sheet principles that follow from the Excessive Deficit Criteria were imposed to hinder the PPP model being chosen by member states as a means of disguising public deficits by placing major capital investments on the private partner's balance sheet. By setting up accounting principles for the conduct of PPP business throughout the EU area, this is clearly an attempt to control the long-term public financial consequences of such PPP contracts with a massive private finance element. Logically, the accounting issue is especially pertinent for governments with large public spending deficits, although the recent crisis has obviously exacerbated government deficits in most European countries. While this may render PPP schemes more attractive for governments, the shortage of risk-willing private capital may on the other hand reduce the ability of private partners to engage in large-scale PPP activity. Whatever the effect of the current crises, the meta-governance framework now entrusts the Commission and Eurostat with competencies to scrutinise the risk transfer and legal ownership of signed PPP deals in the member states.

Third, within the procurement framework, three models of regulated PPPs – CT-PPPs, CC-PPPs, and IPPPs – are present. Whereas CT-PPPs are subject to the full provisions of the Procurement Directive, which means that this form of PPP must be procured on the common EU-wide PPP procurement market, CC-PPPs are regarded as being of less priority and are merely subject to the general principles of the Single Market as found in the Treaty's Article 43 and 49. Finally, IPPPs are not subject to EU regulation. Various models of PPPs are thus regulated differently in this meta-governance framework, and efforts at integrating PPP markets have clearly been most pronounced for PPPs such as DBFOM, DBO, BOT, and BOOT models awarded as classic contracts with direct,

unitary payments to the private partner. The data collected for the purposes of this article do not give any clear explanation as to why different regulatory priorities are applied to various PPP models, and future scholarly work is warranted in order to further explore this feature of the EU's regulation of PPPs.

Finally, a number of initiatives to support disclosure of information, competence building, and sharing of best practice constitute an increasingly important feature of this meta-governance framework. Initiatives have been taken to facilitate competence building at multiple levels of governance, and have recently been institutionalized with the launch of the EPEC. These recent initiatives resemble some of the characteristics of the Open Method of Coordination (OMC), a recent and now quite pronounced mode of EU soft governance based on network governance, multiple layers of participation, and the spread of best practice (Borrás & Jacobsson, 2004; Pochet, 2005). The findings thus support the broader tendency of EU regulatory reform moving in the direction of soft governance. In this sense, it can be argued that we do see a slowly emerging meta-governance structure that sets a framework of general principles and guidelines for PPP activity at national, regional and local administrative levels.

**Table 4. The EU's meta-governance of PPPs**

	<i>Logic of regulation</i>	<i>Regulatory authority</i>	<i>EU mode of governance</i>
<b>EU's Procurement Directive</b>	Regulation- <i>for</i> -PPP markets	EU (> €5.15 threshold)	Community Method (command-and-control)
<b>Accounting and on/off balance sheet</b>	Regulation- <i>of</i> -PPP markets	EU and the member states	Soft governance (naming-and-shaming)
<b>Three models of regulated PPP</b>	Conceptual meta-governance	EU: CT-PPPs Member states: CC-PPPs and IPPPs	Community Method applies to various degrees according to priority of each PPP model
<b>European Partnership Excellence Centre</b>	Disclosure of information, competence building, and spread of best practice	EU and multiple levels of national, regional, and local actors	Open Method of Coordination (best practice, learning, expert communities)

But the analysis also revealed that establishing a common EU meta-governance framework for PPP in the EU is a long and winding road, which may in fact never be realised because of significant national diversities in the preference for welfare state provision (Pochet, 2005). Rather than expressing a single mode of regulatory governance for PPPs, the EU's meta-governance is a compound regime encompassing various regulatory logics and different modes of governance (see Table 4). *Regulation-for-markets* and *regulation-of-markets* are the two dominant logics of regulation, and parallel efforts to facilitate a common European PPP market and control the fiscal effects of PPP activities at national and local levels characterise this meta-governance framework.

## CONCLUDING REMARKS

While the creation of a European Single Market has been a major driver of economic integration in the EU area, it has been recognised that such integration of markets requires an effective infrastructure throughout. In 1996 it was estimated that €600 billion would be needed in 2010 to establish the Trans-European Transport Network (TEN-T) including 75.200 km of roads, 78.000 km railways, 480 ports, 330 airports, as well as traffic management systems, user information systems, etc. (PricewaterhouseCoopers, 2005: 7). The need for investment in assets and infrastructure must furthermore be seen against the background of EU enlargement, which has been estimated to require an additional €80-90 billion of investment in physical infrastructure in order to bring the new member states up to the current EU average (Brenck et al., 2005). Despite this widely recognised challenge, the EU's initiatives to promote formation of PPP projects have largely been stalled. The article has detailed that the EU's meta-governance framework provides the Commission with no direct regulations with which to support or constrain uptake of PPPs in the member states. This leaves considerable room for manoeuvre for national governments to craft national policies and regulations that are more or less supportive towards PPPs.

But the analysis also demonstrated two sets of EU regulations that apply if a public authority in a member state decides to sign a PPP deal: the public procurement directive and the on/off balance sheet criteria. With the competitive dialogue procedure, introduced in 2004, the Commission has launched a procurement method to support the development of free and open PPP markets. The accounting regulations, better known as the on/off balance sheet issue, require that assets under a PPP scheme in any of the 27 member states are allocated to the partner that bears the actual risks involved in the deal. Whereas the Commission has so far abstained from formulating an authoritative definition of PPPs, the procurement directive and the treaties set out three models of regulated PPPs - CT-PPPs, CC-PPPs, and IPPPs - to which various priorities and regulations apply (European Commission, 2004).

The EU in general, and the Commission in particular, has been struggling with two concerns which were not always compatible: to promote an EU-wide procurement market for PPP projects (a regulation-*for*-market logic) and to make sure that governments do not resort to the PPP model as a means of bypassing the Stability and Growth Pact criteria for responsible fiscal policies (a regulation-*of*-markets logic). The latter has been a sober concern, especially viewed against the recent economic crises that could potentially make it more tempting to make use of PPPs as a way of overcoming short-term budget restraints.

For those believing (or hoping) that the EU's meta-governance of PPP will lead to further investments in physical infrastructure development, this article brings mixed news. The analysis shows that, despite the Commission's enthusiastic appraisals of public-private partnerships, the EU has as yet mostly engaged in regulation of PPP at a rather abstract and conceptual level, thus reserving most real regulation competencies to national and local administrations. The Commission and the European Investment Bank's direct influence on the formation of PPP is found at a project basis, and only for those projects that DG TREN supports financially or the EIB supports via loans or guarantees. With the launch of the European Partnership Expertise Centre (EPEC), the Commission and the EIB have created an institutional platform for practice exchange,

formulating codes of conduct and building expert communities, thereby promoting more evidence based learning in the future. Faced with limitations to the classic Community Method of hard law regulation, the central regulatory actors seem gradually to increase the preference for soft governance mechanisms, such as advice services, competence building, and policy learning.

If PPPs are here to stay, and much suggests that they are, more needs to be learned about the EU's role in regulating them. One promising venue of research would be to comparatively study the different practices of implementing EU PPP policy and regulation in national public administrations. Thereby, knowledge on various national practices could be accumulated and compared. Another strategy would be to adopt a full International Relations approach, and compare the EU's framework for PPPs with initiatives of other international organisations such as the OECD and the IMF. Both have recently published reports and articles sympathetic towards PPPs (see for example Corbacho, Funke & Schwartz, 2008; OECD, 2008). Irrespective of specific choice of research design, there is clearly a need to further scrutinise above-state and multi-level governance aspects of the regulation of PPPs as a supplement to the single country and case study approaches, which have hitherto prevailed in the academic PPP literature.

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## NOTES

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<sup>1</sup> Some scholars, especially scholars of law, prefer to use the term 'soft governance' instead of soft law to distinguish formal law from other measures of a non-binding nature. Here, in accordance with most EU policy research, I use the two terms interchangeably.

<sup>2</sup> It turned out that in DG research the PPP concept meant something rather different than that defined here, as it was more about private involvement in research projects and research strategies. That interview is therefore not directly referred to in this article, but served as general background information.

<sup>3</sup> Or any other public project that involves a private partner in the delivery of a public works contract.

<sup>4</sup> The CT-PPP (contract-PPP) and CC-PPP (concession-PPP) are my abbreviations, whereas the IPPP (institutional PPP) is the Commission's official abbreviation for PPPs with a common ownership.

<sup>5</sup> DG TREN could initially support cross-border high priority projects with up to 10 percent of costs, but this has recently been raised to a maximum of 20 percent of total project costs.

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## APPENDIX 1: EMPIRICAL SOURCES

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