Speech delivered at the 3d annual Public-Private Partnership Global Summit

Ladies and Gentlemen,

I have been told that you would be interested to hear about the European Commission's current policy on public-private partnerships and its future projects. Let me start by saying that the Commission itself is a partnership among many directorates, each having its specific tasks and responsibilities. As Commissioner responsible for the Internal Market, I am particularly concerned with procurement issues. This will be the focus of my intervention today.

The European Commission recognises the benefits of partnership arrangements between the public and the private sector. Co-operation with the private sector can bring advantages, such as the availability of private sector funds, know-how and managerial experience. Public-private partnership projects can only thrive, however, if they are supported by fair and transparent rules.

The phenomenon of public-private partnerships confronts EU procurement law with a major challenge. EU procurement law does not define a public-private partnership, nor does it provide for a specific set of rules covering the procurement of PPP projects. In fact, public-private partnerships come in many forms and are continuously developed in order to suit the particular characteristics of specific projects. Further, the terminology 'public-private partnership'

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.
Office: C100 02/27. Telephone: direct line (32-2) 2998356. Fax: (32-2) 2969498.

is not wholly adequate. Partnerships are also frequently realised between entities that all belong to the public sector or have a 'mixed' public-private status.

In the context of procurement, the terminology 'public-private partnership' is commonly used in order to mark the difference with more traditional forms of procurement. In traditional procurement, the government identifies and finances an asset or a service entirely through its own efforts and resources. In PPP, the private partner assumes a much greater role than is the case in traditional forms of procurement, and stays involved over a longer period of time. Typically, the private partner assists the government in the planning and design of the project. Further, the private partner may arrange for the financing of the project, by having recourse to financing techniques available on the private market. Finally, the private partner usually assumes the operational responsibility for the asset or service involved over a set period of time. When reviewing potential breaches of the procurement rules, the Commission has come across a wide variety of partnership situations, such as toll-road projects, school and land development projects realised in the frame of the British 'Private Finance Initiative' and arrangements whereby municipalities delegate the provision of water services to joint venture structures, to name just a few.

Public-private partnerships are not the primary focus of the current EU procurement directives. And yet in some Member States these deals can be as large as all the other public procurement put together. In order to remedy this situation, the Commission has taken a number of

initiatives over the past years. First, the Commission adopted in 2000 an interpretative communication on concessions. In that communication, it has sought to clarify the legal requirements for procurement arrangements that are not covered by the directives, in particular concessions. Second, the Commission has, within the current review of the procurement directives, proposed a new method for procuring complex contracts, enabling public entities to negotiate tailor-made solutions with various participants. This has become known as the competitive dialogue. Both initiatives merit a further word of explanation.

The communication on concessions first. This communication was designed to fill a void left by the procurement directives. The starting point of the communication is the distinction which the directives draw between 'public contracts' and 'concessions'. Concessions are defined in the same manner as public contracts, except for the fact that consideration for the construction to be carried out or for the service to be provided must consist, at least partially, in the right to exploit the construction or the service involved. Concessions involve a transfer of operational responsibility from the public to the private. For a project to qualify as a concession within the meaning of the procurement directives, however, the revenue of the private partner must be related to the results of operation of the construction or service involved. Where the private partner receives a fixed payment, or where its returns are fully guaranteed, the project will not qualify as a concession but rather as a public contract within the meaning of the directives. The textbook example of a concession within the meaning of EU law, is the toll-road project.

While public contracts are in principle subject to the detailed rules of the procurement directives, only works concessions are covered by the directives and then only subject to a ‘light’ regime. Services concessions are not covered by the directives at all. This created the wrong impression that, under European law, public authorities could award services concessions to whom they please, without any prior call for competition. As a result, an important part of economic activity remained outside the reach of the achievements of the single market.

In its interpretative communication, the Commission recalled that <u>all acts whereby public bodies procure an asset or a service must respect the rules of the EC Treaty</u>, and the principles set forth therein. The two most important principles are transparency, which implies that public authorities must inform potential candidates of the intended procurement project, and equal treatment. This implies that all candidates must be treated on the basis of equality throughout the selection process.

The practical upshot is that any procurement activity undertaken by the public sector, whether or not it is covered by the EU procurement directives, must in principle be preceded by a call for competition. In the absence of more specific rules, the public authority is free to choose the most appropriate selection procedure, as long as the requirements of transparency and equal treatment are met.

The second initiative the Commission has taken in the field of procurement law and PPPs concerns the competitive dialogue. As mentioned before, PPP projects may be subject to the detailed rules of the EU procurement directives. For instance, a project of the Design-Build-Finance-Operate type falls within the reach of the procurement directives when the private sector partner is being paid on the basis of fixed instalments. This normally means that the open or restricted tender procedure must be used, leaving no room for discussions with participants.

Such procedures may not be adequate in complex cases, where the contracting authority simply cannot set out in advance which technical, financial or legal means best meet its needs. One way to deal with such situations under current law is to organise a so-called 'technical dialogue', and thereafter conduct a 'normal' award procedure. Yet this possibility may not always be sufficient, in particular because the company that helps the public entity to define its specifications, may not be allowed to participate in the tender that follows.

The Commission has taken the opportunity of the current revision of the procurement directives to introduce a new tender procedure, the 'competitive dialogue.' The competitive dialogue incorporates a phase in which the public authority can discuss all aspects of the contract with various participants, possibly in successive stages. When the contracting authority thinks it has arrived at one or more workable solutions, the dialogue is closed and the remaining participants are invited to submit bids based on the solution that they have presented during the dialogue.

The competitive dialogue can only be used in relation to contracts which are so exceptionally complex that it is not possible for the contracting authority to define the technical means of satisfying its needs or what form the financial or legal structure of a project should take. An example of where the competitive dialogue might apply is a complex public private partnership where the authority might want to offset part or all of the operational, financing or risk factors of a given project but where the complexities are so great that it does not know how to go about structuring the project. So the first few times such a complex infrastructure project is undertaken, it might come within this category. That may not be the case, however, where there have already been similar projects to learn from.

Of course, the new procurement directives still await adoption by the Council and the European Parliament. After a first reading by the Parliament, the Council has reached a political agreement on the text of the directives. The texts will now go back to the European Parliament for a second reading, at which stage the Parliament may still propose amendments. The directives will probably be adopted in the course of next year; it will then be for the Member States to implement them.

I have spoken of what the Commission has done thus far in order to accommodate for the phenomenon of public-private partnerships in the frame of EU procurement law. Various parties, including some governments, industrial groups, the European Parliament and the

Economic and Social Committee, have asked the Commission to take the matter further. It is felt that the current state of EU procurement law does not provide sufficient legal certainty. The absence of a proper legal framework would hinder the development of PPP projects within the European Union. This is exacerbated by the fact that the treatment of concessions and PPPs varies widely from Member State to Member State. Some players, needless to say, are opposed to a legislative initiative on PPPs at the European level.

The rise of the PPP phenomenon confronts EU procurement law with a number of questions that must be clarified. Yet finding adequate solutions is not a simple task. Here are a few examples.

As I have pointed out, any procurement activity, even if it takes the form of a public-private partnership project, must respect at least the basic principles of the EC treaty. Yet beyond that common basis, the treatment of PPP projects under EU procurement law can be very different depending on the legal status of the operation. PPPs that qualify as 'public contracts' are subject to the detailed provisions of the procurement directives, PPPs that qualify as 'concessions' are subject to a much lighter regime. PPP projects do not always fit easily within the existing categories of 'public contracts' and 'concessions.' But what is the alternative? There is no overarching definition for public-private partnerships. PPP is an umbrella notion covering a wide range of economic activity and is in constant evolution. Further, while many public-private partnership arrangements may be seen as a form of procurement, others do not seem to involve procurement at

all. A crucial question to resolve is, therefore, whether a unified approach to PPPs is possible and if so, whether it is appropriate.

Here is a second example of the complexities involved. The current procurement directives focus on the procedure leading up to the selection of the winning bidder, but do not cover anything that comes afterwards. The absence of clear rules governing the life of the contract may lead to problems, in particular where the terms of the contract are finalised after the selection of the winning bid, or where the project involves a long-term relationship between the public and private sector. Both situations are pervasively present in PPP-type operations. Setting some rules here seems long overdue, but again the question is how. For example, contractual terms are often being modified over the course of the life of a PPP project in order to accommodate the changing needs of the public interest. A public authority may wish to change the design of a project during its construction, for instance, or may want to secure an extra service. Yet the question is how far the public and private partners parties may go in modifying their existing agreements. If an agreement is being modified in a substantial manner, it may be necessary to re-open a competitive bidding procedure in order to prevent a distortion of competition.

My services are currently examining these and other issues in order to assess the need for specific European rules on PPPs. The Commission plans to adopt a consultative document on public-private partnerships to solicit the views and comments of all interested parties. It should then be able to decide whether to launch a

legislative initiative or not, and if so what that legislative initiative should look like.

This is where the Commission stands as regards public-private partnerships. Let me conclude by stressing the importance of conferences, such as the present one, bringing together the real-world experience of public and private partners operating in different legal regimes. Let's learn from it together.

[20 minutes - 2.088 words]