

# PRIVATE-PUBLIC PARTNERSHIP

## CURRENT SITUATION

### Background

The “Strategy for Encouraging and Developing Foreign Investment”, adopted in 2006 by the Government of the Republic of Serbia recognizes public private partnership as a good mechanism to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service traditionally considered as public activities, through the cooperation with private sector finance and utilization of private management expertise.

The first PPP projects (however, not under that name) originate from granting of the concessions by the Republic of Serbia to the foreign investors for exploration and exploitation of certain mining wealth, construction, use and maintenance of highways and joint participation of the public enterprises and private sector in the field of utility activities (gas distribution, public transport, waste management, etc.).

### Legal framework for PPPs

Serbian legislation does not lay down general rules covering the phenomenon of PPPs. With the exception of the Law on Concessions and, to a certain extent, the Law on Communal Activities, the issue of the PPP is rather indirectly regulated and governed by various acts. Thus, most of those acts are not covering PPP matters primarily, but envisage possibility of applying of PPP in the fields of activities traditionally performed by a public authority. The most important laws are:

- Law on Concessions;
- Law on Public Companies and Performing Activities of Public Interest;
- Law on Communal Activities;
- Public Procurement Law;
- Energy Law, Law on Mining, Law on Gaming Activities, and other laws and bylaws.

Under mentioned laws, an activity of public interest can be assigned to a private partner, entirely or partially. The PPP may include the design, funding, execution, renovation or exploitation of a work or service. An institutionalized PPP, also possible under Serbian legislation, involves the establishment of a company held jointly by the public partner

and the private partner. The joint entity thus has the task of ensuring the delivery of a work or service for the benefit of the public.

Although not stipulated by each of the mentioned laws, by entering into the PPP the following guidelines are to be considered:

- the principle of equal and fair treatment, free market games and autonomous approach of contracting parties (within the concession granting procedure);
- the principle of economy and efficiency based use of public funds;
- the principle of ensuring competition among the bidders;
- the principle of transparency of public funds utilization;
- the principle of equality of the bidders;
- the best bid election criteria.

It is also to be noted that particular regulation often overlaps, in the sense that it is not clear which of the abovementioned laws should be primarily applied for certain activity subject to a PPP, as well as it is not beyond doubt whether appliance of one the set ups envisaged by the particular law excludes relevance of other laws, or such laws should be applied cumulatively. This refers to the procedure under which a PPP is developed, as well as to substantial issues.

### Law on Public Companies and Performing Activities of Public Interest

This law generally prescribes that the business activities of public interest (such as production, transport and distribution of electricity, production, transport and distribution of coal, telecommunication, use, maintenance, protection and improvement of the public utilities (water, roads, mineral resources, woods, rivers, lakes, spas), communal activities, as well as other activities of public interest can be conducted by the public companies and also by private companies. If the public entity opts to establish a public company for operating these activities, a PPP between such public company and the private entity is possible in the manner that public company could entrust its private partner for operation of certain tasks within the scope of subject activity of public

interest. When solely performed by a private company, such an activity is previously entrusted by the competent public authority (the Republic of Serbia as well as Local Self Government). It is also possible for the public authority to enter into partnership by establishing a joint company with a private entity. The procedure of the entrustment is not regulated. However, an entity empowered with performance of the activity of public interest conducts its business under the agreement executed with the public authority. Essentially, such agreement defines mutual obligations of the contracting parties and the rights and obligations regarding the use of state-owned assets for the undertaking of activities of public interest.

### Law on Concessions

The law sets out various activities of the public interest which could be granted as concession to a private entity. Up to now, the concessions have been granted in the areas of exploration and exploitation of mineral resources and road infrastructure. The law prescribes the tender procedure, key elements of the concession contract, including concession fee and termination of the granted concession. Establishing of a Serbian concession company is mandatory. Protection of the concessionaires' rights is regulated as well. A concessionaire enjoys tax incentives as a foreign investor. In that regard, subsequently changes in law are applicable only if they are to benefit the concessionaire. The duration of the granted concession may be up to 30 years, depending on the subject, the estimated profit, level of assumed business risk, demand for construction at an early phase and demand for market development in the field of the concession.

Foreign investors are not allowed to obtain concessions in certain restricted fields of business activities and in restricted areas.

### Law on Communal Activities

The Law on Communal Activities stipulates in a general manner the undertaking of communal activities, allowing to a local public authority to establish public companies or to entrust the undertaking thereof to another entity for a period of up to five years. So far, it is common practice that public and private partner establish a joint venture company, as a carrier of the subject communal activity. If the undertaking of communal activities or certain tasks within those activities

is entrusted to a company taking over the obligation of investing assets into the said activity, the period for which said entrusting may be undertaken may last for the duration of the return period of the invested assets, but no longer than 25 years.

Local public authorities stipulate the term and the manner of undertaking of the communal activities on the grounds of a public tender, and particularly: the terms and manner of holding the public tender; issues that must be regulated by the agreement; the duration of the agreement, the terms and procedure of termination of the agreement prior to the expiry of the agreement period and the rights and obligations arising therefrom. However, the said Law prescribes that local public authority may decide to entrust the undertaking of the communal activities to another company by the gathering of offers or by direct arrangement, in which case a review and expert evaluation of the submitted offers by a specialized organization is necessary.

### Law on Public Procurement

The law stipulates, inter alia, the terms, manner and procedure for procuring goods and services and performing works in cases when the contracting authority for the said procurement is a governmental body, organization or institution or some other legal entity stipulated under said law. There are certain cases of the entrustment of particular activity of public interest in which cases other laws and bylaws refer to the appliance of the provisions of this Law. However, the Law on Public Procurement is quiet whether it should be applied in regard to PPPs.

## POSITIVE DEVELOPMENTS

Adoption of the mentioned Strategy for Encouraging and Developing Foreign Investment and herewith stressed importance of the PPP should increase interest of the Serbian authorities for further development of this concept.

## REMAINING ISSUES

The coexistence of the various laws and by-laws regulating the PPP often provides uncertainty under which of those laws a PPP is to be implemented. Variety of diverse laws regulating same issues in different manner (especially in regard

to the procedure of the entrustment of certain activity or obtaining licence of its provision) results in lack of certainty when planning or initiating a PPP.

Furthermore, activities which could be subject of the PPP are in competence both of the Republic of Serbia and the local authorities, so the PPP practice is often substantially different on the republic and local level, which leads to the variety of applied untypical models, neither directly envisaged by the law nor recognised in the PPPs practise in more developed systems. To such sui generis PPP models it is inherent that the possibly occurring risk during the cooperation falls out of the existing regulation thus, resulting in the legal uncertainty.

It is highly questionable, as well, whether the principles of the Law on Public Procurement are applicable in the cases where the PPP is to be established under the law which does

not provide the clear procedure when choosing a private partner, i.e. Law on Public Companies and Performing Activities of Public Interest.

It is very common that the public authority entering into certain PPP provides assets (such as real estate) as its contribution in subject PPP deal. The incoherency and dubiousity of the legislative regarding state, i.e. local public authority's property in many cases prevent further development in this field. The positive budgetary legislative also hinders further progress in this field; the incapability of local public authorities to indebt for the purposes of the PPP is such example.

In practice, very often, different political, even personal, interests of the governing political structures, both on the level of the state and on the local level, inhibit much faster implementation of PPP in Serbia.

### FIC RECOMMENDATIONS

- The existing legal framework should be systematized with the clear overview of all possibilities which are offered to foreign investors who are considering the PPP, either as a way of entering the Serbian market, or as a way of further expansion of their activities in Serbia. In that sense, enforcing PPPs umbrella law is recommended. Other relevant laws should be harmonized accordingly;
- Improved communication between the central and local authorities on the potential of the PPP concept and the implementation of intended projects would be most welcomed;
- The possibility of establishing a special governmental body, with the competences in initiating and supporting pilot schemes, standardizing the PPP process and operating as a clearing house for know-how and serving as a central contact point for the private and public sectors, especially local public authorities interested in PPP solutions, could further emphasize and improve the PPP practice in Serbia;
- Also, some amendments in existing legislative are required; adjustments and amendments of the public procurement, budgetary, taxation law, recognizing particular needs of the PPP would doubtless lead to broader interest of the foreign investors for this concept in the Republic of Serbia.