

PPP projects in Slovakia



The issue of public private partnership (PPP) is relatively new and has been partly included in Slovak legislation only recently. Currently, Slovakia has hardly any experience in the implementation of these projects and the interpretation of certain legal institutes which enable PPP implementation may not be based on the particular practice of the relevant Slovak public authorities.

PPP definition

Many definitions of PPP exist, arising from the different forms and types of these projects. Basically, PPP can be defined as a complex project of co-operation between the public and private sector, the goal of which is to provide for public services or infrastructure through a private partner. In the scope of the classic form of such a relationship the public sector arranges for capital assets and pays a private entity for them, in advance, an agreed sum (e.g. based on the contract for work). In PPP projects, however, the public sectors remunerate the private entity for the output, that is, for the rendered public services of the predetermined quality and the private entity is responsible for outputs including the infrastructure necessary to achieve the required output (e.g. based on a specific agreement the private entity plans, finances, constructs and operates highways for which it collects tolls from the state or the users of the highway).

A significant attribute of PPP by which it differs from other projects is the method of distributing risks between the private and public sector where the major risks are assumed by the private entity, complicated project financing and the long-term character of contractual relationships. From the legal point of view these projects may take the form of institutionalised co-operation (based on the joint venture of the public and private sector) or the form of different contractual agreements (no individual type of contract but a complex of several innominate contracts).

Legal framework of PPP in the Slovak Republic

Compared to the legislation of the major countries of the European Union, the Slovak legal order has no special regulation governing PPP projects or stipulating their legal definition.

With respect to their nature several legal regulations of public law may apply to PPP (for example, the Public Procurement Act, laws

governing the administration of property owned by the state or self-administration, Budgeting Act, Road Traffic Act, Act on Electronic Tolling System etc.) and of private law (Commercial and Civil Code).

Concession procurement

However, Slovak law contains a so-called concession procurement which is regulated in Act No. 25/2006 Coll. on Public Procurement ("Public Procurement Act"). This Act implements the respective EU legislation regarding the placement of public orders.

Concession on the works, which is one of the forms of PPP, is defined in the Public Procurement Act as an order of the same kind as the order for construction works, with the difference being the right to use the construction for a certain time as compensation for the remuneration of the construction works. The right to use the construction may be connected with monetary performance.

From the point of view of a private investor (concessionaire) the Public Procurement Act sets out the following restrictions in connection with the execution of the concession agreement:

1. The concession may not be granted for more than 30 years from the date when the occupancy permit regarding the respective construction becomes final or the permanent operation of such a construction commences or any other event agreed in the concession agreement occurs, if the concessionaire had or could have revenue from the operation of the construction;
2. A private investor becomes the administrator of state property by operation of law, with all the related rights and obligations. The Administration of state property may not be transferred to a third party (the term "administrator" is not defined specifically by the Public Procurement Act, nor does this Act refer to any other law. Therefore, it is not clear whether a private investor must comply, for example, with the Act on the Administration of State Property, which defines the administration of state property and the corresponding rights and obligations of the administrator of such property); and
3. The respective construction may not be subject to transfer, auction, or third party rights.

At the same time after the concession agreement is executed, the state, or as the case may be, the contracting authority may not transfer of the ownership of the construction or the building plot to a third party.

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Similarly to other types of public agreements the subject of which is the delivery of goods, performance of the work or the provision of services, public authorities must use the methods and the practices of public procurement when executing the concession agreements, except in certain exempt cases. This means that only a private entity which succeeded in a tender within public procurement may become the contracting party. Thus, in terms of the procedure for a public authority to acquire an order the Public Procurement Act basically does not distinguish between ordinary procurement and concession procurement.

However, the methods and practices set out in the Public Procurement Act do not apply to ordering concessions for services, which are defined as orders of the same kind as orders for the provision of services, with the compensation of monetary remuneration for the services in the form of taking benefits from the provided services.

One procedural institute which can be used in PPP projects under the Public Procurement Act is the so-called “competitive dialogue”. Competitive dialogue can be used in cases of notably complex projects and the public tender or restricted tender cannot be used and projects where the public authority is unable to define the technical requirements or legal or financial conditions for the project (for example, traffic infrastructure projects). It should be a flexible procedure enabling discussion of the particular aspects of the order with each individual applicant.

However, it must be noted that the Public Procurement Act only regulates the basic framework of the concession agreement. Other parameters of the concession agreements or other contracts governing PPP projects (e.g. division of liability between the parties, financing of the project and setting of cash flows, division of risks, “step in right” of the financing company, the implications of the eventual invalidity of the PPP agreement, etc.) will be based on the agreement of the par-

ties, and this agreement must comply with the respective provisions of the Commercial Code, the Civil Code, or other applicable laws (for example, the Labour Code in the case of a posting of employees, etc.).

Other PPP concepts

Many PPP concepts exist and may be broken down based on different criteria, e.g. method of the transfer of risks or title to PPP assets. Within the classic model, which differs from the concession agreement model, a private investor may own a structure and the title to this structure may be or must not be transferred to the state after the termination of their co-operation.

Potential legal barriers to PPP project implementation

Though the current Slovak legislation enables the carrying out of PPP projects, it may not be excluded that the implementation of rather complex PPP projects may require several legal amendments. Mainly, law governing the administration of state property and restricting its disposal (e.g. a security interest may not be created in this property) or insufficient control of the state over public debts generated by PPP projects may cause problems. PPP projects which include the collection of fees from users of the relevant service may be problematic due to the absence of law governing such collections (as opposed to payment for a rendered public service the collection of fees must be authorised by legislation) etc.

In conclusion, we note that PPP is more an economic and social than a legal concept focused on rendering more effective public services of higher quality. The legal environment and individual legal institutes should create conditions for the successful implementation of these projects.

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