

# PUBLIC-PRIVATE PARTNERSHIP

1.40

## WHITE BOOK BALANCE SCORE CARD

Recommendations:	Introduced in the WB:	Significant progress	Certain progress	No progress
Systemic and organizational changes in the management of capital investments are necessary to assure an efficient implementation of public investments, irrespective of the model of provision. This issue has been recognized and certain efforts have been made by the Ministry of Finance, although with delays in implementation. Through the way they are structured, PPPs could resolve a number of issues, including a more efficient provision of public services and a higher level of transparency in the procurement process. In particular:				
The institutional capacities of the PPP Commission have to be further improved and strengthened for more consistent project reviews, including an increase of its competences (to include project preparation and monitoring) and capacities (to have more people with sector-specific expertise)	2012		√	
Promote available and officially approved contract templates, e.g. ESCO street lighting contract templates. Promote related manuals for public partners to prepare ESCO projects	2017			√
Amending the rules of the LGAP so as to exclude or limit the applicability of its provisions relating to "administrative contracts" to PPP contracts	2017			√
Practical implementation of the rules relevant for determining the project value that are PPP-specific needs to be improved and the capacities of the public sector strengthened to fully delineate such projects from purely public procurement projects	2017			√
Take advantage of the IFI's support for project preparation and body of knowledge on PPPs. Resources from EIB's European PPP Expertise Centre (EPEC), the IFC's advisory services in public-private partnerships or EBRD's Infrastructure Project Preparation Facility (IPPF) can be used for project preparation	2017		√	

## CURRENT SITUATION

Serbia is historically in need of investments directed towards public infrastructure, investments concerning projects of public interest and those pertaining to the provision of services of public interest. The magnitude and complexities of these types of investments call for establishing legal certainty and transparency in the delivery of a public-private partnership (hereinafter: "PPP") project. To facilitate progress in this respect and a step in a forward-looking direction, the Law on Public-Private Partnership and Concessions (hereinafter: the "PPP Law") was adopted in 2011, introducing the concept of PPPs into the Serbian legal system for the first time.

Despite the PPP Law having been adopted in 2011, its practical implementation has mostly been seen in the past several years, in relation to which it is noted that the Public Private Partnership Commission has to date approved 112<sup>1</sup>

public private partnerships, signalling that there appears to be quite a sizeable appetite towards opting for a PPP project structure in implementing investments into public infrastructure, projects of public interest and procurement of services of public interest.

The number of PPP projects that have been approved to date appears to confirm that a properly structured PPP can facilitate a return on investment that would be greater than the value that would have been obtained by using the traditional public investment model through a classic public procurement (i.e. funding from the budget). Aside from the return on investment, historically the public sector has not shown to be best placed to manage the complexities of developing, managing and operating public infrastructure investments or providing services of public interest to a satisfactory level.

Despite the high number of approved PPP projects, based on available information in the Register of Public Contracts, so far only a limited number of public contracts have been executed. In addition, the biggest infrastructure projects so far have mostly been executed in the traditional way,

<sup>1</sup> List of approved public private partnership projects available on the website of the Public Private Partnership Commission of the Republic of Serbia at: <http://jppp.gov.rs/koncesijevesti/spisak>

through bilateral arrangements and the “finance & build” model. The Register of Public Contracts does not contain bilateral arrangements.

Whilst the larger portion of PPPs that have been implemented in Serbia to date are of a smaller scale, two that are noteworthy in terms of their complexity, importance and magnitude are the PPP project for waste management services in the City of Belgrade and the concession project for the airport Nikola Tesla.

### POSITIVE DEVELOPMENTS

Since its adoption, several amendments to the PPP Law have been implemented, recognising the need to adjust the legislative framework to the changing market and trends in this respect. Notably, amendments to a large extent addressed conflicting provisions of the PPP Law and Public Procurement Law (the latter applying to the tender procedure for PPPs without elements of a concession).

Undoubtedly, the above referenced large-scale PPP projects represent the first of this scale to have reached commercial close in Serbia, which is a success in itself. As far as existing practices are concerned, the commercial and financial close of the concession project for the airport Nikola Tesla and the commercial close (and pending financial close) of the PPP project for waste management services in Belgrade overall represent progress towards establishing uniform best practices reflecting international standards with which the wider international community is familiar when it comes to PPPs.

### REMAINING ISSUES

Whilst notable progress is palpable in the area of PPPs, achieving progress in several aspects that are outlined below would highly contribute to the further development of PPPs and their appeal in Serbia, as well as convey an inviting message to potential investors.

In terms of the legislative framework, the PPP Law and the Public Procurement Law are in need for improvement, thus the alignment with the legislative framework of the European Union (EU) is requisite, as the alignment promotes an investor-friendly climate and legal certainty and will likely contribute in alleviating concerns associated with investing in Serbia. Aside from the PPP Law, which is the key law to regulate this area, intrinsic to a PPP project are the way in which

public services are dealt with, public companies, public debt provisions and other sectoral laws and regulations which are not aligned amongst themselves, which ultimately raises the level of legal uncertainty associated with a PPP project.

Accounting for the fact that launching a PPP project requires large resources as well as specific know-how to successfully launch, tender and deliver, focus should be drawn to the methodology development related to approving a PPP project proposal and equipping the public sector with the required know how. Currently the legislative framework is lacking in this respect, and the public sector is not sufficiently experienced to apply a tool set to identify which PPP project proposal provides for the best “value for money.”

Due to the lack of sufficient market practice in implementing PPP projects, there is no agreed outline of key contracting principles that could be used as a starting point for any PPP project. Furthermore, the provisions of the PPP Law regarding the submission of the self-initiative proposal by a potential private partner creates dilemmas and perplexities with regards to the vaguely defined mandatory content of such a proposal. In addition, the self-initiative proposal assumes that the proposer, a potential private partner, submits a business plan and financial analysis in advance, which consequently, in commercial terms, disrupts its competitive position. All these issues distance away potential private partners from formally initiating PPPs, thereby practically limiting pro-activity on the private sector side. Therefore, in light of the foregoing, the amendments of the PPP Law provisions in order to precisely specify the content and procedure of self-initiative proposal in a way that eliminates the abovementioned deficiencies, is indispensable.

Interaction with the new Law on General Administrative Procedure: The new Law on General Administrative Procedure (LGAP) became applicable in June 2017, and it introduced the concept of “administrative contracts”; that is, contracts concluded between an administrative authority and a private partner within the administrative procedure. According to prominent experts and the applicable interpretation, PPP contracts may fall into this new category under the LGAP, which may become a significant obstacle for the PPP market going forward, since it will likely affect the financing of PPP projects and generally increase the costs and risks of the private partner. Moreover, the relevant provisions of the LGAP significantly limit certain rights

of private parties, especially the very right to terminate the contract (instead, a vaguely regulated concept of “objection” is at a private party’s disposal in such specific cases).

Lastly, it is worth noting that a PPP will involve a public debt provisioning to a larger or smaller extent depending on the size of the specific PPP project, which currently is not properly accounted for under Serbian budgetary and public debt legislation. Recognising the long-term nature

and financial implications of a PPP (whichever way structured), further legislative fine tuning should be considered to ensure proper financial planning on the side of the public partner. This is of crucial importance in setting up the notion of bankability for any PPP project and providing comfort to any potential private partner, and by extension financiers wishing to participate in the delivery of a PPP project which will rarely be implemented without heavy external financing.

## FIC RECOMMENDATIONS

Systemic and organizational changes in the management of capital investments are necessary to assure an efficient implementation of public investments, irrespective of the model of provision. This issue has been recognized and certain efforts have been made by the Ministry of Finance, although with delays in implementation. Through the way they are structured, PPPs could resolve a number of issues, including a more efficient provision of public services and a higher level of transparency in the procurement process.

In particular:

- The institutional capacities of the PPP Commission have to be further improved and strengthened for more consistent project reviews, including an increase of its competences (to include project preparation and monitoring) and capacities (to have more people with sector-specific expertise).
- Promote available and officially approved contract templates, as well as investing resources in training public sector partners to successfully navigate a PPP project from inception to realization.
- Amending the rules of the LGAP so as to exclude or limit the applicability of its provisions relating to “administrative contracts” to PPP contracts. Further amendments to key legislation to align with legislation of the EU. And the legal framework has to be amended in order to eliminate identified deficiencies in relation to the self-initiated proposal and consequently, in order to make room for more pro-active approach of the private sector in initiating PPPs.
- Practical implementation of the rules relevant for determining the project value that are PPP-specific needs to be improved and the capacities of the public sector strengthened to fully delineate such projects from purely public procurement projects.
- Take advantage of the International Financial Institutions’ (IFI) support for project preparation and their know-how on PPPs. Resources from the European Investment Bank’s (EIB) European PPP Expertise Centre (EPEC), the International Finance Corporation’s (IFC) advisory services in PPPs or the European Bank for Reconstruction and Development’s (EBRD) Infrastructure Project Preparation Facility (IPPF) can be used for project preparation.