

# The general framework for liberalization and regulation of public utilities in countries of ex-Yugoslavia



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### The general framework for liberalization and regulation of public utilities in countries of ex-Yugoslavia

This edition of Network Industries Quarterly aims to provide insights into the general legal framework for liberalization and regulation of public utilities, notably communal services, in countries of ex-Yugoslavia. Among ex-Yugoslav countries, two are European Union (EU) Member States (Slovenia and Croatia), two are in the process of accession negotiations (Montenegro, Serbia), one is a candidate country (Macedonia) and one represents a potential candidate country (Bosnia and Herzegovina).

After World War II, ex-Yugoslavia was a unique example of self-management, and a specific system of governance and societal ownership of companies, including public utilities. In the early 1990s, Yugoslav disintegration and democratization coincided with economic transformation from a socialist market economy to a market economy. However, legacies of the past economic system are still present in some aspects, albeit in some countries more than others, and influence the process of liberalization of public utilities. This process was urged by joining the EU or is still urged by EU accession requirements. Most of the impetus for liberalization comes as a response to low investments in infrastructure, as most of these countries have reached high debt levels and therefore a private finance infrastructure seems to be a solution. The market liberalization agenda began to come to the front, and regulatory reform urged creation of independent regulatory agencies for state-wide public utilities such as electricity and gas markets. On the other side, municipal (communal) services are mainly provided by local authorities and public operators. Liberalization agenda in many of these countries presupposes privatization of public undertakings, contracting out or alternatives to privatization such as Public-Private Partnerships (PPPs) and concessions, with special attention given to the general legal framework for PPPs and concessions in these countries.

The following are some of the issues the country contributions have strived to address:

- The scope and characteristics of public undertakings providing utilities and the character of public utilities owned or regulated by local self-government units;
- PPPs and concessions as an “alternative” to full privatization: basic overview of active projects and reference to the legal and institutional framework for PPPs and concessions;
- Liberalization agenda and the main issues in regulating local public utilities (communal services);
- The character of regulatory powers and challenges posed to municipalities in regulating communal services.

Although all country contributions have a similar structure, the level of detail may differ, notably due to the existing level of development of the normative and institutional framework in a respective country and different experiences in private sector involvement. After presenting the institutional and normative setting, in the concluding remarks authors have identified the main pitfalls and prospects for change. Although differences exist, it seems that the volatile political situation in many countries of ex-Yugoslavia and the fragile political will to perform necessary reforms of public (including local) administration and public sector of the economy are the most important deficiencies.

Therefore, it is necessary to adjust legal and regulatory frameworks and create a stable economic environment. Local administration and business communities have to understand the concept of PPPs and private finance initiatives, while policymakers and local authorities must develop adequate plans and facilitatory structures for potential PPP projects, including capacities to initiate projects and perform cost-benefit analysis for the potential projects.

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## dossier

- 3 The Legal Regime of Utility Services and Public-Private Partnership in Bosnia and Herzegovina - Zoran Vasiljević
- 9 The Framework for Liberalization and Regulation of Public Utilities in Croatia - Frane Staničić
- 13 The General Framework for Liberalization and Regulation of Public Utilities in the Republic of Macedonia - Marjan Nikolov
- 17 An Overview of Public Utility Services and General Legal Framework for PPPs and Concessions in Montenegro - Budimka Golubović
- 21 General Framework for Liberalization and Regulation of Public Utilities – the case of the Republic of Slovenia - Aleš Ferčič
- 26 Liberalization Agenda and the General Framework of Serbian Local Public Utility Services Regulatory Regime - Tatjana Jovanić

## 32 announcements

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# The Legal Regime of Utility Services and Public-Private Partnership in Bosnia and Herzegovina

Zoran Vasiljević\*

The author analyzes the state regulation of utilities and public-private partnerships (PPPs) in Bosnia and Herzegovina and points to the different models of implementation of the PPP, as well as practical experiences. The conclusion is that there is a need for harmonization of regulation and the reinforcement of the role of supervisory authority.

## General remarks

Bosnia and Herzegovina (BiH) is a complex country whose legal nature provokes different views (federation, confederation, etc.). It consists of two entities, the Republic of Srpska (RS, 49% of the country) and the Federation of BiH (FBiH, 51% of the territory of Bosnia and Herzegovina), with Brcko District as condominium of both entities. Also, the FBiH is further divided into ten cantons. Each of these territorial units (entities, District and cantons) has its own legislation and constitutes a separate legal subsystem within BiH. The whole of the public sector is finally complemented by local government units (cities and municipalities) and public enterprises.

BiH, like other candidate countries for membership of the European Union (EU), has the obligation to create a three-year program of economic reforms<sup>1</sup>. End of January 2016, the Program of Economic Reforms (ERP BiH 2016-2018) has been adopted at the state level. In addition to the macroeconomic data, it contains the overall program of structural reforms to improve the growth and competitiveness of the country. BiH as a country of about 3.8 million inhabitants had a GDP in 2015 of about 29 billion BAM. Total public spending is about 41% of GDP (of which external debt is about 29%)<sup>2</sup>, while the unemployment rate is between 27-28%.

Like the territorial organization of BiH, the legislation relating to the issue of utilities and public-private partnership (PPPs) is also dispersed. RS, Brcko District and

each of the cantons of the FBiH have their own laws on public utilities and PPP, which are at different levels of alignment with the EU *acquis communautaire*. Thus, in the FBiH only Zenica-Doboj Canton has harmonized its Law on PPP<sup>3</sup> with the European standards. Although there are initiatives, the FBiH has not yet passed its law, but the Program of economic reforms of FBiH for the period 2016-2018 anticipated its adoption. Also, the law does not exist at the level of the overall state. However, at the state level, there are other laws related to the matter of PPP, for which provisions apply in the process of establishing partnerships, such as the Public Procurement Act<sup>4</sup> and Concessions Act<sup>5</sup>, which also exist at other levels of legislative power.

## The scope of utilities services provision and local government jurisdiction

Utility services as activities of general interest in BiH fall within the jurisdiction of local governments<sup>6</sup>, which are regulated by the constitutions of the entities (eg., art. 5 of the Constitution of RS), and on the basis of them, the laws on local government<sup>7</sup>. Only Brcko District, which operates as a unit of local government, is stated in the Constitution of BiH (art. 6/4). Independent competences of the local government units, *inter alia*, in the area of services include planning and providing performance of utility services: the production and supply of water, gas, thermal energy, public transport of people in urban and suburban transport, the purification and wastewater disposal, the funeral activities, maintenance, arrangement

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<sup>1</sup> Stated programs have been adopted at both the state and at the entities level. RS thus recently (by the end of 2016) adopted Program of economic reforms for the period 2017-2019. See: [www.narodnaskupstinar.net/?q=la/narodna-skupstina/sjednice/materijali-za-sjednice/materijali-za-21-posebnu-sjednicu-nrs](http://www.narodnaskupstinar.net/?q=la/narodna-skupstina/sjednice/materijali-za-sjednice/materijali-za-21-posebnu-sjednicu-nrs).

<sup>2</sup> In RS, it is planned to spend a 5.5% of the projected GDP on the local government in 2016.

<sup>3</sup> Official gazette of Zenica-Doboj Canton, No. 6/16.

<sup>4</sup> Official gazette of BiH, No. 39/14.

<sup>5</sup> Official gazette of BiH, No. 32/02 and 56/04.

<sup>6</sup> In FBiH, jurisdiction is divided between local governments and cantons. See, for example, art. 7-9 of The Communal activities Act of Canton Sarajevo, Official gazette of Canton Sarajevo, No. 14/16.

<sup>7</sup> In FBiH in force is The Principles of Local Government Act in FBiH, Official gazette of FBiH, No. 49/06 and 51/09, and besides, each canton has its own legislation. In Republic of Srpska in 2016 was passed new Local government Act of RS, Official gazette of RS, No. 97/16.



and equipping of public green and recreational areas, maintenance of public traffic routes in settlements, storm and other water drainage from public areas, cleaning of public areas in settlements and other utility services, in accordance with the laws on local government<sup>8</sup>. Namely, the assembly of the local government may also determine other utilities as activities of special public interest, if they are indispensable for life and work of citizens, companies or other organizations. Similar enumeration of municipal activities is contained in the Communal Activities Act of RS<sup>9</sup> under art. 2, with some added activities such as waste disposal from residential and business premises, management of public spaces for car parking, maintenance of public toilets, management of cable ducts for communication cables and systems, marketplace activities, chimney sweep business, public lighting in urban areas and activities related to animal hygiene. The Communal Activities Act of Canton Sarajevo<sup>10</sup> in turn, adds activities of decoration and maintenance of public clocks. Those activities can be divided into activities of individual or collective utility consumption, depending on whether it is possible to charge them separately from each user according to the amount of actually performed utilities.

For the above enumerated purposes, public companies in ownership of cities and municipalities (also they can be founded at the level of several local governments) can be founded or the conduct of activities contracted out to the private business entities on the basis of PPPs, with retention of the right to secure the organization and the manner of their performance, as well as supervision. The Local Government Act of RS under art. 39 (2) gives explicit competence to the assembly of the local government to affirm the price of utilities. This is confirmed by the Communal activities Act of RS in art. 20 (3), but is also emphasized in art. 6. that local government can make a decision to prescribe in detail the possibility for the subsidized price of utilities, categories of beneficiaries and terms of subsidies, and in general the unit of calculation for each type of public utility and the payment method of utility services. In any case, if the public enterprise is not given the approval for the price of the utility service and thus the provision of customer service to customer would be brought into question, the local governments can compensate the difference between existing and economic price of utilities from their budgets. Unlike the RS legislation, laws in the FBiH do not define that the level of utility service price is determined by the service provider, but merely give it the right of making the proposal. Thus, Communal Activities Act of Canton Sarajevo in art. 22 (5) stipulates that the validity of the utility provider's

calculations and final proposal for the price of utility is determined by the independent expert body of the Canton, city or municipality, and the actual price is determined by the Government of the Canton or city/ municipal council. This means that public authority has even power to change the price proposed by the provider of utility service, and not only to give consent.

It should be noted that for the certain services of general economic interest, the criteria for determining the price may be additionally defined by *lex specialis* which regulates those activities, such as, for example, the distribution of electricity<sup>11</sup>. In this area, prices may depend on the status of the customer. In fact, the customers who meet the requirements for obtaining the status of an eligible customer, and have the right to purchase electricity from the supplier by their choice, can negotiate the price with the seller. Such status have, eg., "Birač" Zvornik in RS, or "Aluminium" Mostar in the FBiH (Baltić, 2016). The specifics are also present in regulation relating to the activity of water supply (Zulić, 2015).

Regarding the activities of the joint utility consumption, the determination of utility charges is specifically affected with the level of equipment of settlements with the communal facilities and devices of joint utility consumption, as well as with the quality and standards of communal products and services. Determination of the amount of utility charge is, in any case, under the jurisdiction of the public sector body and it is a joint common solution in the laws on communal activities in BiH.

### The legal nature of public utility companies

Public utility companies which local government units are establishing for the purpose of performing utility activities are, by their legal nature, public companies and, provided that their organizational structure is not regulated by the laws on communal activities, the provisions of the laws on public enterprises are applied. The basic characteristics of public companies are that they perform activities of general interest and that their major shareholder is an entity from the public sector. Thus, according to the Public Enterprises Act of the RS, public company is considered a legal entity established in a form of joint stock company or a limited liability company to perform activities of general interest and in which basic (share) capital RS or some local government have a majority stake, either directly or indirectly<sup>12</sup>. The organizational structure of these companies, however, differs from the general regime of the Companies Act RS<sup>13</sup>, so the obliged bodies are stakeholders meeting,

<sup>8</sup> See art. 18 (2) of the Local Government Act of RS.

<sup>9</sup> Official gazette of RS, No. 124/11.

<sup>10</sup> Official gazette of Canton Sarajevo, No. 14/16. See art. 3. of the stated Act.

<sup>11</sup> In addition to the law at the state level, there are laws at the entities level which establish regulators in which jurisdiction is determination of prices.

<sup>12</sup> See art. 2 (1) of the stated Act, Official gazette of RS, No. 75/04 and 78/11.

<sup>13</sup> Official gazette of RS, No. 127/08, 100/11 and 67/13.

the supervisory board (which the Companies Act RS does not recognize), and management (comprising the director and executive directors). In addition to these bodies, in the context of the implementation of internal procedures the audit committee is also included (Rajčević, 2012). Thus, unlike the general regime which is based on the one-tier system of corporate governance in the domain of public enterprises legislator still stands on the positions of the two-tier system, which once represented the basic solution for all companies (according to the Law on Enterprises RS of 1998, which is no longer in force).

In carrying out their activities the public enterprises are subject to the risk of decreased efficiency due to the absence of competition, as well as corruption, which is particularly manifested through circumvention of procedures provided by the Public Procurement Act (Avramovic, 2010). Even these reasons indicate the need for transformation, as well as harmonization of the legal system with the EU *acquis communautaire*, particularly in the area of PPP, as well as competition law.

Many utility companies are privatized in accordance with the privatization laws enacted on the territory of BiH. Thus, the Privatization of State Capital Act of RS<sup>14</sup> has enabled the privatization of the part of the basic capital in the former purely state owned public enterprises. In some of them private subjects took over the majority share, while the entity (RS) has retained a majority stake only in companies that have been declared companies of strategic importance. The classic example of communal activity which is now in a 100% private property is "Marketplace"<sup>15</sup> Ltd Banja Luka. This company has originally been partially privatized and after that in 2011 a company "MG Mind" from Mrkonjic Grad took over a majority stake. By 2013 "MG Mind" reached 90% of the share capital and benefited from the possibility of squeezing out the remaining shareholders. Finally, "Marketplace" is transformed into a limited liability company<sup>16</sup>. In addition, the "MG Mind", through its subsidiary company "Marketplace" indirectly took over a controlling stake in another former public utility company, which now operates under the name "Cleanliness"<sup>17</sup> municipal service a.d. (joint stock company) Banja Luka and is engaged in activities of street cleaning, removal of home, street and industrial waste, snow cleaning, and the like<sup>18</sup>. Accordingly, this company is, at present, regulated by the Companies Act, and not the Public Enterprises Act.

<sup>14</sup> Official gazette of RS, No. 24/98.

<sup>15</sup> „Tržnica“

<sup>16</sup> [www.trznica-bl.com/struktura-vlasnistva.html](http://www.trznica-bl.com/struktura-vlasnistva.html)

<sup>17</sup> „Čistoća“

<sup>18</sup> "Marketplace" thus has about 51% of the share capital in "Cleanliness", while City of Banja Luka participates with only 30%. See the ownership structure at: <https://www.blberza.com/Pages/issuedata.aspx?code=cist>

<sup>19</sup> [www.ekapija.com/website/bih/company/photoArticle.php?id=684732&path=dozvole\\_160511.jpg](http://www.ekapija.com/website/bih/company/photoArticle.php?id=684732&path=dozvole_160511.jpg)

<sup>20</sup> But there are various solutions in the legislation. Thus, for example, under art. 18. of the PPP Act of RS, Official gazette of RS, No. 59/09 and 63/11, when local government unit or public institution/enterprise founded by the local government unit is a public partner, the consent should be given by the Ministry of finance and the competent ministry, while in other cases the Government of RS gives consent on conclusion of contract.

<sup>21</sup> See determination of public partner under art. 6 (1) of the PPP Act of RS, Official gazette of RS.

<sup>22</sup> In the case if there is any.

There are, however, opposite examples. One of them is the city of Tuzla which has won the annulment of the Decision of the Privatization Agency of Tuzla Canton of 2001. After 14 years the city council in Tuzla unanimously adopted the decision on the protection of public utilities and the need to be declared public good<sup>19</sup>. Thus, privatization of five utility companies: Public Utility Company (PUC) "Water supply and sewage", PUC "Komunalac", PUC "Commemorative Center", "Market-marketplace" and "Central heating", was prevented.

### Public-private partnership

Local governments are often not able to independently solve problems within their scope, including utility services, as well as the activities of public services (Dukić Mijatović and Golic, 2013), so the PPPs may represent a solution. The decision to initiate the procedure for establishing PPPs is brought by assemblies of the concerned local government units, while the agreement on mutual rights, obligations and responsibilities of public partners in the process of establishing a PPP, is concluded by mayors or heads of the concerned local government units, on the basis of prior consent given by assemblies<sup>20</sup>. The role of the public partner may, however, play other public sector entities, such as the state, entities and cantons (or their governments through relevant ministries), public institutions and public companies<sup>21</sup>.

In any case, public partners should draft tender documentation before announcement of public invitation. They should also prepare a study of economic feasibility prior to the private partner selection procedure and apply competitive dialogue in stated selection process. Therefore, it is of great importance to educate participants in procedures of preparation and implementation of PPP projects. The commissions for the PPP in FBiH and District, as well as commissions for concessions, on the state, entities, cantonal and district level have the role to organize specialized programs of education of public partners and other participants. Other competent bodies<sup>22</sup> can cooperate with stated commissions.

### Supervision

The realization of PPPs involves finding a compromise between the two interests. On the one hand, the interest lies in achieving social welfare and quality of life by im-

proving the level and quality of services of public interest, and on the other hand, in realizing the economic benefit of its own activity (Cvetković, 2015; Cvetković, 2014). Therefore, the question of supervision over the implementation of such projects is of great importance. In RS the control is performed by the relevant ministries, the Ministry of Finance, the relevant inspection bodies and the Supreme Service of the Public Sector Audit<sup>23</sup>. The legislative bodies of the FBiH<sup>24</sup> and Brcko District<sup>25</sup> provide the commissions for PPP (founded by the Government of the FBiH Canton or the District), which also have the right to monitor the implementation of PPP projects, but without any special power. They only examine the reports and information on implementation of the PPP projects and then inform the governments (of canton or district) on their findings.

Also, the services of local government are authorized to supervise PPP projects implemented at the local level. In RS, this jurisdiction is stipulated by the Communal Activities Act under art. 32-33, which stipulates that control over the implementation of regulation in the field of utility activities, is performed by the body of the local government responsible for utilities. Administrative control is performed by the Ministry of Spatial Planning, Construction and Environment, while the communal police of the local government unit, as well as other inspections when needed represent inspection authorities. Finally, the regulations governing consumer protection entrust public authorities with the possibility to protect users of public utilities' services which are provided through the PPP, given that it is a service of general economic interest as defined in indicated regulations<sup>26</sup>.

### Contractual forms

Two basic forms of exercising PPP in BiH are contractual and institutional form.

As stated, the Public-Private Partnership Act of Zenica-Doboj Canton regulates only contractual forms of partnerships, and the two models:

- a) basic - where the legal basis is the right of construction and by which the payment of compensation to the private partner is made entirely or mainly from the budget based on the availability of public service according to agreed standards,
- b) special - where the legal basis is concession and by which the payment of compensation to the private

partner, entirely or mainly, is done by the end users of public service.

Art. 6 of this Act emphasizes that the private partner undertakes the obligation from the public partner and the risks associated with financing and construction process, and at least one of the two key risks: the risk of availability of public building or demand risk. The procedure for concluding a contract consists of the identification phase of a PPP project, the PPP project proposal preparation, selection of the private partner and contracting PPP. The public partner submits the final text of the contract for the opinion of the competent Attorney. The Act also contains provisions on anti-corruption<sup>27</sup>. On the other hand, the Public-Private Partnership Act of RS opens the possibility that the public partner may propose other types of contractual form of public-private partnerships<sup>28</sup>. It also emphasizes in art. 6 (5), as well as the Public-Private Partnership Act of Canton Sarajevo in art. 9, that the private partner may, for the purposes of conclusion, i.e., contract enforcement, establish a company with special purpose. This company is involved exclusively in the implementation of the PPP project, which is the reason why it was founded.

Accordingly, the contractual PPPs can be established on the basis of one of the two procedures regulated by special laws, and those are public procurement procedure, regulated by the Public Procurement Act of BiH, or concession procedure, regulated by the Concessions Act of BiH, and separate entities and cantonal laws. Thus, the Concessions Act of BiH provides for the Commission for Concessions of Bosnia and Herzegovina to act as an independent regulatory body, which carries out its competence in the capacity of the Commission for Concessions BiH or in the capacity of the Joint Concession Commission, which performs functions and powers in relation to the grant of concessions which are not exclusively BiH jurisdiction or in the case of issues that arise in connection with the grant of concessions between BiH and / or RS. The entities, in turn, have their own commissions for concessions<sup>29</sup>.

The concession is granted to a bidder who responded to the invitation to tender, who has fulfilled all the criteria set out in the tender, and who has high ranking in relation to other tenderers, i.e. the one who is declared as the most successful. To attract as many quality bidders, the invitations to tender are sent to a large number of addressees and, if the Commission for concessions BiH requested so, it will be sent an international invitation. There is a possibility that a potential bidder sends a self initiated offer to competent Ministry, which then estimates whe-

<sup>23</sup> Art. 24, the PPP Act of RS.

<sup>24</sup> See, eg., art. 23 of the PPP Act, Official gazette of Canton Sarajevo, No. 27/11.

<sup>25</sup> See art. 5 of the PPP Act of Brcko District BiH, Official gazette of Brcko District, No. 2/10.

<sup>26</sup> Thus at the level of BiH is passed the Consumer Protection Act, Official gazette of BiH, No. 25/06, as well as the Act of the same name at the level of RS, Official gazette of RS, No. 6/12 and 63/14.

<sup>27</sup> Art. 30 of the PPP Act of ZDC.

<sup>28</sup> Art. 10 (3) of the stated Act.

<sup>29</sup> Art. 5-6 of the stated Act.

ther there is a public interest and, in the case of a positive attitude and after the authorization from the Commission for Concessions of BiH has been obtained, initiates negotiations with the bidder for the grant of concession<sup>30</sup>. Concluded concession contract assumes also certain status effects compared to the concessionaire in the sense that he cannot transfer, directly or indirectly, more than 15% of voting rights, unless he receives the approval of the Commission. Also, he cannot perform any activity other than that specified in the concession contract.

Concessions Act of RS<sup>32</sup> stipulates under art. 7 the possibility of carrying out concession on the Build-Operate-Transfer (BOT) model, and allows contracting other models for the implementation of concession. Concession agreements are concluded for a period not longer than 50 years, but can be renewed. Supervision over the implementation of this Act is performed by the competent authorities of administration of the RS and inspection is carried out by the Department of Inspection Affairs and competent inspections of local government units.

### Institutional form

Unlike the Public-Private Partnership Act of the Zenica-Doboj Canton, other laws on PPP in BiH regulate the institutional form of PPP, which is based on co-ownership between a public and private partner in a joint company responsible for the implementation of PPP project. The founding of such a business organization is preceded by the conclusion of the contract of partnership, as an unnamed contract of civil law (in current legislation). This, in fact, represents a phase of foundation of the company which is subject to the general company law regime.

### Implementation in practice

It should be noted that in BiH there are examples of implementation of PPP projects. According to its value, in particular, project proposals from the health sector are most successful. As the best example can be mentioned the inclusion of the private health institution "Euromedic International" from the Netherlands during the formation of Dialysis Center at the Clinical Center in Banja Luka. That company has been selected on the basis of the tender announced by the Government of the RS in 2000. Besides the center in Banja Luka, this company has built a modern center for chemo dialysis in Bijeljina, Laktasi and East Sarajevo, too, by which it provides patients the European standard of services. In cooperation with the Dutch company, which is also one of the largest operators of health institutions through PPP, the Centre for radiotherapy within the Clinical Center of Banja Luka is also equipped, as one of the most modern in the region. "Euromedic

International" has invested in the purchase of equipment, and the Health Insurance Fund reimburses radiation therapy to all its insured persons. According to data from the study on economic viability, the Fund should in this way achieve cost savings of at least 6.5% (Vukovic 2014). Apart from the already completed projects, the other project proposals in the health field are also made and waiting for implementation, such as the construction and equipping of the Center for Cardiosurgery in a spa village Slatina in the municipality of Laktaši (Komasar, 2015).

In addition to the health sector, PPP projects have been successfully implemented in other areas, such as transport (in this sector it is just waiting for the realization of a significant project proposal relating to the construction of the highway Doboj-Vukosavlje as a part of the Corridor Vc which passes through RS), parking, street lighting, public garage, as well as tourism and culture. Such is the project of construction of "Kamengrad- Andric's town" in Visegrad, according to the preliminary solution of the celebrated film director Emir Kusturica. For the realization of this project a joint company "Andrićgrad" has been founded, co-owned by a Emir Kusturica's company "Lotika", the Government of the RS and the municipality of Višegrad. The "Lotika" has a majority share of 51% (Vladušić 2012). The town has constructed city hall, theater, museum, library, memorial house of Ivo Andric, and other objects. The project is worth about 15 million EUR.

### Conclusions

Legislation of PPP in BiH is fairly dispersed and positioned at different levels of alignment with the EU acquis. In this sense, there is a need for harmonization, where of great benefit could be the planned adoption of the law on PPP at the level of the FBiH entity.

The need to improve the quality of public services is, in any case, beyond doubt, and the lack of public funds further emphasizes the importance of developing cooperation between public and private sector.

PPPs, on the other hand, carry risks, especially with regards to applying the competition law and the possibility of creating corruptive conduct. Therefore, the competent supervisory authorities should have an enhanced role. Non-punishment of illegal actions causes mistrust towards these forms of investment, which ultimately harm the country's economic development. The regulations alone must clearly emphasize the need to protect the public interest in the conduct and control of implementation of PPP projects.

Finally, the public sector must do more to attract investors.

<sup>30</sup> Concession contract cannot be concluded without previous consent of the Commission, unless it is concluded with the international financial institutions whose member is BiH.

<sup>31</sup> Official gazette of RS, No. 59/13.



It is necessary to pay more attention to the creation of the strategy of developing PPP, especially at the local level. The positive results also come with the realization of a large number of projects of lesser value, not just the big ones.

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# General Framework for Liberalization and Regulation of Public Utilities in Croatia

Frane Staničić\*

The author analyzes the general framework of regulation of utilities and public-private partnerships (PPPs) framework in Croatia and gives practical examples of the existing PPP initiatives. His contribution concludes with the assessment that the volatile political situation hinders reforms of public administration, which is reflected on the public utilities system.

## Background

When one makes a survey at the public sector in Croatia and compares it to the IMF's Governments Finance Statistics Manual (2014), an obvious conclusion follows: Croatia's public sector encompasses more than 60% of the GDP. Namely, public owned enterprises revenues alone make roughly 28% of all revenues of the business sector in Croatia (Vizek, 2015). The central government revenues were around 40% of the GDP in 2016, and those of the local government were around 7% of the GDP. The public debt is around 85% of GDP at the end of 2016 and the persons employed in the public sector represent 23% of the total employed persons. However, if persons employed by publicly owned enterprises were to be included, this percentage would be significantly higher (44%)<sup>32</sup>.

The public sector comprises of: central government, local government, all public entities which are financed through the central budget (public healthcare system, public education system) and Non-financial corporate sector (HEP Group, Croatia Airlines, Adriatic Oil Line etc.) and Financial corporate sector (Croatian National Bank, Croatian Bank for Reconstruction and Development, Croatian Postal Bank) whose obligations are included into the public debt. It should be noted that local self-government is extremely fragmented, with 576 units of local and regional self-government: 428 municipalities, 127 cities, 20 counties (regional level of local self-government) and the capital – City of Zagreb<sup>33</sup>. This must of course be

compared with the number of inhabitants of roughly 4 million<sup>34</sup>.

As a general remark, it can be said that the size of the government regarding its share in Croatia's GDP is too large and that from that a conclusion must be derived – that the central state is the most important factor in the economic developments and growth in Croatia. The local government makes around 7% of the GDP which is comparable with other South East European (SEE) countries (NALAS, 2016), which also shows a lack of decentralization and from that a conclusion must be derived that Croatia is a highly centralized state. The system of local and regional self-government is fragmented and not equipped to fulfill its role to the public.

## Public Utilities in Croatia

In Croatia's legal setup of public utilities, which is prescribed by the Local and Regional Self-government Act<sup>35</sup> and the Utility Services Act<sup>36</sup>, providing public utilities (with the exception of electricity which is the obligation of state owned HEP Group) is the obligation of the units of local self-government – municipalities and cities. Public utilities include water supply, water drainage and purification, public transportation, waste disposal, public areas maintenance, maintenance of non-public roads (local roads, streets, squares) and public lighting. In order to provide public utilities, municipalities and cities have several options regarding the way in which these services will be

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<sup>32</sup> Izvješće: Analiza plaća u javnom i privatnom sektoru u Hrvatskoj [Report: Wage Analysis in the public and private sector], Zagreb, 2014, <http://www.eizg.hr/hr-HR/Analiza-placa-u-javnom-i-privatnom-sektoru-u-Hrvatskoj-1229.aspx>

<sup>33</sup> The notion of "Local Self-Governance" is a term used in some eastern European laws, describing the local level of power, not attributed to the general state. Local Self-Governance as territorial governance has some intrinsic powers, while some powers are delegated by the central level (delegation, conferral).

<sup>34</sup> <https://uprava.gov.hr/o-ministarstvu/ustrojstvo/uprava-za-politicki-sustav-drzavnu-upravu-te-lokalnu-i-podrucnu-regionalnu-samoupravu/lokalna-i-podrucna-regionalna-samouprava/popis-zupanija-gradova-i-opcina/846>

<sup>35</sup> Official Gazette of the Republic of Croatia no. 33/01, 60/01, 129/05, 109/07, 125/08, 36/09, 36/09, 150/11, 144/12, 19/13, 137/15.

<sup>36</sup> Official Gazette of the Republic of Croatia no. 36/95, 70/97, 128/99, 57/00, 129/00, 59/01, 26/03, 82/04, 110/04, 178/04, 38/09, 79/09, 153/09, 49/11, 84/11, 90/11, 144/12, 94/13, 153/13, 147/14, 36/15.

provided. They can set up a company, public institution or its own service without legal subjectivity. Furthermore, they can give a concession or sign a special contract for providing public utilities (except for water supply, water drainage and purification, for which the Waters Act<sup>37</sup> prescribes they must be provided by a company exclusively owned by the local municipality or city with the exception of water drainage and purification which can be provided via concession also). Providing electricity is the obligation of the state-owned company – the HEP group.

The regulatory powers regarding public utilities are variously prescribed in different special laws regulating different areas. For example, if a municipality or a city chose to give a concession for providing waste disposal, they are responsible to monitor the concessionaire according to the Concessions Act<sup>38</sup>, but this is also the responsibility of the Ministry of finance because of the fact that concession incomes are partly the income of the central budget. Municipalities also regulate the prices for waste disposal according to the Sustainable Waste Management Act<sup>39</sup>, give their approval to the prices for water services as is prescribed by the Waters Act, etc. It is safe to say that local self-government has a vital role in providing and regulating public utilities no matter the way they are provided. The government also has an important role in establishing prices for some utilities. For example, the price for electric energy is determined by using the Methodology for determining prices for calculation of electric energy<sup>40</sup> which is passed by the Croatian Energy Regulatory Agency. This Agency is also responsible for a similar Methodology for the prices of gas and the prices of heat energy. Additionally, the Government of the Republic of Croatia has the authority, under the Gas Market Act<sup>41</sup> to determine the highest price of natural gas for households for a period of maximum three years.

According to some authors (Primorac, 2010), there are 167 companies which provide public utilities in Croatia, and are set up as publicly owned companies. Other sources state that there are around 152 public companies which provide water supply. It is safe to say that there are several hundred entities which provide public utilities in Croatia. This is a result of the fragmented system of local self-government which hinders the development of public services due to the inability of many municipalities to provide basic public services.

## Liberalization agenda

There is strong opposition to the liberalization of public utilities, especially regarding water supply. Privatization of certain public utilities is regarded as a highly volatile political question. In 2016 Croatia passed the National reform plan<sup>42</sup>. It does not mention privatization with the exception of companies in which the state has a minority stake, only the improved management of public companies is highlighted. In general, public opinion regarding concessions, PPP and privatization in the sector of public utilities is fairly negative, which has political consequences as the ruling elite, regardless of their political background, hesitates to broaden private investments and influence in this sector.

## Public Private Partnerships

PPP is regulated by Public-Private Partnership Act<sup>43</sup>. Under this Act, PPP represents a long-term contractual relationship between public and private partners focused on building and/or reconstructing public buildings in order to provide public services. The private partner, through the duration of the PPP, takes on the risk regarding the building process and minimally one of the following risks: the risk of availability of a public building or the risk of demand. There are two models of PPP: contractual PPP in which public partner signs a contract with a special company and status PPP which is based on a joint company which implements the PPP project. The PPP contract must be signed for duration of minimum three years, and maximum 40 years. The public partner has the right to establish the standard for services provided, payment and/or collection of established fee and to supervise the provided services. The private partner has the right to manage the risks taken and the right to charge the service, or to pay the fee. If a public authority plans to enter into PPP, it has to notify the Agency for investments and competitiveness (Agency) regarding its intention. There is a public authority body in Croatia whose function (among others) is to help public authorities to prepare PPP projects – the Center for Monitoring Business Activities in the Energy sector and Investments. This public body has been appointed as implementing body for the government PPP program and PPP projects. It is charged with helping public bodies in preparing PPP and in conducting all phases in PPP projects.

<sup>37</sup> Official Gazette of the Republic of Croatia no. 153/09, 63/11, 130/11, 56/13, 14/14.

<sup>38</sup> Official Gazette of the Republic of Croatia no. 143/12.

<sup>39</sup> Official Gazette of the Republic of Croatia no. 94/13.

<sup>40</sup> Official Gazette of the Republic of Croatia no. 71/16.

<sup>41</sup> Official Gazette of the Republic of Croatia no. 28/13, 14/14.

<sup>42</sup> Nacionalni plan reformi 2016 [National reform plan 2016], [http://ec.europa.eu/europe2020/pdf/csr2016/nrp2016\\_croatia\\_hr.pdf](http://ec.europa.eu/europe2020/pdf/csr2016/nrp2016_croatia_hr.pdf)

<sup>43</sup> Official Gazette of the Republic of Croatia no. 78/12, 152/14.

The Agency either refuses or accepts, with the consent of the Ministry of Finance, the proposed PPP project. If the Agency refuses the project, its decision may be challenged in front of the competent administrative court. The selection of the private partner is then regulated by the Public Procurement Act<sup>44</sup>, and the only applicable criteria for selection is the economically best tender. The Agency keeps records on all PPP, controls their implementation through the duration of the PPP, and approves any changes in the PPP contract. The public partner has a responsibility to send reports to the Agency every six months regarding the implementation of the PPP. When implementing PPP, it is possible to grant a concession to the private partner. Of course, PPP is possible through concessions. without a special PPP contract, especially through concessions for services and concessions for works. In these concessions the concessionaire provides the service or implements the works and is granted the right to collect fees for his services and/or to manage the built facilities.

The concessions system is governed by the general Concession Act, but also by many special laws which differ more or less from the Concessions Act. The concession procedure is rather lengthy, with the obligation to publicly announce the tender, pass the concession decision in a form of an administrative act, in order to subsequently sign the concession contract which is an administrative contract. The decision is subject to appeal to the body which resolves appeals in the public procurement procedures, and the contract is, for now, subject to revision under the regular courts, but with the entering into force of the new Concessions Act in 2017 it will fall under the jurisdiction of administrative courts. It should be noted that the Concessions Act which is now in force (from 2012) is not fully aligned with the *acquis* (Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts<sup>45</sup>), but that will change with the forthcoming Concessions Act.

It is also important to mention the Strategic Investment Projects of the Republic of Croatia Act<sup>46</sup> under which a project, if it is characterized as a strategic one, is implemented faster and with less bureaucratic red tape. The Government formed a Committee for strategic investment projects which selects and approves such projects, whose president is the vice-president of the Government of the Republic of Croatia. Once granted this status, all procedures in connection with such a project are considered to be urgent. This is also one of the steps the government

took in order to improve investments and the overall investments climate in Croatia.

### PPP practice in Croatia

There were examples of PPP in Croatia in the past, especially in road constructing, with the example of BINA Istria which was granted a concession to build highways in Istria in 1995. But, the development of PPP in Croatia started in earnest in 2007 with the construction of sports halls in the form of PPP in which the private partner built the halls (in Varaždin and Split), and the public partner is paying the lease until the contract expires and the halls become the property of the public partners. Other examples of PPP in Croatia are reconstructions of public buildings (schools, terminals, administrative buildings). The most important PPP is the construction of the new Zagreb Airport which is a PPP in a form of a concession with a value of 1,420,800,000 HRK (approximately 190 million EUR). The value of PPP which are in the PPP register with the Agency is 2,538,434,056 HRK (approximately 340 million EUR).

Project name	Capital worth (HRK)
Zagreb Airport	1,420,800,000
Sports hall Varaždin	177,174,280
School upgrade Varaždin group 1	27,628,610
School upgrade Varaždin group 5	39,685,001
School upgrade Varaždin group 4	13,939,404
School upgrade Varaždin group 3	16,065,311
School upgrade Varaždin group 1 and 2	31,932,259
School upgrade Varaždin group 3 and 4	40,560,479
School upgrade Varaždin group 2	18,427,258
School upgrade Varaždin group 1	49,677,685
Reconstruction of Varaždin's County building	8,976,983
Bus station Osijek	120,000,000
Koprivnica highschool	69,566,786
Arena Split	504,000,000
Total	2,538,434,056 (without VAT)
Table 1 – contracted PPP in Croatia <sup>47</sup> (1 Euro=7.6 HRK)	

There are many projects in the planning phase with the Center worth 2,111,047,976 HRK (approximately 277 million EUR) which have been approved by the Agency with a pending public procurement procedure in order to select the private partner<sup>48</sup>.

<sup>44</sup> Official Gazette of the Republic of Croatia no. 120/16.

<sup>45</sup> Official Journal of the European Union, L 94/1, 28. 3. 2014.

<sup>46</sup> Official Gazette of the Republic of Croatia no. 133/13, 152/14, 22/16.

<sup>47</sup> <http://www.aik-invest.hr/jpp/projekti/>

<sup>48</sup> [http://cei.hr/upload/2015/10/20151021\\_dynamic\\_562788a163399.png](http://cei.hr/upload/2015/10/20151021_dynamic_562788a163399.png)

Project name	Capital worth (HRK)
Justice square Zagreb	1,350,000,000
Neuropsychiatric hospital Popovača	124,500,000
General hospital Varaždin	240,000,000
Home for the elderly Gerovo	24,000,000
Varaždin County schools	107,000
Istria County & town of Poreč schools (4 schools)	145,759,900
Town of Koprivnica schools (3 schools)	100,000,000
Rebuilding of public lightning city of Kraljevica	4,160,000
Rebuilding public lighting city of Novska	7,000,000
Rebuilding public lighting municipality of Višnjan	1,520,000
Rebuilding of public lightning city of Novi Vinodolski	4,194,298
Rebuilding public lighting municipality of Kostrena	1,875,874
Total	2,111,047,976 (without VAT)
Table 2 – approved but not yet contracted PPP in Croatia <sup>49</sup> (1 Euro=7,6 HRK)	

## Conclusion

PPP is not unknown in Croatia, and has a rather long history of use. However, a lot of PPP projects were not completed, or, if completed, became a source of financial problems for the public partners (especially for municipalities which realized that they cannot afford the cost of the projects). Today PPP is reserved for smaller projects than before, as can be seen from the data supra regarding the contracted PPP and the projects that are pending completion. There are also problems regarding the aforementioned fear of privatization of public utilities, especially water services which has created a somewhat hostile environment for investments, especially foreign. The government tried to put up a PPP in which highways would be given into concession to private partners, but was stopped by huge public dissent. Most privatization processes are hindered by a lack of political support, which can also be seen from the data given supra regarding the huge economic impact of the state in Croatia's GDP. Furthermore, the political situation has been volatile in the last year and a half, which is also hindering public administration reforms and of the system of local self-government. This reform is of crucial importance in order to better the public utilities system, as it depends on the capacity of the local self-government. To conclude, there are many ways in which investments through PPP and concessions can be bettered, but that all depends on the (non) existence of political will to perform necessary reforms.

<sup>49</sup> <http://www.aik-invest.hr/jpp/projekti/>

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# The General Framework for Liberalization and Regulation of Public Utilities in the Republic of Macedonia

Marjan Nikolov\*

The author describes powers of local governments in managing communal competences and setting conditions regarding the operation of communal services. This country overview stresses the conclusion that Macedonia is facing a fiscal space both at central and local level budgets. Lack of proper needs assessment for PPPs is the result of the lack of central and local government level coordination, among other factors.

## Background

The public sector in Macedonia as per the IMF's Global Financial Stability indicator (GFS - IMF 2014) definition incorporates: central government; local government; non-financial corporation sector (Electricity Generation Company, AD ELEM and Electricity Transmission Company, AD MEPSO) and financial corporation sector (Macedonian Bank for Development Promotion). The central government revenues are around 31% of the GDP in 2015 and the local government revenues are around 5.4% of the GDP in 2015. The public debt is around 50.6% of GDP in Q3 2016 and the employed persons in the public sector represent 23.4% of the total employed persons in Q3 2016<sup>50</sup>.

Some general observations from the public sector data in Macedonia are that the central government and funds in Macedonia are around 30% of the GDP thus; the size of the government measured with this indicator is relatively low compared to other transition countries and compared to the OECD countries (Nikolov, 2009a). Further, local government in Macedonia is a bit more than 5% of the GDP and this is comparable with the other South East Europe (SEE) countries but it is lower than the developed countries in EU (NALAS, 2016; Nikolov, 2013). Note also that the finances of the Public Utility Companies (PUC) owned by the local governments in Macedonia are not consolidated with the presented data.

## Public Utilities in Macedonia

Macedonian municipalities inherited experience in managing the communal competencies from the Former Yugoslavia. Since independence and the start of transition in 1991 power has traditionally been centralized and the only competencies municipalities have had were in the area of communal services until 2005 even though the law on local self government was enacted in 2002 the proper local government finances came to be defined and regulated with the law on financing local self government in 2004 (UNDP, 2005).

In accordance with article 22 of the Law on local self government municipalities have competencies in communal activities in: water supply, waste water sewage, public lighting, public cleaning, rain water drainage, public transportation, gas and heat supply, cemeteries management, local roads reconstruction and construction, public parking, green markets management, green areas and parks, and solid waste management.

All the conditions related to the communal activities like financing, design, construction, maintenance and related are regulated in the Law on communal activities from 2012 and other proper by laws like the law on public enterprises. In accordance with the Law on communal activities the providers of communal services are the PUC established by the municipalities and the City of Skopje

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<sup>50</sup> Source: Author's calculations on Ministry of finance data. Macedonian GDP in 2015 was about 9 billion EUR. The population size as per the last 2002 census is around 2 million.

and the Government of the Republic of Macedonia.

PUC at the local government level are established by the municipal councils. The PUC by the Law on communal services are licensed communal service providers. On the other hand, as per the Law on public enterprises the management of the PUC are the Board of Directors with the Director General and the Supervisory Board. The Board of the Directors comprises at least 5 and at most 15 members and their mandate cannot be longer than 4 years. The Director of the PUC is appointed and can be fired by the Mayor of the municipality. The Supervisory Board is comprised of 5 members appointed by the municipal council. The mandate of the Supervisory Board members is 4 years as per the law on public enterprises.

As already noted, the finances of the PUC in Macedonia are not consolidated with the municipal public finances. Macedonia has one-tier local government with 80 municipalities and the City of Skopje as a separate local government unit comprising 10 municipalities. The councils of these municipalities established 69 PUC in Macedonia. The municipal councils also approve the PUC annual accounts and tariff changes and also guarantee any long-term loans. The recent reform was the setting of tariffs for water services by the central regulatory body. The regulatory competencies are organized in a way of extending the competencies of the existing Regulatory Energy Commission with the competency of regulating the tariffs of the water services (regulated in the proper energy law<sup>51</sup>).

## Public-Private Partnerships (PPPs) in Macedonia

### Investment needs

The investment needs in Macedonia both at central and local level government were already confirmed not only by the World Bank PER documents from 2008 and domestic researchers (Nikolov, 2009b) but with citizens' lesser satisfaction with the quality of public services and regional imbalances (UNDP, 2009; Bartlett et al, 2010). The needs for investment are relatively high in contrast to the relatively low fiscal space at the central and local government budgets and low domestic and foreign direct investments (FDI) in Macedonia (CEA 2016). The donors are downsizing their engagement in Macedonia, the capacity to utilize the Instrument for Pre-Accession (IPA) is weak (Nikolov, 2016) and it seems that the PPP can be the instrument to settle the often contradictory goals among the government, investors and consumers.

In Macedonia, as per the last Public Investment Program

(PIP) 2009-2011 the total cost of the planned projects is estimated at some 2.5 billion EUR (Nikolov, 2011). Estimated capital investment needs in the area of waste water for example in Macedonia can go up to 250 EUR per capita on average (Becchis, 2015). Estimated investment needs for approximation to EU environmental legislation in the sectors of urban waste, sewerage, municipal waste management (landfill and other installations) are around 430 million EUR (CEA, 2006). It is also mentioned in the PIP that the government's imperative is to engage foreign investments primarily through concessions, donations, PPP, direct and joint ventures. On the other hand, to be consistent with the period of the PIP, the Fiscal strategy for the period 2011-2013 mentions the PPP in the context of the local governments: "...a proper effect is expected from the initiative of the private sector in the public sector through the PPP as incentive to improvement of the local service quality and increase of the revenues".

Macedonia is a candidate country for integration into the EU and it has to comply with the EU's standards and rules, in particular with the EU Directives on Public Procurement (PP) including PPP and concessions and fulfill the benchmarks for Chapter 5 of accession negotiations relating to PP. The PPP model attracts investments into public infrastructure and services worldwide. However, it continues to remain occasional rather than systematic in Macedonia (ReSPA, 2015).

### Compliance of PPP and concession with the EU acquis

In Macedonia, PP law and PPP law are aligned in general with the EU acquis. The authority responsible for monitoring and control of PP law is the Ministry of Finance and the authority responsible for monitoring and control of PPP law is the Ministry of Economy. Related to the procurement, there is a by-law adopted by the Public Procurement Bureau (PPB) where the criterion for the most economically advantageous tender is prescribed<sup>52</sup> as a contract award criterion. However, the recent frequent use of the lowest price as a criterion for awarding a public procurement contract (including PPP/concession contract) violates the principle of value for money (VFM).

### Types of PPP contracts as per the Macedonian PPP legislation

Depending on the means of remuneration by the public partner for the provided public works and/or public services, as well as allocation of key inherent risks, a public private partnership in Macedonia can be established, as per the PPP law, either as: public works concession and/

<sup>51</sup> Related documents of the supplementing of the law and the voting in the Macedonian Assembly can be accessed here: <http://sobranie.mk/materialdetails.nsp?materialId=343c7b43-61d5-4ed3-bc82-965442b6e334>.

<sup>52</sup> See the by-law at the link: <http://javni-nabavki.finance.gov.mk/bjn-portal/wordpress/wp-content/uploads/METODOLOGIJA-ZA-IZRAZUVAWE-NA-KRITERIUMITE-ZA-DODELUVAWE-NA-DOGOVOROT-ZA-JAVNA-NABAVKA-VO-BODOVI1.pdf>.

or contract or public service concession and/or contract. Public works and services concession according to the international terminology are a concession contract, Build–Operate–Transfer (BOT) or Design-Build-Finance-Operate-Transfer (DFBOT) projects i.e. user pay projects. Public works and services contracts according to the international terminology are work contracts and service contracts i.e. authority-pay projects.

### Example of PPP in municipalities in Macedonia

In Macedonia at central government level the most significant concession so far was the airport project. At the local government level, a number of public utility contracts have been signed in the following areas: waste management, zone system of public parking, public lighting and administrative offices buildings. We illustrate examples of PPP projects for various sectors where the sector falls under the competency of local government (Nikolov, 2015):

**Waste disposal:** City of Skopje as a grantor awarded a concession agreement covering the reconstruction of the landfill "Drisla" – Skopje, including construction of new installations for the disposal of waste in accordance with EU standards and within the investment dynamics given in the bid of the selected concessionaire. The concession is implemented as an institutional PPP, given that existing public enterprise established by the City of Skopje is transformed into a Limited Liability Company whose founders are the City of Skopje (20% equity) and the foreign private partner as majority partner (80% equity). City of Skopje is obliged to guarantee a certain amount of waste each year. In the case of less amount of waste, City of Skopje is obliged to compensate the unrealized income from the waste disposal to the concessionaire. The investment was estimated at about 90 million EUR and by the contract is expected for the private investor to invest 73 million EUR of capital. The period of the contract is 35 years.

**Street lighting:** The Municipality of Makedonski Brod has awarded a concession contract for public service - reconstruction, modernization and maintenance of public lighting - in the municipality of Makedonski Brod for a period of 10 years with an estimated value of some 270,000 EUR. The private partner is obliged to replace existing light bulbs with new energy-saving light bulbs and to maintain them for the period of the contract but also to extend the scope of the service with new lightning spots. The remuneration of the private partner pays the municipality from the funds it collects from the citizens and legal entities on behalf of the communal tax. Given that energy-saving bulbs provide electricity savings after electricity company payments and payments to the concessionaire, the municipality should generate some income and assets will remain to the municipality after the expiration of the

concession period.

**Parking:** Municipality of Bitola as grantor has awarded a public service concession - zone system of parking. The concessionaire is obliged to acquire the spider vehicle, management software system parking zone, PD devices for zone system of parking, foxes, vertical and horizontal signaling, "call centre" and other equipment needed for the operation of parking lots, as well as to do winter and summer parking-marking. In return for the investment, recovering the costs of operation and achieving reasonable profit, the concessionaire is entitled to charge end-users for parking services. The concessionaire pays the municipality a concession fee each year. The investment is estimated at about 261,000EUR. The number of parking places is 1,679. The period of the contract is 6 years. The public partner-Bitola is responsible for construction of the parking places. Most of the parking lots were already constructed and the smaller amount that needed to be constructed should be constructed by the Bitola municipality.

**Administrative offices building:** The Municipality of Gjorce Petrov has awarded a public works contract for the construction of a municipal administrative offices building (municipal hall) with approximately 3,500 square meters. Private partner is obliged to design, finance, construct and transfer the municipal hall. The private partner on the other side was awarded the right to build a commercial building with approximately 11,500 square meters in its ownership on the land which is owned by the public partner. Private partner got a 40% discount on the land construction fee. Implementation of this contract is in process.

### Conclusion

The need for modern infrastructure and better services is evident in Macedonia. The lack of proper fiscal space both at central and local level budgets makes the PPP an opportunity to meet citizens' needs for better services and to achieve value for taxpayers' money.

Macedonian PPP legislation is generally compatible but not fully compliant with the acquis. The specific PPP/concession law exists where a clear definition of PPP/concession are prescribed together with criteria for PPP project approval. On the other side the PPP/concession regulations do not provide criteria for fiscal impact of PPPs assessment and the PPP/concession regulations are not compliant with the EU (Eurostat) rules on government deficit and debt.

There is a lack of political will and champions to make the environment for PPP in Macedonia more transparent. Prevalent practice is that PPP has been seen in Macedonia

as a “pocket bank” where the public sector can take money from the private partner so that the public sector can continue to work as usual and more, stigmatizing the private partner if searching for profit.

Proper central and local government level coordination is missing. The decentralization in Macedonia is more of a deconcentration than devolution type (Nikolov, 2013). For example, if a municipality wants to go for a PPP for a kindergarten, the municipality can use block transfers from the central government for child protection for its best use. Risk arises because if the public partner pledges the block transfer to the private partner in order to achieve value for money the private partner cannot employ people in the new kindergarten as it must wait for ministerial approval to fund new employees. Additionally, if the kindergarten is privately run there is a risk for fiscal oversight when budgeting for the next fiscal year. The quasi devolution of the fiscal decentralization makes it risky and/or practically impossible to exercise PPP at local level for “decentralized” competencies such as education and child care in Macedonia.

"Lack of proper needs assessment at central and local level for infrastructure projects in order to make pre-feasibility PPP assessment as of what project are affordable and what projects provide good value for money so that it can be considered as PPP projects. For example, at the municipal level the author is not aware of any proper strategic plans of municipalities in direction of identification of what projects can be considered as PPP projects."

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# An Overview of Public Utility Services and General Legal Framework for PPPs and Concessions in Montenegro

Budimka Golubović\*

This contribution casts a light on the system of public utilities in Montenegro, assigned to local self-government units. As local public utility companies are facing poor financial and other capacities to provide quality services, long awaited Law on PPP is expected to provide additional mechanisms to the existing legal framework. The author argues that it is necessary to adopt and adjust legal, regulatory and political frameworks, create a stable political-economic environment, and harmonize laws with EU's regulations and best practices.

## Introduction

According to the IMF's World Economic Outlook Database as of October 2016, Montenegro, population 0.622 million, recorded a GDP of EUR 2.601 billion (2014). GDP for 2017 was projected to be EUR 2.922 billion.

Montenegro's public sector consists of the Government of Montenegro, appointed in December 2016, with 19 ministries, 19 bodies/agencies belonging to relevant ministries, 6 separated administrations, 2 secretariats, 7 institutes, 1 directorate and 1 agency. Montenegrin territory is divided into 21 municipalities, Capital of Podgorica with 2 City Districts and The Old Royal Capital of Cetinje. Namely, there are 23 local self-governments in Montenegro, while 2 of them are recently established with poorly developed administration<sup>53</sup>.

Local budgets are financed from: (i) own income – taxes or fees determined by local parliaments, but limited by general legislation; (ii) legally shared revenues, including Personal Income Tax, Concession Fees, etc.; (iii) Equalization Fund and (iv) national budget.

The public sector should provide the highest possible level of services for local populations. Therefore, it should invest resources provided by populations and national resources in infrastructural projects. Provision of sources is always a challenge for the public sector since regular budget incomes and resources' utilization are limited by their own capacities and economic-political decisions. Challenges that national, especially local governments in Montenegro are facing are related to keeping the fiscal self-sustainability and poor potential to provide signifi-

cant investment from the public incomes in infrastructural projects. Additional characteristics of national and local budgets are previous and inherited/chronically high debt and high dependence on external financing: donations, foreign investments, and loans from international financial institutions.

## Public Utility Services

According to the Law on Local Self-Governments and other relevant administrative regulations in Montenegro, public utility services in Montenegro are assigned to local self-governments. Each of the local self-governments in Montenegro, according to the local regulations, has an established local public utility company/companies for providing public utility services: water supply, sewage and draining systems, solid waste removal and recycling, public lighting, parking services, etc. Additionally, local self-governments have established local departments to deal with conducting and developing communal services, maintaining communal facilities and securing communal order. They also engage in construction and reconstruction works on local and uncategorized roads, streets and passages in settlements. They arrange for construction and use of facilities, outbuildings and temporary facilities, adequate development in accordance with local urban planning and communal services. Therefore, local self-governments in Montenegro are mostly interested in making public utility service more efficient and effective.

Companies that local self-governments had established in Montenegro were Public (Utility) Companies (PUCs) prior to implementation of the Law on Improving Business Environment, effective in 2010. The law brought local governing bodies into public competency. Therefore,

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<sup>53</sup> Petnjica in May 2013 and Gusinje in March 2014.

all local PUCs became companies – rarely shareholdings, mostly Limited Liability Companies (LLCs) founded 100% by local government. The major positive effect of this transformation, forced by the law, is that those companies could be privatized, transformed, and managed by professionals, either partly or temporarily. On paper those companies are a part of the free market! Although all PUCs became LLCs within 3 years as prescribed by the law, almost nothing changed in their business operations, development, financing or management.

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Box 1:

The Law on Local Self-Governments and the Law on Public Utility Services calls on local governments to organize public utility services. Local Parliaments establish Public Utility Companies (PUCs) with 100% ownership, management and control. Local Parliaments also determine and control prices and service quality on a regular basis through annual reports delivered by those Companies. Pricing methodology and monitoring of the complete public utility sector is entrusted to the Government of Montenegro. There is no case of sharing ownership, management or control over PUC's in Montenegro, although that option is possible, having in mind that PUC's are organized as LLCs. Examples of providing public utility services by some investors or another company are arranged as separate projects or time-limited contracts.

The new Law on Public Utility Services, effective February 2018, prescribes that the Energy Regulatory Agency will be in charge of licensing companies that could provide public utility services, determines price methodology, monitors quality of services provided, takes care of public interests and proposes regulations in the area of public utility services.

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### PPP legal framework in Montenegro

Local public utility companies are facing poor financial and other capacities to provide quality services and local governments have recognized PPP as an adequate and efficient model for accommodating all interests. However, Montenegrin legislation does not recognize PPP and the Draft Law on PPP dates February 2015. Considering the EU Directives and best practice in this area, this is highly recommended, but still in the “public debate phase”. The Draft Law aims to determine conditions, ways and procedures for adopting PPP projects, rights and obligations of both public and private partners, content and procedure of PPP contracts, PPP forms, best bidder selection procedure and other relevant issues. The draft is based on the following principles: public interest protection; public

government free management; transparency; non-discrimination; equal treatment (prohibition of discrimination of any person); indivisibility of the project; proportionality; free competition; efficiency; environmental principles; legal security; free will.

Current legislation for this issue in Montenegro is related to the Law on Private Sector Participation in Delivery of Public Services and Law on Concessions. Some parts of the Law on Private Sector Participation in Delivery of Public Services were put out of force after adopting the Law on Concession. The Law on Private Sector Participation in Delivery of Public Services aims to increase the level of private sector participation in activities of common/public interest. It is applicable to all public bodies and refers to delivery of public services relevant for the contract on leasing and management, as well as agreements on BOT. The Law on Concessions is substantially transposed into the Draft Law on PPP, while now it determines the conditions and procedures of utilizing public resources by a private company for the common/public interest.

Still, new Draft Law on PPP is criticized in various aspects: it reduces the control role of the National Parliament in comparison to the Law on Concessions, as the Government of Montenegro is to decide and monitor concession contracts; it excludes the public debate on each concession contract, which is mandatory; there is no time limitation for the concession contracts as it is currently foreseen in the Law on Concession (60 years); it foresees the establishment of the Agency on Investments as the monitoring body, responsible to the Government of Montenegro, which again excludes the National Parliament from deciding on utilization of national resources. Additionally, the Law on Concessions defines several types of concession contracts although only public works and public services concessions could be considered as PPP projects.

According to the Law on Concessions, local governments are attributed a certain share of a concession fee if the concession subject is located on its territory. That share is regulated by the Law on Financing Local Self-Governments in the following way: 70% of the concession fee for natural resources, 20% for the port and 20% for the coast use. Although municipalities participate in the concession contracting procedures, the government is making decisions on the choice of concessionaires and determines other contract elements. The budgets and transfer of concession fees transfer between national and local level is not quite transparent.

Despite this and the fact that municipalities and Union of Municipalities<sup>54</sup> as their supporting institution analysed and recognized the PPP model as efficient and adequate

<sup>54</sup> A round table discussion on “The legal framework for public-private partnerships in Montenegro” was organized on March 13th 2015 in Podgorica by the Cabinet of Deputy Prime Minister for Economic Policy and Financial System, in cooperation with the Union of Municipalities within the public discussion on Draft Law on PPP. The Round Table's aim was to familiarize stakeholders with the new legislation proposal, with a particular focus on local government units in terms of public contracting authorities and business associations from the aspect of private partners.

for providing quality services at low costs, they do not have plans for utilization of facilities and locations for PPP implementation, they still have not developed adequate analysis and expertise in this area, nor the expert support at the national level.

Although best practice examples are available, including the South East Europe PPP Network which does not include Montenegro, Montenegrin authorities have not scrutinized best practices despite obvious need, especially at the local level.

### PPP practice in Montenegro

Available data on completed or implementing PPP projects in Montenegro could not be fully given as exact and final since there are no systematic data neither at the national nor local level. The Concession Commission is keeping records on the concession contracts, which include PPP projects, but without clear difference between PPPs by its definition and other types of concessions. National and local governments implemented several PPP projects:

#### National level:

- In the IT sector, the Government of Montenegro acquired the “Wireless Montenegro Project” in 2011. This project includes the supply and operation of a digital radio communication system for the national emergency services and a Wi-Fi broadband internet network for commercial use. It was developed as an institutionalized (joint venture) PPP in which the government has a 25% stake and the Austrian private partner has the remaining 75%. The system has partially been implemented whilst the Wi-Fi broadband internet network still has to be deployed.
- The Ministry of the Economy procured 13 concessions for the construction and operation of small hydro-power plants under two bundled tender processes conducted in 2008 and 2010. Four of these were terminated early due to the non-fulfilment of contractual obligations by the private partners, while others are under some of the implementation phases.
- The Ministry of Education implemented a students’ dormitory project in Podgorica in 2012. In this project, the private partner is responsible for the design, financing, construction and operation of a student accommodation facility, which will be transferred to the Ministry once the 30-year contract has expired.
- The Ministry of Health procured two concessions: 25-year contract for the financing, construction and operation of a PET/CT equipment, signed in 2010

and 15-year contract for the financing, construction and operation of a medical waste facility, signed in 2011.

- Several projects in the tourism sector through concession and/or leasing attractive coastal zones for its valorisation were planned in 2010 and some of them are currently in the implementation phase (Lustica Bay), others are in the tendering phase (Ada Bojana, Velika plaza) that the Ministry of Sustainable Development and Tourism is working to coordinate the projects.

#### Local level:

- The Capital of Podgorica recently (end of 2016) announced signing the PPP contract with a local construction company on reconstruction of the city stadium. The agreement is to share business premises at the stadium after the reconstruction 66.4%: 34.5% in favour of private partner.
- The Capital of Podgorica implemented two urban development projects (commercial centres and market halls) and a social housing project.
- The local government of Cetinje implemented a small street lighting project under a 25-year contract for the commercial and touristic development of the “Lipska Cave” speleological site.
- The local government of Herceg Novi implemented a local road project under a 22-year concession.
- The local government of Budva is implementing several touristic PPP projects: resorts, golf courses, hotels. Some of them are postponed, while some are in progress.

### Conclusion

PPP concept has not been introduced and implemented in Montenegro as it should have been. Therefore, it is necessary to adopt and adjust legal, regulatory and political frameworks, create a stable political-economic environment, harmonize laws with EU’s regulations and best practices. Local business communities and policy stakeholders are unfamiliar with the PPP concept. They should have easy access to the information. It is important to present the concept to those who decide and those who might benefit from.

Montenegrin institutions at the national and local level are still not part of regional and other networks in this area. Some institution should be established for making this concept available and familiar to relevant bodies.

Even those PPP/Concession projects implemented or planned in Montenegro are not targeting the sectors they are intended for – public utility services. There is no adequate plan or structure for potential PPP projects that include the investment need assessment, spatial and other plans for particular location, cost-benefit analysis for the potential projects, organizational proposal and other key elements for initiating PPP project. Loans are still the main source of financing infrastructural projects, which makes Montenegro even more financially instable.

One of the strongest advantages of the PPP concept is its transparency and it's unclear as to whether this is a cause or consequence of the situation for its lack of implementation in Montenegro despite the necessity for such measures.

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# General Framework for Liberalization and Regulation of Public Utilities – the Case of the Republic of Slovenia

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Legal framework for liberalization and regulation of public utilities in the Republic of Slovenia is in principle comparable to similar legal frameworks in other European Union Member States. In the field of public-private partnerships (PPPs), Slovenian legal framework is well developed, however, institutional support at the state level needs to be improved and more pro-active approach of the Government would be highly welcome.

## 1. Introduction

The Republic of Slovenia<sup>55</sup> became an independent country on 25 June 1991. Simultaneously, it began to transform its political and economic systems and sub-systems. Not surprisingly, the Slovenian public sector also underwent this process.

The initial impetus for public sector transformation can be mostly attributed to internal factors. A new constitutional order brought many substantial organizational and procedural changes, which directly or indirectly affected the Slovenian public sector and triggered its transformation<sup>56</sup>. Further impetus came from outside due to increased participation in the international community. The most important factor however was the country's orientation towards the then European Community (EC)<sup>57</sup>. Its influence has been present even before the Republic of Slovenia became a Member State in 2004 and a member of the Euro-zone in 2007. Obligations accepted during the association process and even more so after accession play(ed) a significant role in shaping the Slovenian public sector or at least of its 'economic part'<sup>58</sup>, which traditionally includes public utilities.

Before I proceed to discuss public utilities in the Republic of Slovenia, I would explain some related concepts, namely, public sector, public undertakings and public services. Public sector of the Republic of Slovenia is consisted of: public organs or administration at the state and local level, public funds, public institutes, (independent) agencies established by the state or/and by one or more municipalities, Health Insurance Institute of Slovenia (mandatory service), Pension and Disability Insurance Institute of Slovenia (mandatory service), public economic institutes, and public undertakings and other legal persons under the state or/and municipalities control. Public undertaking has two meanings in the Slovenian legislation. The Services of General Economic Interest Act defines public undertaking by using narrow formalistic approach, since it is defined as a company established and governed by the state or/and one or more municipalities for the provision of services of general economic interest. On the other hand, the Transparency of Financial Relations and Maintenance of Separate Accounts for Different Activities Act defines it by using wide functional approach (as used in the Directive 2006/111/ES). Public services in the Republic of Slovenian are non-economic or economic activities subject to public services obligations. Here, the

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<sup>55</sup> The Republic of Slovenia is a parliamentary republic. Its public administration is organized at the state and local level. The local public administration is composed of 212 municipalities whose typical competences are local spatial planning and development, and provision of local public services including water and wastewater service). Some state's macroeconomic data: GDP(2015): 18,693 EUR per capita; volume growth of GDP (2015): 2.2 %; GDP per capita in PPS[EU-28 = 100](2015): 83; actual individual consumption per capita in PPS[EU-28 = 100](2015): 75; public debt (2015): 83.1 % of GDP; share of domestic production in total supply of goods and services (2013): 69.7 % (total value of domestic production: goods 33.2 %, services 66.8 %); average price change for total use(2013): 96.4 %; average price change for final household consumption(2013): 100.4 % (see: the Slovenian Statistical Office web-page).

<sup>56</sup> Without any ambition to discuss new constitutional order and the aforementioned significant changes in this article, let me just point out a shift from the administrative economy to the social market economy.

<sup>57</sup> And after the Lisbon Treaty from its 'successor', i.e. the European Union.

<sup>58</sup> Because of the principle of institutional autonomy this influence was more or less indirect.

main emphasis is on the economic public services, which correspond to services of general economic interest in the sense of article 106(2) of the Treaty on Functioning of the European Union.

### Liberalization in the network infrastructure sectors

Liberalization in network infrastructure sectors, such as energy, communications, postal services and transport sectors, has been unrolled according to the European Union (EU) legal framework<sup>59</sup> consisting of sector specific rules (and of general competition rules)<sup>60</sup>. Yet this in spite of the sector specific approach, used because of considerable differences between the aforementioned sectors<sup>61</sup>, one can perceive more or less the same pattern of liberalization process in those sectors.

First, legal barriers for market-entry, (mainly) created by exclusive and special rights, were removed<sup>62</sup>. But this alone would not suffice for the transformation of previously closed and uncompetitive markets to (more) competitive markets, since companies that would like to enter this market, i.e. new-comers, would not be able to effectively offer services because of the lack of (own) network infrastructure, having a characteristics of essential facility, which was in hands of ex-monopolists, i.e. incumbents. Therefore, the second logical step was a pro-competitive regulation, through which actual and not merely formal

conditions for the establishing of desired market competition intended to be created. By this kind of ex-ante economic regulation precisely the problem of infrastructure should be solved, which is characterised by a combination of a natural monopoly and economic irreversibility of (fixed) costs. This was done in such a way that the obligation of the incumbent, which owned the infrastructure, was defined such that it had to provide interested companies with access to it, and at an appropriate price. Moreover, this price was/is not set by the incumbent, but by the so-called national sector regulator<sup>63</sup>, which was established as an independent regulatory agency specifically in order to define price and to perform other ex ante regulation in certain<sup>64</sup> economic sectors under the liberalization process. Since the simultaneous presence of the former vertically-integrated monopolist on the markets, both above and below the network infrastructure operation market proved to be problematic in a daily practice<sup>65</sup>, this eventually led to its disintegration or by using different kinds of separation<sup>66</sup> of the network operation from other business activities.

As a result, in the aforementioned sectors competition gradually sprang up but not of the same kind and not of the same intensity. Namely, in the central or pure public utilities markets, i.e. network infrastructure operation markets, one can mainly find competition for the market<sup>67</sup>, while in the upstream and downstream markets dominates

<sup>59</sup> Considering the nature of this article, I do not discuss the European Union legal framework in detail here; however, for practical reasons I would like to point out the following:

- the European Union law has a constitutional character within the Slovenian legal system;
- the European Union has an exclusive competence in the establishing of the competition rules necessary for the functioning of the internal market;
- the so-called sector specific rules define far-reaching obligations for Member States, however, this is not to say, that all-sectors general competition or economic rules do not play any role but rather opposite;
- the European Commission shall ensure, inter alia, the application of competition rules and shall, where appropriate, address appropriate directives or decisions to Member States.

<sup>60</sup> Considering the European Commission's practice in last ten years, it is obvious that the general competition rules, such as articles 101, 102 and 107 TFEU, are often used for the purpose of (full) liberalization.

<sup>61</sup> One size simply does not fit all.

<sup>62</sup> Such a 'de-monopolization' is a pro-competitive deregulation. Since a deregulation can be oriented towards more or less competition; I use the adjective 'pro-competition'.

<sup>63</sup> In the Republic of Slovenia there are more than just one sector regulator.

<sup>64</sup> Such as energy sector (around 3 % of GDP2015), communications sector (around 4 % of GDP2015), postal services sector (around 0.5 % of GDP2011) and transport sector.

<sup>65</sup> Because of the real chance of the abuse of power, which stems from ownership and management of the network infrastructure, on the upstream or downstream markets.

<sup>66</sup> There are several kinds of separation having different nature or intensity. The first grade of separation is accounting separation, which demands separate accounting for each activity. The second grade of separation is functional separation, which demands separate business units or departments (within the same legal person) for each activity. The third grade of separation is legal separation, which demands separate legal persons for each activity. Finally, the fourth grade of separation is ownership separation, which demands separate ownership for each activity, that is to say, there cannot be a business group carrying out the operation of network infrastructure (essential facility) and which would at the same time carrying out one or more activities at the upstream or downstream market(s).

<sup>67</sup> Where the network infrastructure is predominantly operated by public undertakings, e.g.:

- ELES, d.o.o., electricity transmission system operator,
- SODO, d.o.o., electricity distribution system operator,
- Plinovodi, d.o.o., natural gas transmission system operator,
- Pošta Slovenije, d.o.o., universal postal services operator,
- Telekom Slovenije, d.d., communications system operator,
- Slovenske železnice – Infrastruktura, d.o.o., rail system operator.

competition within the market<sup>68</sup>.

However, that is certainly not to say, the competition sprang up in the aforementioned sectors only. After all, in the new paradigm of social market economy as introduced at the beginning of the nineties a private property protection, free business incentive and market competition became a general rule<sup>69</sup>. Yet, also this rule is not without exceptions or limits, mainly due to the public interest considerations<sup>70</sup>. In the social market economy, economic aims shall not a priori prevail over non-economic aims<sup>71</sup>.

This approach is important to take into consideration in all economic sectors, particularly in those providing essential services. I would also like to point out the water sector, not only because it is a typical network infrastructure sector but also because of the new constitutional provision which explicitly recognized the self-standing right to drinking water and it reserved provision of the household water supply for public sector<sup>72</sup>.

The Slovenian water sector was not liberalized according to the aforementioned liberalization pattern, yet some market competition, although modest, sprang up, but private participation is relatively weak<sup>73</sup>. In principle, the Slovenian water sector is dominated by vertically integra-

ted public bodies, predominantly by local and regional public undertakings<sup>74</sup>. Even though I do not want to make any prejudice, since at the moment there is still no act for implementation of the new article 70a of the Constitution and, logically, no case law in this regard, it is relatively safe to say that at least in the mid- and long-term period<sup>75</sup> the new constitutional provision has a potential to affect the water sector structure and competition<sup>76</sup>. As far as I understand the new constitutional provision, it excludes private participation in two ways; it demands public ownership over water resources as well as public provision of water supply services. With other words, the Constitution itself now prohibits two kinds of the genuine or material privatization, i.e. privatization of public asset (water resources) and of public task (provision of water supply service)<sup>77</sup>. Yet, this seems to be in line with the EU law since it is neutral in relation to national decisions governing the ownership regime for water undertakings<sup>78</sup>, and also – at least *de iure*<sup>79</sup> – in relation to the self-provision of public tasks in the water sector<sup>80</sup>. On the other hand, however, I have scruples about the (supposed)<sup>81</sup> intent to transform the household water supply from economic to non-economic activity<sup>82</sup>.

Let me here also point out that the new constitutional provision is directed at water resources and household water

<sup>68</sup> A market competition is not protected by the European Union rules only, but also by the genuine domestic rules, including competition rules, whose scope of application is not limited to cases where the trade between Member States may be affected.

<sup>69</sup> At the moment, I am not aware of any specific liberalization agenda, since the competition approach is already dominant. But at the same time, I would like to point out that there is a privatization agenda according to which more or less all public utilities companies directly or indirectly owned by the Republic of Slovenia are classified as strategic investment which should in principle stay in the state's hands (see <http://www.sdh.si/en-us>). For practical reasons, let me point out the article 345 TFEU according to which the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

<sup>70</sup> In principle, supranational (and national) competition rules define relative prohibition of restrictions of competition. See for example articles 101(3), 106(2) and 107(2-3) TFEU.

<sup>71</sup> In case of their collision, a careful primacy-assessment must be carried out on case-by-case basis.

<sup>72</sup> Article 70a of the Constitution:

(1) Everyone has the right to drinking water. (2) Water resources shall be a public good managed by the state. (3) As a priority and in a sustainable manner, water resources shall be used to supply the population with drinking water and water for household use and in this respect shall not be a market commodity. (4) The supply of the population with drinking water and water for household use shall be ensured by the state directly through self-governing local communities and on a not-for-profit basis.

<sup>73</sup> Here, I limit myself to household water supply services and to waste water or sewage services.

<sup>74</sup> In 2014, the structure of the Slovenian Water Sector was as follows: self-provision: 26%; local public undertakings: 26%; regional public undertakings: 58%; (private) concessions: 4%.

<sup>75</sup> I expect that the existing concessions granted to private undertakings will remain in force.

<sup>76</sup> At any rate in the field of household water supply services while this is less likely in case of waste water or sewage services.

<sup>77</sup> Privatization in a wide sense is a transfer of something, e.g. of a task, right or asset, from a public to private sphere. In theory, there are different classifications of privatization, however, in this article I use very common classification, i.e., the so-called formal privatization in case a legal person of public law is converted into legal person of private law, and the so-called genuine or material privatization in case a specific (public) task is transferred to private person where the transferred task remains under the public control, e.g. public services concession, or where this is not the case; or in case a specific (public) asset is transferred to private person (e.g. sale of shares).

<sup>78</sup> See article 345 TFEU.

<sup>79</sup> In addition, one should also consider possibility of *de facto* impact of state aid and other general competition rules.

<sup>80</sup> See Communication from the Commission on the European Citizens' Initiative 'Water and sanitation are human right! Water is a public good, not a commodity!', COM(2014) 177 final, 19. 3. 2014.

<sup>81</sup> This assumption relies on the informal discussion with a member of a working group which has prepared the theoretical background for the new constitutional provision.

<sup>82</sup> The application of the competition rules does not depend on whether the entity is set up to generate profits. Non-profit entities can also offer goods and services on a market. See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19. 7. 2016, p. 1.

supply 'only', therefore it at least formally (*de iure*) allows private participation and market competition in other segments of the water sector, e.g. the disposal of sewage or waste water. In the daily practice, however, although the core activities such as water supply and wastewater treatment are legally considered as two different activities, in most cases the same undertaking provides both activities in a given geographical area.

### Public-Private Partnerships (PPPs) in Network Infrastructure Sectors

PPPs can be found in all aforementioned network infrastructure sectors, yet, until now, projects above 1 million EUR are mainly concentrated in the field of energy<sup>83</sup> and water<sup>84</sup>, which are mainly concentrated at the sub-national level (i.e. regional or local/municipality level). I assume that in these two fields even new public private partnerships will be established in the near future considering the trend towards smart grids in the field of energy and also considering the need to modernize as well as to expand the canalization and sewage or sanitation plants<sup>85</sup>. Moreover, I assume at least some new PPPs in Slovenia will be established in the field of (tele)communications; namely, because of thoughtless spatial planning which led to very dispersed settling with low user-density, there are a lots of (rural) areas where private investors alone will certainly not be willing to invest in the so-called high- and ultra-speed broadband networks. Moreover, at the moment it is also not certain how the so-called second rail track will be built, while PPP is one of several options.

The Republic of Slovenia enacted its Public-Private Partnership Act as late as 2006<sup>86</sup>. The act regulates the purpose and principles of private investment in public projects and/or of public co-financing of private projects that are in the public interest (hereinafter: PPP)<sup>87</sup>, the methods of encouraging PPP and the institutions concerned with its encouragement and development, the conditions, procedure for creation and the forms and methods

of operating PPPs, the special features of works and service concessions and of public-private equity partnerships, the transformation of public companies, the system of law that applies to resolving disputes arising from PPPs and the jurisdiction of the courts and arbitration services to decide on disputes arising from such relationships<sup>88</sup>. Unfortunately, considering the length of this article, only certain issues can be discussed here.

The purpose of the Act is twofold. It intends to foster and protect the public interest and it intends to enable and promote private investment in the construction, maintenance and/or operation of structures and facilities of PPP and other projects that are in the public interest, to ensure the economically sound and efficient performance of commercial and other public services or other activities, which are provided in a method and under conditions that apply to commercial public services. It also relates to other activities whose performance is in the public interest, aims to facilitate the rational use, operation or exploitation of natural assets, constructed public good or other things in public ownership, and other investment of private or private and public funds in the construction of structures and facilities that are partly or entirely in the public interest, or in an activity provided in the public interest<sup>89</sup>.

The Act defines methods of promoting PPPs. In order to promote PPP, the public partner must, *inter alia*, assess whether it can be carried out as a PPP; namely, it shall assess the grounds of project feasibility and comparison of options or other projects. This assessment is obligatory, except in the case of projects provided by a regulation. In my opinion, in this regard some improvements are still possible. There are cases where in reality no business risk was transferred to private persons who even do not make any investments and yet exclusive or special rights were granted<sup>90</sup>. Again, at the state level more should be done not in terms of support only, even in form of consultations, but also in terms of control. Another tool to promote 'healthy' projects is that decisions determining the

<sup>83</sup> More precisely, natural gas distribution network.

<sup>84</sup> More precisely, water distribution network, canalization and sewage or sanitation plants.

<sup>85</sup> Here is already considered a potential impact of the new constitutional provision, which would probably decrease public private partnerships regarding the water distribution network. The latter will, however, need great investments considering the fact that one-fourth of the Slovenian water network was installed before the year 1920. See *Water and Wastewater Services in the Danube Region: Slovenia Country Note*, IMF, 2015, p. 6.

<sup>86</sup> As it seems the act will be modified in the near future by the Act on the award of concession contracts and public-private partnerships which intends to implement the Directive 2014/23/EU of the European parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28. 3. 2014, p. 1. In addition to the aforementioned 'central' act in the field of public private partnerships, also some other horizontal and sector specific acts apply.

<sup>87</sup> More precisely, according to the article 2 of the Public-Private Partnership Act, public-private partnership is a relationship involving private investment in public projects and/or public co-financing of private projects that are in the public interest, and such relationship is formed between public and private partners in connection with the construction, maintenance and operation of public infrastructure or other projects that are in the public interest, and in connection with the associated provision of commercial and other public services or activities provided in a way and under the conditions applicable to commercial public services, or of other activities where their provision is in the public interest, or other investment of private or private and public funds in the construction of structures and facilities that are in part or entirely in the public interest, or in activities where their provision is in the public interest.

<sup>88</sup> See article 1 of the Public-Private Partnership Act.

<sup>89</sup> See articles 6 and 7 of the Public-Private Partnership Act.

<sup>90</sup> See *Poročilo o sklenjenih oblikah javno-zasebnega partnerstva v Republiki Sloveniji* (2009).



public interest in establishing PPP and on implementing projects in one of the forms of PPP shall be taken by the Government or by the representative body of a self-governing local community. Other public partners may take decisions determining the public interest in establishing PPP and on implementing projects in one of the forms of PPP only on the basis of the agreement of the founder or of authorization provided by law. PPP contracts shall be adopted by other public partners after obtaining the consent of the founder<sup>91</sup>. Yet, also in this regard I sometimes miss more awareness that PPP is not a miracle solution which always works, no matter how it is planned and executed. The truth is, PPP is neutral since it could be either success or failure, depending on its performance from the first to last day of the project. Although for now I am not aware of any project in the Republic of Slovenia that would fail, I would like explicitly to point out that we shall not assess the sphere of private and public<sup>92</sup> partners only, but also the sphere of customers/users.

The Act empowers the Ministry of finances to form a special organizational unit within its structure to develop, monitor and cooperate in implementing PPPs in Slovenia, to draw up manuals for operating PPPs, to formulate expert proposals for amendments to regulations and the adoption of other measures that might help improve practices and eliminate problems in this area, and to perform other tasks provided by this Act. In addition, for the purpose of studying policy and providing consultation in the area of PPP a Council of the Slovenian Government for PPP shall be created, which shall be headed by the minister competent for finance, while other members of the Council shall be independent experts in the economic, legal and other areas of PPP<sup>93</sup>. Yet, in my opinion, this institutional support needs to be reconsidered and reformed in order to become more proactive. What is more, I believe that the major shortcoming in the discussed field is weak national-level or central support and capacity to plan nation-wide projects. Nevertheless, as the practice shows, PPPs at the local level are in principle very successful in terms of planning and executing projects, even when relatively large-scale.

Last but certainly not least, the Slovenian Public-Private Partnership Act recognizes two forms of PPP<sup>94</sup>. Namely, the contractual and institutional (equity) PPPs. In the network infrastructure sectors the latter can be found very rarely. That is to say, a great majority of all PPPs in the Republic of Slovenia are established in the form of contractual arrangement.

## Conclusion

Legal framework for liberalization and regulation of public utilities in the Republic of Slovenia (particularly in the economic sectors such as energy, communications, postal services and transport) is in principle comparable to this kind of legal frameworks in other EU Member States.

Namely, in the new paradigm of social market economy as introduced at the beginning of the nineties a private property protection, free business incentive and market competition became a general rule. Yet, this is not to say there are no exceptions, which are probably most obvious in the water sector. Nevertheless, a private participation and market competition are in principle more or less present in all network infrastructure sectors, but of course not of the same intensity and not of the same kind. As I already said, in the central or pure public utilities markets, i.e. network infrastructure operation markets, one can mainly find competition for the market, while in the upstream and downstream markets dominates competition within the market<sup>95</sup>.

In the field of PPPs one can notice relatively well developed legal framework, however, institutional support at the level of state needs to be improved and more pro-active approach of the Government would be highly welcome. In fact, the biggest weakness lies in the institutional design and capacity to plan nation-wide projects. This is in particular obvious when state projects are compared with local projects. Namely, local projects have been relatively large in investment terms, and it is fair to say that numerous local authorities have shown capacity to plan and execute large-scale projects which is certainly encouraging.

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4. Directive 2014/23/EU of the European parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28. 3. 2014.

<sup>91</sup> See articles 8 – 11 of the Public Procurement Act.

<sup>92</sup> In a strict sense (public authority or body as such).

<sup>93</sup> See articles 20 – 22 of the Public-Private Partnership Act.

<sup>94</sup> See articles 26 – 30 and articles 96 – 134 of the Public-Private Partnership Act.

<sup>95</sup> Again, the water sector has rather different characteristics.

# Liberalization Agenda and the General Framework of Serbian Local Public Utility Services Regulatory Regime

Tatjana Jovanić\*

This contribution aims to cast a light on the existing local utilities regulatory framework in Serbia, and its performance and financing, including public-private partnerships and concessions. As liberalization agenda is on the horizon, the author argues that institutional capacities of local administration have to be strengthened and regulatory powers of cities and municipalities well understood and elaborated.

## Introduction

Since democratic changes in 2000, after a long and still ongoing process of transition to a market economy, the Serbian government strives to pursue fiscal, structural and regulatory reforms under an IMF program that runs through 2018. GDP Annual Growth Rate in Serbia averaged 2.81 percent from 1997 until 2016.

The Serbian road to the European Union (EU) started in November 2000, when a "Framework Agreement between the EU and the Federal Republic of Yugoslavia (FRY)" was signed, enabling the EU to provide assistance for political and economic reforms. The Stabilization and Association Agreement between the EU and Serbia was signed on April 2008<sup>96</sup>. On 22 December 2009, Serbia applied for EU membership and received candidate status for EU membership in March 2012. The Council of the European Union decided on 28 June 2013 to open accession negotiations with Serbia<sup>97</sup>. As a candidate country, Serbia has to align its system of macro-economic governance with the requirements set out by the EU. Namely, the Enlargement Strategy of the European Commission suggested for the first time to create European Semester Light, fostering the system of national economic planning in order to assist western Balkan states with tackling economic reforms, restructuring their economies and stimulating growth and employment from the early stages of accession negotiations.

For more than a decade in Serbia, the reforms were guided by neo-liberal doctrine and fostered by conditionality imposed primarily through international financial institutions such as the IMF. Privatization, liberalization

and deregulation were the main pillars of the reforms, blindly followed by politicians who have made many wrong decisions in setting transition goals. After more than two decades of transition, a political interest still dominates in assets, and the inefficiencies of the public sector of the economy have accumulated a large structural deficit, passed through to public debt. Drafted on the basis of the Guideline on National Reform Programs issued by the European Commission, Serbia's Economic Reform Program of 2016 focuses on steps ensuring the completion of the privatization and restructuring of public companies and reduction of the state's share in the economy.

Even though tremendous progress has been achieved in liberalization, privatization, and macroeconomic stabilization, the Serbian economy still faces problems generated by the public sector, including country wide network industries or local utilities. Although assets for performance of local services of general economic interest were mostly left in the ownership of local authorities, the modalities of private infrastructure financing may be expected in the future, and hence all the inherited risks.

## On the way to liberalization and restructuring local utilities providers

Restructuring of public enterprises and communal services providers (as a special legal form for provision of services of general economic interest) is one of the most important reforms on the agenda, and a big challenge for state and local administrations. Restructuring of public enterprises and liberalization in the network infrastructure sector to comply with the EU rules on competition is, on the other hand, an explicit duty assumed by signing the Stabilization

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<sup>96</sup> The Agreement entered into force on 1 September 2013.

<sup>97</sup> The First Intergovernmental Conference took place on 21 January 2014.

and Association Agreement.

From a strategic standpoint, the reform of public utilities in Serbia has been an issue on the agenda since the early 2000s. One of the most comprehensive strategic documents has been created within an EU funded project – Municipal Infrastructure Support Program, the beneficiary of which was the Ministry of Regional Development and Local Self-Government in 2010. Within this project, several toolkits were created dealing with project preparation, implementation, feasibility study etc. A (draft) Strategy of Restructuring of Public Utility Services has also been one of the outputs of this project<sup>98</sup>. However, up to now no systemic steps were taken to operationalize the idea of restructuring public utilities. The Fiscal Strategy foresaw the enactment of the Program of restructuring local public utilities, and drafting of the National Strategy for Restructuring Local Public Utilities. However, no official document has yet been published. Recently amended Law on Communal Activities has paved a way for the entry of private capital, but without any strategic approach there is a risk that the practice may diverge in more than 150 local self-government (local territorial government) units.

## The legal framework

### The main components of an enabling legal framework

As a pre-condition for liberalization of communal services, the most important legal framework set out by general legislation should refer to the issues of ownership rights, organizational forms of service delivery, the public procurement framework and tendering procedures, service financing mechanisms, price-setting mechanisms, the budgetary framework of funding capital investments, and ensuring quality control and consumer protection. Péteri classified the most important preconditions for local utility service delivery into seven categories (Péteri 2003: 11–22). First among them is legislation on organizational forms of service delivery, which ranges from rules on municipal enterprises to general company laws. Depending on the scope of decentralization, local governments are responsible for strategic development of public utility services as well as for various capital investment schemes for local projects. In addition to the legal framework on tendering and public procurement procedures (PPP), PPP rules refer to privatization and restructuring by creating the framework for alternative service provision, which should enable better resource allocation and better performance, i.e., key components in service delivery, the selection process of private partners, specifications of performance, agreements on price setting, service monitoring,

and renegotiations. One of the critical components of the regulatory process is the price-setting mechanism, if prices are approved by a central level entity or the municipality who “owns” public utility.

### Organizational forms, control and ownership

The Law on Public Enterprises and Activities of General Economic Interest<sup>99</sup> defines activities of general economic interest, which include public utilities<sup>100</sup>. Article 3 of this law defines a public undertaking in a formalistic approach, as a specific type of a legal entity, a company established by the state, autonomous province or a local self-government unit. In addition, services of general economic interest could be provided by a limited liability or a joint stock company exclusively owned by the State, company owned by the Republic of Serbia, autonomous province, local self-government unit or a subsidiary of such companies, as well as the company or an entrepreneur to whom the public body has conferred the provision of services. This definition is not in line with the Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings<sup>101</sup>. Also, it contradicts the definition prescribed in the Law on Public Private Partnership and Concession, which is in line with the above directive. The Law on Public Enterprises and Activities of General Economic Interest regulates the setting up and the business of public enterprises. It entails general conditions for performance of activities/delivery of services, or corporate governance.

The law on Public Utility Activities<sup>102</sup> listed fifteen communal services, among which the majority represent services of general economic interest (e.g. water provision, district heating, parking service) which specific regulatory regime is more precisely defined in the Law on Consumer Protection<sup>103</sup>, however only in terms of consumer rights such as the right to access, protection against disconnection, redress etc. An option is left to cities and municipalities to define, in their decisions on public utilities (based on this law) other potential communal services, as well as details on the performance of services. Only the activities of water distribution and the city transport by trolleybus and tramway may not be provided by a private party, but solely a public enterprise owned by the local self-government unit.

### Competences and regulatory powers of Local Self-Government Units

<sup>98</sup> <http://www.misp-serbia.rs/wp-content/uploads/2010/05/Strategija-restrukturiranja-JKP-Predlog.pdf>koristi

<sup>99</sup> Official Gazette, No. 15/2016.

<sup>100</sup> This corresponds to services of general economic interest in the sense of article 106(2) of the Treaty on Functioning of the European Union.

<sup>101</sup> OJ L 318, 17.11.2006, p. 17–25.

<sup>102</sup> Official Gazette, Nos. 88/2011, 104/2016.

<sup>103</sup> Articles 83–92, Official Gazette, Nos. 62/2014, 6/2016.

The Act on Territorial Organization of the Republic of Serbia<sup>104</sup> regulates its territorial organization, formed of the following units: autonomous provinces (Vojvodina and Kosovo), 24 cities and 150 municipalities. There are 29 administrative districts, but an administrative district does not represent a territorial organization unit, but rather a regional center of state authority. Law on Local-Self Government regulates<sup>105</sup>, among other issues, competences and authorities of the City of Belgrade, and cities and municipalities as local self-government units. According to this Law, the city or municipality may establish public enterprises, or the public service could be contracted out, in line with the principle of competition, transparency and the application of the Law on Public Procurement. Namely, the Assembly of the city or municipality decides on setting up the services and public enterprises, executive and oversight boards, and gives consent on the statutes of such entities. In line with article 20 of this Law, the unit of a local self-government ensures the provision and development of communal services, and the organizational, material and other conditions for the performance of such services.

One of the consequences of the outdated definition of a public enterprise is that different rules apply to public companies, companies in majority state ownership and private companies performing activities of general interest. The Law on Activities of General Interest has not prescribed the details of the procedure for conferral of the activities of general interest. Local utilities are within municipal competence. The agreement on conferral, as an alternative to concession, is supposed to regulate mutual rights and obligations.

Article 69 of the Law on Public Enterprises and Activities of General Economic Interest, representing *lex generalis* in the matter of public sector enterprises, provides a means of “securing the protection of general interest” authorizing the Government, the competent body of the province or a city/municipality to give consent to the statute, guarantees and sureties, tariffs (safe when other law prescribed that another body grants consent), terms of supply of goods and services, disposal of assets in state ownership, capital investment, etc.

The Law on Utility Services<sup>106</sup> further explains the competence for managing local utilities. Pursuant to the Article, the local self-government unit determines, in line with this law, the conditions for performing communal services,

rights and responsibilities of utility service users, the extent and quality of communal services, and the conduct of supervision of the performance of services. The Government determines the main features such as the minimal geographical cover or number of citizens to which a services is provided, a frequency of delivery, quality parameters, technical capacity which providers should fulfill etc. This Law further specifies the legislative power of the local self-government unit to determine the manner of performance of services, general and special rights of service providers, including price controls and supervisory powers. This Law (Articles 25–29) sets the principles for price setting, basic parameters of price methodology, the procedure of the change in prices of communal services and supervisory power of the city/municipality in this regard<sup>107</sup>, as well as the subsidized price for certain categories of users.

### **Contracting-out the supply of utility services and procurement**

At the local level, infrastructure investments by private investors were initially executed on the basis of the Law on Utility Activities of 1997, which enabled conferral of performing of communal services to an entity not owned/operated by the city/municipality. Most investments were made in the sector of hygiene and waste management, areas which do not assume a large infrastructure investment. Even before the first legal act regulating public-private partnerships was adopted, some forms of institutional PPPs were concluded forming a partnership between a municipality or a group of municipalities and a private partner. (Grubišić et al, 2015).

The existing Law on Public Utility Activities (Article 9) is the basis for conferral of performance of services, on the basis of decision of the Assembly (city/municipal). The procedure of conferral of services is subject to the application of rules on public procurement and the general PPP and concessions framework. Law on public-private partnership and concessions calls for the application of the provisions of the Law on public procurement<sup>108</sup>. In this way these provisions indirectly form the constituent part of the Law on public-private partnership. Amendments to the Law on PPP and concessions specify that service concessions are classified as the group of contracts awarded based on the Law on Public Procurement.

### **Brief overview of the PPPs and concessions normative framework**

<sup>104</sup> Official Gazette, Nos.129/2007 i 18/2016.

<sup>105</sup> Official Gazette, Nos. 129/2007, 83/2014, 101/2016.

<sup>106</sup> Official Gazette, Nos. 88/2011, 104/2016.

<sup>107</sup> As prescribed in Article 28, the competent body of a local self-government unit gives consent to the proposal for price change. The proposal comprises the explanation of the rationales for price change and the detailed structure of the proposed price. The proposal has to be published at least 15 days before the competent body decides on price change. Alternatively, the Assembly of the city or municipality may determine the conditions for price change even before the consent of a competent body, if this is stipulated in the agreement on conferral of provision of services.

<sup>108</sup> Official Gazette, Nos. 124/2012, 14/2015, 68/2015.



The Law on Public Private Partnerships and Concessions of 2011 was, obviously, drafted under the influence of potential investors, and its rules enable a flexible approach to project financing. It may be claimed that the new regulatory framework is satisfactory to a larger extent (Radulovic and Nenezic, 2012). This Law contains necessary rules (for example on surety instruments, step-in rights, etc.) recommended by relevant international practice guides such as the European PPP Expertise Center (EPEC) guide on PPP of the European Investment Bank<sup>109</sup>, Public-Private Partnership in Infrastructure Resource Center of the World Bank, etc. The Law regulates the conditions and methods for defining, proposing and approving the partnerships, defines the subjects authorized to propose and execute the projects of public-private partnerships, the rights and duties of the public and private sector partners, the form and the content of the public contract (with or without the concession elements), the legal protection in the procedure of awarding the public contract, the subject matter of concession, as well as all other issues which are significant for the realization of a public-private partnership.

Public-private partnership is achieved in two ways and is organized in two legal forms: contractual and institutional. Concessions form a special part of public-private partnership. Article 20 stipulates that the public agreement shall be concluded as a public-private partnership agreement or as a concession agreement. Duration of the public-private partnership project, i.e. concession, is limited to a maximum of 50 years.

In July 2013, on the basis of the Law on PPP and Concessions, the Commission for Public Private Partnership adopted a Methodology for the Value for Money analysis in Public-Private Partnerships and Concessions<sup>110</sup>. This analysis should be obligatory when the PPP does not have elements of a concession, but the same methodology should be used in a feasibility study for a PPP with the elements of concession, prepared by a public body.

In order to enhance the transparency of the granting process and evidence of the public contracts, in June 2013 a Rulebook for the recordkeeping and content of public contracts register was adopted<sup>111</sup>. However, the general public opinion in Serbia is that the process of public tendering and public contracts is not sufficiently transparent.

Amendments to the Law on public-private partnership and concessions, effective March 2016, have been introduced to secure a better control of fiscal risks in PPP projects through the analysis of fiscal impact for project proposals exceeding 50 million EUR<sup>112</sup>.

#### **The effect of financial limits imposed on local authorities**

In terms of sources of financing, Serbian cities and municipalities may be divided into two groups (Nenezic and Radulovic, 2012:66). The first group comprises local self-government units which have reached the upper limits set out in the Law on Public Debt<sup>113</sup>. The other group is composed of those entities with low credit capacity and status, and to whom banks are not interested to lend, but could be interesting to international financial institutions and development banks. Limiting factors for financing are also related to low cash flows mainly due to limited government support, tariff policy. Therefore public utility companies are more prone to short term financing. Further, the Law on Public Property imposes restrictions related to surety. Namely, when assets are not treated as assets of an enterprise, the public company is treated as the user of the publicly owned assets (ownership by the state)<sup>114</sup>. Another limit is related to the lack of possibility of issuing a guarantee by local self-governance units, due to the Law on Public Debt. The last limitation could, to a certain extent, be mitigated through the support agreement. When credit support or financing from own resources is not a viable option for a communal service provider, the PPP is an option both for the local self-government unit, and the service provider owned by the municipality.

#### **Project proposals which have been awarded a positive opinion (green light) by the Commission for PPPs**

Since March 2012, as of the date 21 February 2017, the Commission has evaluated around fifty proposals for PPPs with or without elements of concession and has issued 44 positive opinions for PPPs with or without elements of concession<sup>115</sup>. The following table (Table 1) shows that the majority of positive opinions related to communal services, while only five were related to other infrastructure projects such as railroad concession, river port etc. Unfortunately, there is no official data about the exact amount of projected and/or performed PPPs and concessions in Serbia.

<sup>109</sup> The European PPP Expertise Centre, The EPEC PPP Guide available at: <http://www.eib.org/epec/g2g/>

<sup>110</sup> Available at: <http://www.ppp.gov.rs/dok/38/Metodologija%20za%20analizu%20dobijene%20vrednosti%20u%20odnosu%20na%20ulo%C5%BEeni%20novac%20u%20javno-privatnom%20partnerstvu%20i%20koncesijama.pdf>

<sup>111</sup> Official Gazette, No. 57/2013.

<sup>112</sup> Local projects and the other small-scale projects still remain to be developed in a decentralized manner. However, the opinion of the Ministry shall be necessary only for PPP and Concession projects where the contracting authorities / public bodies proposing the project are under the governmental authority and if their value exceeds 50 million EUR.

<sup>113</sup> Article 36, Law on Public Debt, Official Gazette Nos. 61/2005, 107/2009, 78/2011 and 68/2015.

<sup>114</sup> Articles 19-20, Law on Public Property, Official Gazette Nos. 72/2011, 88/2013, 105/2014, 104/2016 – other law and 108/2016.

<sup>115</sup> The full list of projects granted positive opinion is available at: <http://www.ppp.gov.rs/dok/37/MISLJENJA%20KOMISIJE.pdf>

Table (1) Proposals which have been granted a green light by the Commission for PPPs <sup>116</sup>	
Communal Services	City/Municipality
District Heating	Zrenjanin, Niš, Batočina, Vrbas, Pirot
Waste Management	Topola, Žagubica, Regional Center Keleš, Grocka <sup>117</sup> , Belgrade,
Public Sewage System Reconstruction	Stara Pazova
Public Transport (City or Municipal)	Loznica, Topola, Srbobran, Nis, Jagodina, Šabac, Negotin, Paraćin, Belgrade <sup>118</sup> , Belgrade <sup>119</sup> , Kanjiža, Ruma
Public Lighting	Topola, Sečanj, Vrbas, Vranje, Varvarin, Žabalj, Ada, Beočin, Plandište, Bor, Petrovac na Mlavi, Kruševac
Maintenance of residential buildings and institutions, public lighting and chimney-sweeping <sup>120</sup>	Novi Sad
Water distribution system and construction of a small power plant	Brus
Local railroad construction and maintenance	Stara Pazova
Public Parking Garage	Sabac
Other	City/Municipality
River port and Road Terminal	Apatin
Railroad Concession	E-763 Belgrade-Pozega
Building, reconstruction and maintenance of Belgrade Airport and the airport operation	Belgrade
Optical Network - Telecommunications	Novi Sad
Selected urban infrastructure property	Belgrade

Due to the lack of planning and appropriate risk management, some of the approved projects related to communal infrastructure failed in realization, such is the District Heating PPP in the City of Zrenjanin, which was entered into without a proper feasibility study. Some important infrastructure projects are in the pipeline, such as the offer for the selection of an operator for the Vinca waste landfill as part of a public-private partnership, currently one of the biggest projects of its kind in Europe. Due to the project's complexity, in line with the Law on Public Procurement, the competitive bidding process had been launched and pre-qualification process for the assessment of qualified bidders is under way. According to the City Council of Belgrade, eleven investors expressed their interest. The project involves construction, operation and maintenance of a municipal waste treatment facility and foresees the

construction of a mechanical biological treatment plant with refuse-derived fuel production<sup>121</sup>.

### The need to strengthen the institutional capacity for private infrastructure initiatives

As of the 1990s, the trend of decentralization and privatization of local communal services in Central and Eastern Europe has been continuous, with legislation enabling contracting for service delivery just one among a number of determinants of successful project implementation. However, a stable regulatory framework, institutional capacity, transparency, and the competence and accountability of public administration, including at the local level, are indispensable features in the agenda of priorities for development policies and the transformation process in post-communist economies (Laffont, 2005; Hodgson, 1998). Experiences in development aid show that strengthening administrative capacities and institution building is the key determinant in transition economies (Graham, 2002). Among different levels of influence and the development of PPP policies and projects, institutional support represents one of the main preconditions of an effective PPP policy (Verhoest et al., 2014). One of the main problems in developing PPP projects in Serbia is the lack of administrative capacity of local self-government units even in the phase of formulating the potential projects.

Although a new Serbian Law on Investments<sup>122</sup> has established a modern Serbian Development Agency, regional development agencies are not sufficiently involved in the development of instruments of financing local economic development and private infrastructure financing. The problem of „missing middle“ (Shaw and Greenhalgh, 2010) could be solved by a more active role of the association of cities and municipalities (Standing Conference of Cities and Municipalities), and the strengthening of the network of cooperation among Serbian regional development agencies. Law on Investment mandated the creation of local economic development and investment support units within the local self-government units, an entity authorised by the local self-governments, or a dedicated project team to provide support to an investor investing in the development of communal and local „economic infrastructure“. The role of the Serbian Chamber of Commerce, through its Office for Investment Support and Public-Private Partnership is worth mentioning, as well as the efforts made by the National Alliance for Local Economic Development (NALED), which represents an association of companies, municipalities and civil society

<sup>116</sup> Table has been based on the official report of the Commission for PPPs. [www.ppp.gov.rs/dok/39/2016%20-%20D0%98%D0%97%D0%92%D0%95%D0%A8%D0%A2%D0%90%D0%88%20%D0%9E%20%D0%A0%D0%90%D0%94%D0%A3%20-%20D0%88%D0%9F%D0%9F%20-%20%D0%A4%D0%98%D0%9D.pdf](http://www.ppp.gov.rs/dok/39/2016%20-%20D0%98%D0%97%D0%92%D0%95%D0%A8%D0%A2%D0%90%D0%88%20%D0%9E%20%D0%A0%D0%90%D0%94%D0%A3%20-%20D0%88%D0%9F%D0%9F%20-%20%D0%A4%D0%98%D0%9D.pdf)

<sup>117</sup> Co-generation, district heating.

<sup>118</sup> Intra-city.

<sup>119</sup> Inter-city.

<sup>120</sup> All services proposed within one project.

<sup>121</sup> <http://balkangreenenergynews.com/eleven-offers-for-belgrade-landfill-ppp/>

<sup>122</sup> Official Gazette, No. 89/2015.

organisations.

The functionality of PPP support institutions depends on several criteria, among which the following are crucial: political support, the competence of employees and well developed coordination mechanisms (Verhoest, 2014). Central PPP units may perform PPP policy formulation, technical support, the promotion of PPP and capacity building, but may also green-light projects. Pursuant to article 65 of the Law on Public Private Partnerships and Concessions, a Commission for Public Private Partnership is set up by the Government of the Republic of Serbia and is composed of nine representatives of relevant ministries, the city of Belgrade and the Province of Vojvodina. The main role of the Commission is to give its opinion on the PPP proposal, or the proposal of the concession agreement, after taking into account the opinion of the Ministry of Finance.

The normative framework for PPP implementation, which is wider than laws regulating PPP and concessions, should recognize the role of local administrations not only as stakeholders in but also facilitators of PPP implementation (Jovanic, Sredojevic, 2016). In this sense, legislation in the western Balkans should better define the responsibilities of local administrations and necessary procedures. However, determinants of the local government capacities needed for successful PPP implementation are not only set out in laws and regulations, and a number of the types of expertise are required for PPP promotion and execution.

## Conclusion

This paper aimed to provide a general overview of the normative framework of public utilities of a local character in Serbia, and to give some proposals on the reform, notably the need to strengthen the capacities of the Commission for PPPs and the institutions providing technical support, as private infrastructure investment represents one of the pillars of regional development especially where the State, cities and municipalities have reached upper debt limits. Although during the last few years the normative framework has been upgraded and is mostly in line with EU requirements, investors are still not confident, projects and risk assessments not sufficiently elaborated, and local authorities not sufficiently educated about benefits, risks and negotiating procedures. All this leads to the conclusion that the presence of international financial organizations will be crucial for a successful implementation of large infrastructure projects. Public utilities of a local character, due to underinvestment during the previous two decades, are in urgent need of restructuring. The new legal framework is an impetus for liberalization, however, the regulatory powers of local self governments are underdeveloped, especially in the domain of economic regulation. Risks in public-private partnership projects and conces-

sions may be transferred to users, and therefore proper mechanisms of consumer representation at the local level and consumer protection should be developed (Jovanic, 2012). Preferably, a public agency overseeing the regulatory powers of local self-government units should be established.

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The regulatory reform in developing countries took a prominent role in the 1990s. Both external and internal factors pushed many countries to liberalize their energy markets and introduce independent regulatory agencies to oversee the regulatory reforms. In the beginning, competition policy remained in the background. However, as liberalizations and regulatory reforms matured, competition policy has begun to come to the front. The advances such as technology and result-based tariff models also brought issues of anti-competitive behaviour in energy markets.

While technological and economic advances shape the new market framework, the economic literature catches up with the evolution of energy markets. For example, the competition issues created by incentive regulation models still do not get the attention they deserve.

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The guest editor of this special issue on “Competition Policy in Energy Markets: The Experience of Emerging Economies” is Dr Fuat Oğuz (B.A.: Ankara University, M.A.: The American University, Ph.D.: George Mason University). Dr Oğuz works in the areas of competition and regulation. He published extensively on telecommunications and energy markets. Dr Oğuz has experience in the tariff models, regulatory policies, market analyses and regulatory impact analysis. Currently, he is a professor of economics at Yıldırım Beyazıt University. He teaches law and economics, economics of regulation and antitrust.

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