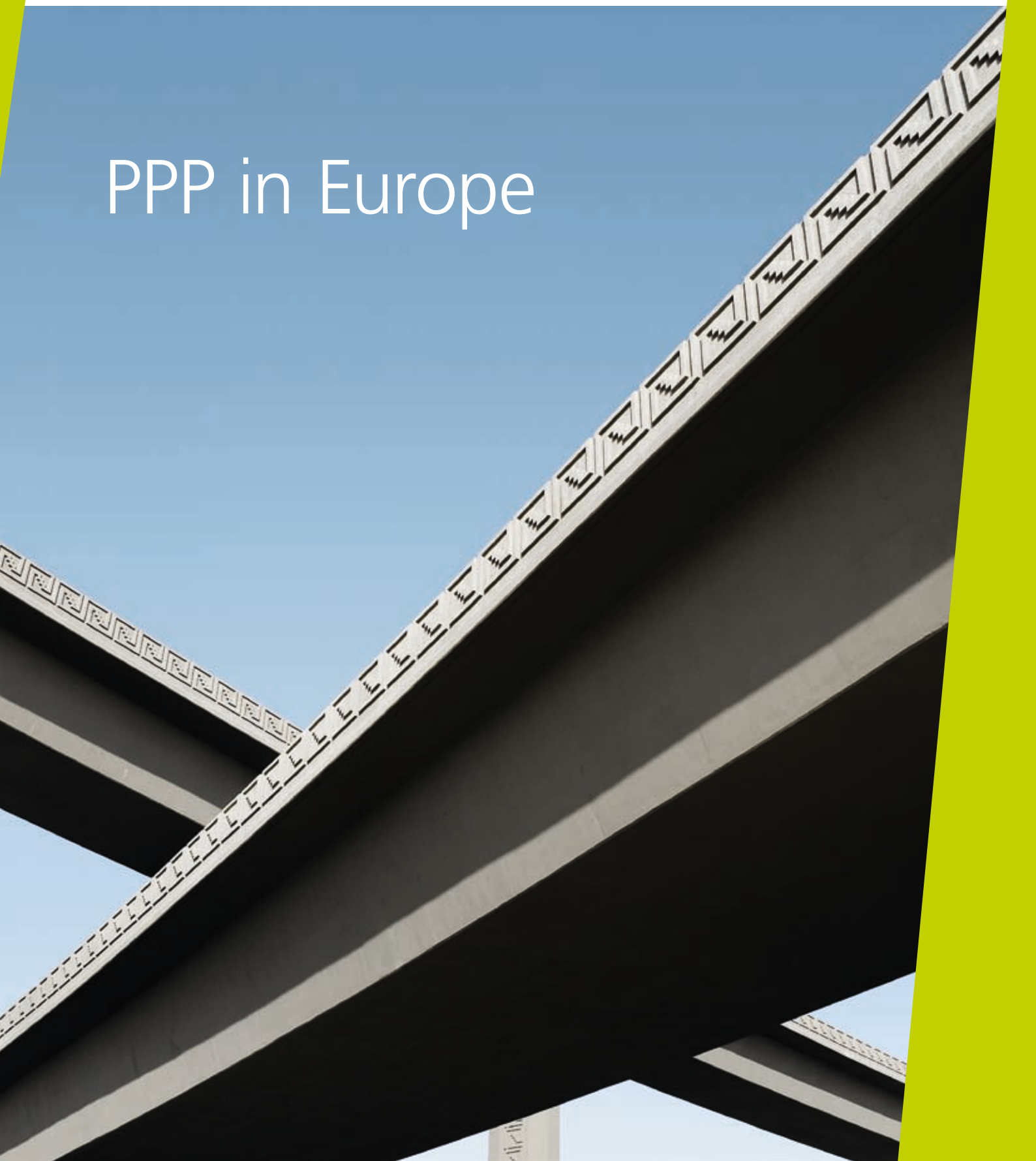
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PPP in Europe



Introduction

We published our last report on PPP in Central and Eastern Europe in April 2009. Given the positive response to the issues and topics discussed in that document and its predecessor, we have expanded the scope of the current edition to cover all of the jurisdictions in which CMS operates in Europe. This recognises the increasingly important role that PPP has to play in the development of infrastructure both in markets with a history of PPP projects and those introducing them for the first time.

In the introduction to our April 2009 report we identified that, despite the potential for a large number of deals in the pipeline, the liquidity shortage in the market meant that deals were competing across Europe for funding. Since then additional pressure has been exerted on the pipeline for PPP deals by the requirement for governments to curb spending in order to reduce budget deficits and borrowing. This has resulted in delays to a number of high profile projects and a requirement to restructure a number of projects that have reached close. Throughout this time period the changing financial climate has created a number of challenges for deals in procurement and required some examination of the institutional, financial and legal infrastructure for carrying out deals.

Despite the current political and financial difficulties, PPP remains an attractive source of finance for the public sector. Significant infrastructure investments are still required across Europe and other sources of funding are being curtailed. The European Commission has also recognised the value of PPP projects in the provision of infrastructure and published a communication on PPPs in November 2009. Well-structured PPP projects continue to provide an attractive investment and can be used by the public sector to stimulate the economy. Given the scale of investment requirements, we remain optimistic about the future of PPP in Europe. It remains the case however that deals will need to be realistic about what the market can offer and it will be those jurisdictions with the right institutional, financial and legal infrastructure that will fare best.

Whilst a document of this nature should not seek to be comprehensive, this report provides an overview of the issues that may affect a PPP project in each country, some background to the law and practice governing PPP projects and examples of the key legal and funding issues that may arise. We hope that you find it of interest.


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CMS has been in the forefront of the use of private sector finance and expertise for infrastructure projects and is the leading European provider of legal services. This review of the current PPP market in Europe draws on the expertise of the members of our Infrastructure & Project Finance Group and demonstrates our ability to provide the ideal combination of international and local experience in each of the markets that we operate.

In addition to the general issues identified in this document, there are often specific questions that individual public sector bodies or businesses will need to address and also specific information that will be relevant to individual projects. Contact details for specialists in the Infrastructure & Project Finance Group across CMS have been provided at the end of this document and we would be happy to discuss any issues that may be of interest to you.

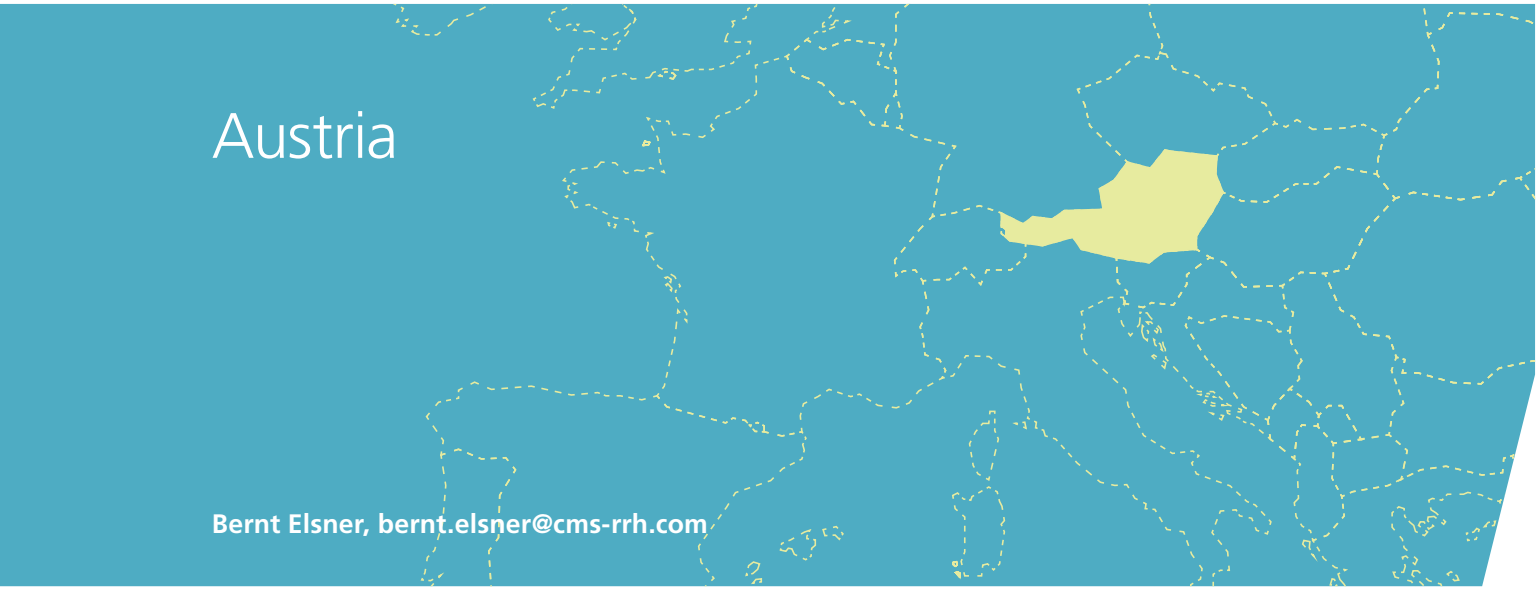
CMS
CMS operates in 27 jurisdictions, with 53 offices in Western and Central Europe and beyond. CMS was established in 1999 and today comprises nine CMS firms, employing over 2,800 lawyers. CMS is headquartered in Frankfurt, Germany.

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Austria



Bernt Elsner, bernt.elsner@cms-rrh.com

Country overview

Austria does not have a wide range of closed PPP deals. The examples below show that most of the closed PPP projects are in the areas of transport infrastructure (roads) and social care/healthcare. In general, the government (both federal and provincial) is interested in expanding the role of PPPs in Austria due to the economic and administrative benefits of this model.

Recently closed and current PPP projects include:

- Ostregion Package 1 (A5 Nordautobahn). This is the biggest PPP project in Austria and is for highways around Vienna and leading north to the Czech border. In 2007 ASFINAG, the State-owned motorway operator, chose the Bonaventura consortium for the DBFOM contract over the next 30 years. The highways involved are the S1 East, S1 West, S2 and A5 South. There are 51 km of roads, with the contract valued at EUR 933 million. Package 2 was not structured as a PPP model but is currently being awarded in the traditional way.
- PPP Maissau. The tender for this PPP road project (B4) in Lower Austria is currently pending, valued at approximately EUR 30 million. It is one of the first road PPPs on a provincial level.
- PPP ring road Klosterneuburg: a provincial road project (2008).
- Hospital PPPs. There have been several projects for the building, financing and facility management of small hospitals in Austria, with project values of EUR 20–50 million. A recent example is the DBFO Hospital Mistelbach in Lower Austria (2009).
- School projects, court buildings and administration buildings. In many cases the private partner is only responsible for facilities management and/or maintenance of the respective infrastructure, not for full operation. Project values are in the region of EUR 20–50 million. Three examples are:
  - provincial court Innsbruck, Tyrol (2009);
  - school and kindergarten Nordbahnhof, Vienna (2008);
  - college (Fachhochschule) St. Pölten, Lower Austria (2007).
- Highway service areas. ASFINAG has awarded DBFO contracts for motorway service/rest areas including parking, fuel stations, a restaurant and exclusive access from the highway. Examples include:
  - A6, Potzneusiedl;
  - S1, Schwechat; and
  - A1, Steinhäusl.

At present there is no central body for the promotion of PPPs in Austria. The Austrian government at one stage planned to put in place a centre of expertise for PPP projects in Austria. The government initially drew on the experience that various ministries and public entities had with PPP projects. However, implementation was stopped due to other political priorities.

In the 2010 Economic Freedom index published by the Heritage Foundation and the Wall Street Journal, Austria was placed 22nd overall and 11th in the European region[1]. Its score was slightly improved from 2009, and its overall score is well above the regional and worldwide average.

Overview of legal system

Austria is a civil law jurisdiction with a civil code. For public procurement the Federal Procurement Act 2006 *(Bundesvergabegesetz 2006)* applies.

[1] http://www.heritage.org/Index/Country/Austria

Austria has a relatively stable legislative system. Changes to legislation are driven by EU legislative changes or following consultation and development by the relevant ministries. There are often amendments related to public procurement. A large number of cases have been taken to the competent public authorities to challenge the procurement procedures used, and so case law must also be considered.

Specific PPP/Concession Law

There is no specific law regarding PPP projects in Austria. The Federal Procurement Act 2006 (the "Procurement Act") implemented the provisions of the EU Directives 2004/18/EC and 2004/17/EC. This provides the legal framework for all public tenders by public authorities. It includes rules for specific procurement procedures (e.g. competitive dialogue) customised for PPP projects. The Procurement Act sets out regulations regarding works concessions as well as service concessions.

Unlike some Central European countries there are no specific legal obstacles to concession models (e.g. there are no restrictions on ownership of land for public infrastructure).

Austrian public procurement law provides a solid basis for PPP projects. There is not thought to be a need for a specific PPP law.

Procurement laws

Austrian public procurement law is regulated within the Procurement Act, which was amended in March 2010. The changes include amendments regarding suitability of bidders and the implementation of the Remedies Directive 2007/66/EC. The Procurement Act sets out regulations regarding the award of contracts for works, supply and service concessions. It also provides regulations regarding remedies to review the award of such contracts. In addition, there are nine different provincial laws for each of the nine Austrian provinces, providing the legal framework for local review proceedings.

The basic framework of the Procurement Act includes the principles of non-discrimination, equal treatment and transparency. Contracts should be awarded only to authorised, capable and reliable bidders at appropriate prices, promoting free competition.

The Procurement Act sets out the following different procedures for the award of public contracts (each specified within the Procurement Act). Some are only available for specific kinds of contract:

- Open Procedure – A one stage procedure in which any company may participate;
- Restricted Procedure with prior publication of contract notice – any company may submit a request for participation. Only those who are invited may submit a tender;
- Restricted Procedure without prior publication of contract notice – the contracting authority invites only selected, suitable companies to submit a tender;
- Negotiated Procedure with prior publication of contract notice – any company may submit a request to participate. Only those who are invited may submit a tender. The terms of the contract are negotiated;
- Negotiated Procedure without prior publication of contract notice – the contracting authority invites only selected, suitable companies to submit a tender, only those who are invited may submit a tender. The terms of the contract are negotiated;
- Framework Agreement – These agreements between a contracting authority and one or more companies provide the contractual framework of the terms (price, quantity, etc.) of purchases during a given period (without a commitment to buy products or services).

Framework agreements may only be awarded after completion of an Open, Restricted or Negotiated Procedure with prior publication. Purchase orders based on the framework agreement may then be awarded directly;

— Dynamic Purchase Systems – An electronic procedure used for the purchase of commonly requested items. Any company may submit a non-binding tender. Any company which satisfies the selection criteria, as well as the specifications for the requested purchases may participate in the dynamic purchase system. To award a contract, all companies within the purchase system are invited to submit a tender for a specific purchase process. The best offer is then chosen based on the criteria determined earlier;
— Competitive Dialogue – any company may submit a request to participate. The contracting authority conducts a dialogue with selected companies about all aspects of the purchase process to develop one or more suitable solutions that meet the requirements of the contracting authority. On that basis the selected companies are invited to submit tenders;
— Contests – there are two forms of contests, the realisation contest and the design contest. Design contests, whether open, restricted or invited are conducted only to award a plan or a design selected by a jury. They are mainly used for town planning and architecture, engineering, advertisement and data processing. The realisation contest leads into a negotiation procedure to award a public service contract; and
— Electronic Auction – This is not a procurement procedure but provides for the possibility of using electronic devices for the presentation of different data within a procurement procedure to automatically select the best tender via an auction process.

All contracts with an estimated contract value exceeding EUR 100,000 are subject to the regulations of the Procurement Act.

There are specific regulations regarding works concessions and service concessions:

— Works concessions are subject to only some regulations of the Act. Essentially there are no regulations specifying applicable procedures. There are also some specific exceptions when awarding additional work to a public works concession. When sub-contracting construction works, the applicable regulations depend on whether the concessionaire is a contracting authority, in which case all provisions of the Procurement Act regarding public works contracts are applicable. If the concessionaire is not a contracting authority only certain regulations are applicable.
— On the award of public service concessions contracts, only some principal rules of the Procurement Act are applicable (i.e. EC-conformity, non-discrimination, free competition, transparency). The informal direct award of service concession contracts however is only applicable below the threshold of EUR 100,000. The regulations of the Procurement Act are not applicable to sub-contracts let by the service concessionaire.

The rules are quite sophisticated and complex. Remedies or challenges of contract awards can be sought before the Federal Public Procurement Authority *(Bundesvergabeamt* or "BVA"), for contracts awarded by the State and public entities on central governmental level. For other public contract awards, challenges are to the nine different public procurement tribunals/independent administrative tribunals of the Austrian provinces. In 2007, 119 challenges were submitted to the BVA. The number of challenges brought before the nine regional tribunals is much higher.

Local funding market

Austria has experienced the same currency issues as the other Member States of the European Economic and Monetary Union, due to the effects of the global economic

crisis. This caused GDP to contract by 0.9% in the first half of 2009. The main sources of funding in Austria, banks and credit institutes, are currently cautious about funding major projects in Austria. Nevertheless the public sector is once again using public contract awards to boost the local economy.

Security issues

Lenders in Austria are generally permitted to take security on a typical limited recourse project finance structure. There are some specific formalities (e.g. notarisation) depending on the type of security. Nevertheless such security can only be given within the framework of the concession contract. Step-in rights for the public authority or the lender are generally possible if the regulations regarding public procurement are complied with.

Government response to the financial crisis

There have been no specific measures to help PPP deals reach completion, but there has been significant additional public investment during the global economic downturn. There are several infrastructure projects that were previously in the pipeline but which have been completed or at least commenced more quickly, in order to stimulate the construction industry, including the projects B4 PPP Maissau, B17 Umfahrung Theresienfeld, Koralmtunnel (between Styria and Carinthia), and the Main Central Station Vienna.

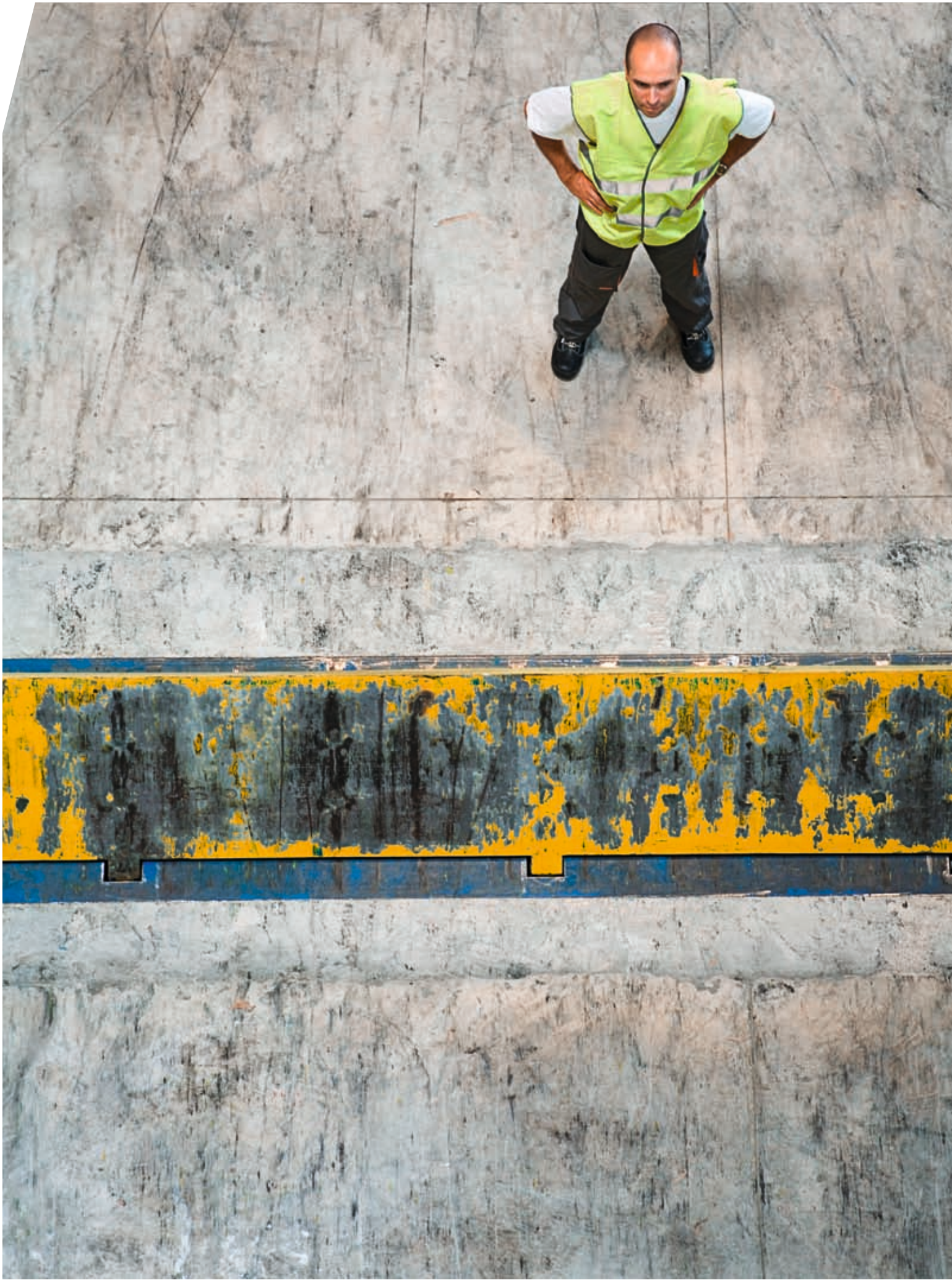
Summary

There is no specific PPP law, but the Austrian Federal Procurement Act mirrors the EU procurement regulations and provides a solid legislative basis for establishing and carrying out PPP projects. However, in spite of this legislative basis only a few PPP projects have been closed in Austria in recent years. Most PPP projects are at a provincial or local level. If the budgetary constraints become stricter in the next years, there should be more PPPs in Austria.

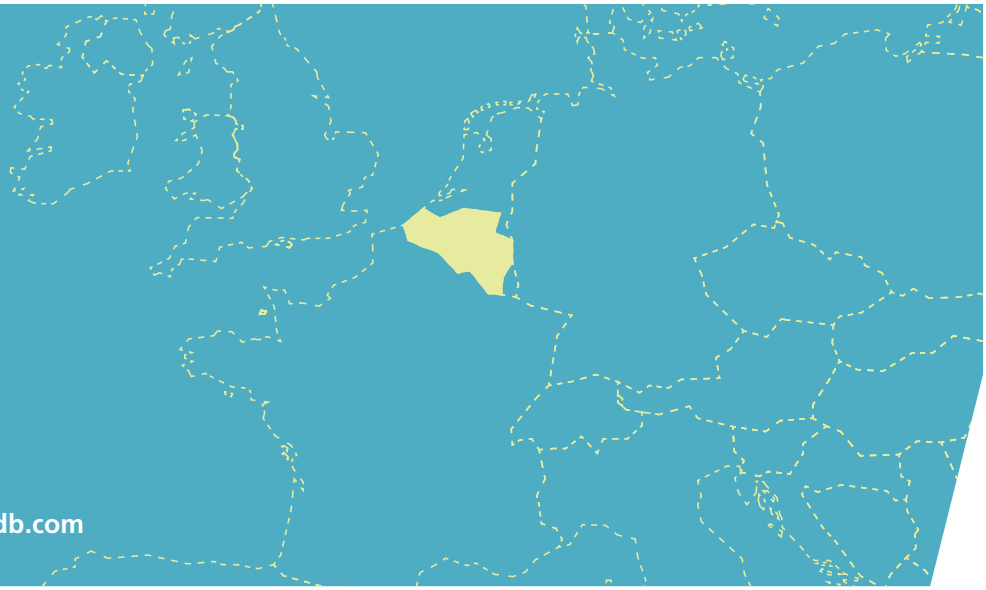
CMS experience includes:

Brenner Basistunnel SE: A 55km cross-border railway tunnel between Innsbruck (Austria) and Fortezza (Italy) to be used for freight and high speed passenger transport. The project has a total value of EUR 7 billion.

A5 Nordautobahn: The first PPP road project and the first monoline wrapped PPP bond in Austria. The A5 Nordautobahn is one of the biggest PPP projects to have completed in Austria to date with a total value of EUR 988 million.



Belgium



Eric Gillet, eric.gillet@cms-db.com

Country overview

In Belgium, partnerships between the public and private sectors started in the last century. This took place by creating mixed inter-communal entities or companies, both market oriented and not, and by developing public service and public works concessions and procurement contracts.

However, the culture of PPP based on "alternative financing" as opposed to traditional financing through public money is not yet firmly established. Many PPPs are based on long-standing public procurement procedures and conventions, especially regarding the use of financing schemes to fund infrastructure projects.

Belgium is nevertheless slowly becoming aware of the added value that PPPs, based on modern Private Finance Initiative or infrastructure project finance schemes, can bring. The benefits to the public come from easing the burden on public money and enhancing the quality of delivered services.

A number of projects have recently been finalised or are under way, such as:

— The Diabolo project. This is the rail link between Brussels and the national airport. It is intended to become the heart of the entire Belgian railway network. The agreement reach financial close in 2008 and construction is under way at present.
— A prison project which involves building four prisons to tackle overcrowding in existing prisons. The contract award procedure is under way.
— A tramline to the city of Liège. The contract award procedure is under way.
— The Oosterweel Project. The aim is to complete the ring road around Antwerp with a direct connection between the E19 North and the E17 South, to speed up international traffic. Construction was planned for 2009–2013, but the project is currently under review because of opposition from residents in Antwerp.
— Liefkenshoek Rail tunnel. The project is to design, build, finance and maintain the 16.2 km railway link between the East and West banks of the River Scheldt.
— Two schools projects, in the northern and southern parts of the country. The contract award procedures are being slowed down for political reasons. They are based on pre-financing schemes, which places the ultimate financial burden on public bodies.
— A project involving computerisation of national archives. This project is based on a real alternative financing plan according to the procurement documentation. The procurement procedure started in November 2009.
— A number of PPPs in the social housing sector have been closed or are under way. These are mostly based on pre-financing schemes.

A major concern for public bodies searching for funding for long-term projects is the desire to remove debt generated by a public project from the public balance sheet as defined by the obligations of convergence under the Maastricht Treaty, i.e. according to the European System of national and regional Accounts (ESA 95), that sets the criteria for the assets classification in a national economy.

One way of providing alternative finance that matches the Maastricht convergence criteria is the creation of joint ventures with private operators who are responsible for providing services in a commercial way. The joint venture must include the adequate transfer of risk and must be in the public interest.

However, public undertakings, given a degree of autonomy, and governed by the same principles of risk transfer and by using commercial and industrial methods can also provide a solution, without necessarily involving the private sector.

In the 2010 Economic Freedom index published by the Heritage Foundation and the Wall Street Journal, Belgium was placed 30th overall and 16th in the European region[1]. Its overall score has decreased by two points since 2009, although it remains above the regional and global averages.

Overview of legal system

Belgium is part of the continental law, based on civil law, similar to France, Spain or Italy. The law is mostly written. Laws and regulations are organised under the umbrella of the constitution, with a strict hierarchy: the constitution, the laws enacted by parliament, governmental regulations, etc. Contracts are submitted to the civil code, including public contracts, except when legislation and regulations set specific rules. Public procurement rules are such a set of specific rules. They apply to the awarding procedure as well as to the execution of the public contracts.

Belgium is a Federal State. The legislative and regulatory powers are distributed to the Federal State and the regions. The Constitutional Court is entitled to check that these authorities act within their scope of competence. Public procurement lies within the scope of the federal government's competence.

Specific PPP/Concession Law

No general legal definition exists in Belgium for public-private partnership contracts; however a decree in Flanders dated 18 July 2003 defines them as "projects carried out jointly by public and private bodies or entities, in the form of a partnership with the view to creating added value for these bodies or entities".

This definition differs somewhat from typical PPP schemes in other European countries and from the European Commission's Green Book of 30 April 2004, in which PPPs are defined as "forms of cooperation between public authorities and the business world which aim to ensure the financing, construction, renovation, management or maintenance of an infrastructure or the provision of a service."

Belgium uses an array of public contracts, civil law contracts and partnership agreements, and, where appropriate, special legislation under which a special purpose vehicle is set up for the implementation and the running of the project. These special purpose vehicles include any type of company whose capital comes from both public and private sources, such as joint ventures, or companies set up under public undertakings legislation (such as the law of 2 April 1962 on the public industry initiative).

The law, particularly administrative law, includes a range of examples of close collaboration between the public and private sectors. The emergence of the modern PPPs is not so much a new legal framework but rather a method of public management which can be implemented by using both new and traditional administrative contracts, or even a combination of contracts in more complex situations.

The increased use of PPPs to achieve public interest objectives can be explained by three factors:

— recognition that the private sector is now capable of raising considerable sums of money to finance public infrastructure;
— increasing pressure of strict budgetary constraints and limited means of public bodies; and

[1] http://www.heritage.org/Index/Country/Belgium

— the development of PPPs as an indication of a change in the role of public bodies in the economy. Previously some 'Partnerships' were simply a legally defined way of organising public services. Public authorities now realise that PPPs have more to offer.

The large investments needed to finance infrastructure programmes in all sectors over the next 20 years cannot be raised by traditional public financing. One example of the solution to this problem is in water infrastructure, where payment based on real cost links the consumer to the financing of the water cycle, as well as the economic operators, whether banks or investors, who are involved in financing infrastructure by lending money or through equity.

Public bodies rely on PPPs to implement projects that are not public services as such, but are in the public interest, for example, developing emerging economic sectors, the reduction of numerical divide through collaboration with telecommunication operators.

Implementing PPP projects gives rise to a number of legal questions related to the financial aspects of the projects, the law of guarantees and company law. All these branches of law affect the project.

Procurement laws

A public procurement can be defined under Belgian law as being a contract between a public authority, or, under certain circumstances, a private entity, and an entrepreneur, supplier or services supplier to purchase works, goods or services. This contract has to involve a financial transfer between the parties in question.

Belgian legislation on awarding procedures is mainly an implementation of EU Directives 2004/17/EC (Utilities) and 2004/18/EC.

Two procedures of Belgian legislation on public procurements are generally used as a basis for PPPs: the concession of works and the promotion contract. Both procedures involve financing of the project by the private partner. In the framework of a concession of works, the private partner will build and finance the works (or part of it) and operate the project during a certain period (to be defined in the specifications) afterwards. In a promotion contract, the private promoter will finance the works and build them. After the execution of the works, the private promoter will in general transfer the property – or lease the building – to the public authority or to a third party. The public authority and/or the third party will then pay a lease or licence fee.

As is the case for European Directives on public procurements, Belgian law does not apply to concessions of services. Awards of services concessions therefore do not have to follow the particular rules on public procurements. However they must comply with the general principles stated in the EU Treaties (such as the principles of transparency and competition).

Concessions can normally be transferred with the consent of the awarding authority.

The Belgian appeal system has recently been completely renewed by the implementation of Directive 2007/66/EC. The vast majority of the provisions found in this Directive have been integrated into Belgian public procurement law.

For large contracts (exceeding European publication thresholds), appeals to contest the awarding decision are quite common. The tenderers benefit from a standstill period for these contracts which enables them to appeal against the decision before the actual conclusion of the contract. It is difficult to estimate the number of successful challenges but quite a large number of them succeed as irregularities during the awarding procedure can be proven.

Local funding market

Demand for PPP projects has been increasing in Belgium for some time due to the worsening condition of public finances and PPP projects are seen as a suitable solution despite their potential problems. Nevertheless, as with all jurisdictions at the current time, liquidity constraints are affecting the availability of finance for large transactions. In this respect it remains important that multi-lateral institutions such as the EIB and EU are involved in financing wherever possible (e.g. for infrastructure projects).

The strict criteria that must be used to satisfy Eurostat that Maastricht limits are observed are often difficult to meet. Two major PPP projects have been recently aborted as they failed to meet such strict criteria.

In spite of the global economic downturn there are no real problems obtaining long-term debt in respect of PPP projects in Belgium, as such debt is generally backed by guarantees issued by the federal or regional government. However, it seems likely that, should it prove increasingly difficult to obtain debt for the whole life of the project, sponsors and lenders will be looking for alternative solutions with medium-term debt (seven to eight years) that will require refinancing later on, as in other jurisdictions.

Security issues

It should be noted that there are no specific legal provisions in Belgium regarding security issues in PPPs. Therefore security issues are mostly governed by the contractual framework applicable to the PPP project.

Legislation in Belgium allows lenders to take security to effect a typical limited recourse project finance structure. Lenders are able to take security over sub-contracts, cash flows, bank accounts and moveable assets. However, enforcing security on the assets is only permitted in the form of a sale by public auction or sale ordered by a court. In addition, security over shares in the contractor can be provided by both pledges and transfers of security.

Granting of security over real estate is only possible in PPP projects where the contractual framework allows a transfer of real estate rights. In all other cases the real estate may not be encumbered either:

a) at all, as it is subject to the exclusive ownership of the authority, or
b) without the prior agreement of the authority.

In summary, there may only be limited assets available for security purposes due to the nature of the assets in the PPP projects.

Some security interests must be registered in public registries (e.g. mortgage over real estate, floating charges), whilst some other types do not have to be registered (e.g. pledges over receivables, bank accounts or shares). Step-in rights for funders are recognised under Belgian law, although a contractual arrangement is needed to implement a step-in agreement. When step-in rights are exercised there is a risk that the contractual framework of the PPP may prevent the lender from performing the services itself or if not providing the services itself, passing the secured assets to another enterprise that can provide the public services.

Government response to the financial crisis

As far as public procurement and PPP are concerned, the financial crisis initially triggered public investment. But this movement has been rapidly exhausted by the lack of money. It is now back to the previous level.

Summary

Public investment in Belgium is mainly triggered by proceeding through new schemes of financing, based on alternative means, away from the financing through the traditional public budgets. These schemes rely on such mechanisms as the true cost of delivering water, or waste treatment. The same or similar principles are now due to apply in the transport sector and in sectors such as justice (prisons), telecommunications and others, opening the door to PPP more widely than in the past.

CMS experience includes:

Brussels Port: A multi-modal port facility with a total project value of EUR 50 million.
Brussels Regional Express railway (RER) project: A high speed rail project for commuter traffic around the city of Brussels. This project has a total value of approximately EUR 1.85 billion.



Bosnia and Herzegovina



Nedžida Salihović-Whalen, nedzida.salihovic-whalen@cms-rrh.com

Country overview

Bosnia and Herzegovina's accelerated economic reform process has greatly improved the business climate and the country has the fastest growing economy in South Eastern Europe. The economy has grown at a steady pace of 5% per year since 2000, a trend that is expected to be maintained in the future. The stability of the *konvertibilna marka (KM),* Bosnia and Herzegovina's currency, further contributes to a favourable business climate in the country. The KM is pegged to the Euro with a fixed exchange rate (KM 1 = EUR 0.51).

Bosnia and Herzegovina has signed the CEFTA (Central European Free Trade Agreement) with neighbouring countries and is negotiating its entry into the WTO (World Trade Organization). Companies operating in the country further benefit from the preferential trade regime with the EU. This agreement allows for all goods that fulfil EU standards to be exported to each of the 27 Member States without quantitative restrictions and free of customs or other duties until the end of 2010. Besides the EU, Bosnia and Herzegovina has preferential export regimes with countries such as Canada, Japan, Russia, Turkey and the USA.

PPP, as a cooperation model between the public sector and the private sector, is a relatively new model in Bosnia and Herzegovina, where market cooperation is still in the early stages.

The Corridor Vc (Corridor 5c) is a 710km route that stretches from Budapest in Hungary, via eastern Croatia, bisecting Bosnia and Herzegovina, ending in the Croatian port of Ploče. This highway, also designated as the European route E73, is a highly significant project for Bosnia and Herzegovina and a high priority.

At a meeting between the Ministry of Communication and Transport of Bosnia and Herzegovina and the EBRD which was held mid 2008, the financing of the priority parts of Corridor Vc were discussed. Representatives of the EBRD stated during this discussion that the EBRD is prepared to support the financing of the continuation of building works on the Corridor Vc in accordance with the PPP model. In October 2008, a credit agreement was signed with the EBRD worth EUR 180,000,000, and has since become effective after all the conditions set by EBRD were met by the authorities in Bosnia and Herzegovina.

Besides applying the PPP model in the sector of road construction, regulations concerning local self-administration in Bosnia and Herzegovina enable municipalities, within their powers, to establish mutual companies with private entities or implement different types of projects. As a result, it is expected that a more intensive application of the PPP model will occur in areas in addition to the road construction sector, where it is already used.

The areas for development include:

— construction of power facilities (e.g. small hydroelectric power plants, wind power stations);
— construction of recycling facilities;
— construction of water purification facilities;
— provision of communal services (e.g. waste collection and snow clearance);
— provision of education or health services; and
— realisation of communication and transportation projects.

There is currently no government PPP body; however, the International Forum Bosnia (IFB) is planning to establish a new and autonomous thematic centre of research focusing on the development of modern economic development modelling of PPP.

The IFB Centre for PPP Development is planning to bring together economists, legal experts, government officials, private sector leaders and international specialists for

dialogue to provide Bosnia and Herzegovina with independent recommendations addressing the following general topics:

— the potential benefits of PPP;
— the legislative changes and the legislative authority that national and local governments will require for the effective use of PPP;
— ways that national and local governments can prepare for PPP, including the adoption of policies, the revision or elaboration of existing procedures and identification of required organisational changes; and
— the process of designing an effective implementation strategy for PPP, including advice and guidelines on how to establish a project team, refine the scope of a project, select the preferred procurement process, establish a schedule for the delivery of the service, design an appropriate communications strategy and obtain the necessary approvals.

In the 2010 Economic Freedom index published by the Heritage Foundation and the Wall Street Journal[1], Bosnia and Herzegovina was placed 110th overall and 39th in the Europe region.

Bosnia and Herzegovina's trade freedom and monetary freedom scores are slightly higher than the global average. Economic development was initially helped by reconstruction efforts, but international trade has been a major source of economic growth. Exports have grown at an average annual rate of about 20% for a decade. Moderate inflation has also contributed to economic expansion. With the banking sector relatively modernised, financial-sector reforms have been significant.

Overview of legal system

Bosnia and Herzegovina is a civil law jurisdiction in which civil law has not been codified.

Following rapid development of legislation in preparation for the accession to the North Atlantic Treaty Organization (NATO) and for obtaining EU-candidate status, in the last few years, Bosnia and Herzegovina has had a relatively stable legislative system.

Specific PPP/Concession law

Bosnia and Herzegovina is a decentralised State, which consists of two entities (Federation of Bosnia and Herzegovina, and Republika Srpska) as well as the Brčko District (a self-governing, entity-neutral administrative unit, which is formally part of both entities).

In the Federation of Bosnia and Herzegovina, a draft PPP law was forwarded to the Federal Government by the Federal Ministry of Transport and Communication. Its adoption by the Parliament of Federation of Bosnia and Herzegovina is expected in 2010.

In the Brčko District, a PPP law was adopted by the Parliament of Brčko District in January 2010, this has now come into force.

In Republika Srpska, the Law on PPP (the "PPP Act") was adopted by the Parliament of Republika Srpska on 11 June 2009 and became effective on 10 July 2009. The PPP Act is fully in compliance with the relevant EU Directives.

The PPP Act defines PPPs as a special form of long term cooperation agreement, wherein the public and private

[1] http://www.heritage.org/Index/Country/BosniaHerzegovina

sector join together resources, capital and professional knowledge in order to fulfil a public need. The public partner of PPPs can be the government of Republika Srpska, a public institution founded by the government of Republika Srpska, a public enterprise whose majority shareholder is Republika Srpska, municipalities and cities, a public institution founded by a municipality or city and a public enterprise whose majority shareholder is a municipality or city. Private partners of PPPs can be legal entities founded by a domestic or foreign legal entity in accordance with the laws of Republika Srpska, which have concluded a PPP agreement (the "PPP Agreement") and which perform the PPP Agreement in accordance with the PPP Act.

The PPP Act provides that the PPP structure may be used for the construction, use, maintenance and management or the reconstruction, use, maintenance and management of property in order to fulfil the public need regarding roads and their associated infrastructure, railways, harbours, communal infrastructure, airports, bus and railway stations, education, culture and sport projects and health projects.

The PPP Act recognises two main forms of PPPs:

a) the institutional form of PPP wherein the public partner and private partner become shareholders of a special contractor (joint venture company) through which a PPP project is implemented; and
b) the contractual form of PPPs wherein the rights and obligations of the public partner and private partner are exclusively contractually regulated. The main contractual forms of PPPs are concessions and private financial initiatives. The concession form of PPPs must be realised in accordance with the provisions of the Law on Concession of Republika Srpska. The private financial initiative is a contract under which the private partner finances, performs, maintains and manages a public building in order to fulfil the need of the public sector, whereby the private partner will charge for its services to the public sector in accordance with the prior specified standards concerning the space and services as well as the payment mechanism.

In PPPs, the determination of allocation of the following risks is obligatory:

a) the construction risk, which refers to activities regarding the initial status of the property which is the subject of the PPP Agreement;
b) the risk of availability, which refers to cases where, during the management of property, the private partner shall be liable because the services have been provided under or contrary to the standards agreed in the PPP Agreement;
c) the risk of the demand, which refers to variability of demand (the existence of under or over demand) in comparison with the expectations at the moment of signature of the PPP Agreement (this is commonly borne by the private partner).

Private partners are to be selected through a public procurement procedure or, where the PPP project requires the use of a concession, a concession granting procedure.

The PPP Act provides that the public partner has to draw up an economic justifiability study for every PPP project before announcement of the public tender. The private partner selection procedure will be regulated by implementing regulation, which is to be enacted by the Government of Republika Srpska within six months from the day the PPP Act became effective.

There are 13 Laws on Concession on the territory of Bosnia and Herzegovina (one state, two entities and ten cantons). The concession gives rights to all natural and legal persons to use natural resources or other public goods for the purposes of improving the country's infrastructure.

Concessions are governed by Bosnia and Herzegovina's State Law on Concessions, the Entities' laws on concessions and the Cantons' laws on concessions (the "Concession Laws").

The Concession Laws provide that the following can be the subject of a concession: the construction and/or use of highways, railways, harbours, airports, the use of water flows and other waters, the construction of power facilities, the construction and use of hydro accumulations, hunting and fishing, gambling, and the use of forests.

The concession may be granted in accordance with the relevant Concessions Laws, which provide that the concession should be obtained (i) in a public tender procedure or (ii) by a direct, self-initiated offer. A direct, self-initiated offer for obtaining the concession is possible in cases where there is no public tender procedure published for that particular concession or for the particular area of exploitation. In that case, if the relevant ministry determines that there is a public interest for the concession, it will file a request to the Commission for Concessions for an authorisation to start the negotiations with the bidder, and the ministry cannot conclude a concession agreement if it does not receive an authorisation from the Commission.

The relevant governmental body (the "Grantor"), at the level of the entities/cantons, has the jurisdiction to grant a concession and the concession will usually be granted at this level rather than at the State level.

In the Federation of Bosnia and Herzegovina, for example, the "Commissions for Concessions" (the "Commissions") act as independent regulatory bodies, which have the authority to suggest the granting of a concession and to coordinate the concession process falling under Federation of Bosnia and Herzegovina jurisdiction. In particular, the Commissions have the jurisdiction to oversee the concessionaire's undertakings with aims such as securing adequate provision of services for consumers, approval of deadlines and conditions for standard service contracts, examination of consumers' complaints with regard to the concessionaire's provision of services and decision making on each request for revision.

The Grantor draws up an economic justifiability study for every project for concession before the public tender. The respective Commission approves this study and communicates this to relevant bodies. Once the project is approved, the Grantor will publish a tender and invite those entities, which comply with the necessary conditions.

The public tender contains the description of the project, the draft concession agreement and a definition of the applicable economic and legal conditions. It also contains requests with regard to the project, principles and methods of calculating the fees, the fee for the Concession (including tax fees for taking part in the tender procedure), the description of means and assets to be given to the concessionaire, the criteria for evaluating offers and awarding the concession to be based on clear and transparent principles of non-discrimination, the deadline for submitting offers and a list of necessary permits and approvals and tax relief related to the project, if they exist. In case the Grantor has not developed a study of economic justifiability, the Commission(s) may request bidders to do so. The government(s) will then, on the basis of the Commission's approval, award the concession to the most favourable bidder. The Commission(s) must immediately be notified of this and all necessary copies of concession agreements and project documentation must be sent to it.

The concession agreement must contain a number of elements prescribed by the Concession Laws, including in particular the rights and obligations of all parties and an obligation to provide services at the lowest price taking into consideration the circumstances, the concession fee, the time, method and the conditions for using the subject of concession, sanctions and compensation for failure to

comply with the concession agreement and the procedure for cancellation of the concession agreement.

The concession agreement is concluded for a limited period of time, which cannot exceed 30 years. This period can be extended up to 50 years, only in a case of extraordinary circumstances that need investments that require a longer time period. The concession contract can be renewed for a period that cannot be longer than half of the initially agreed duration. The concession agreement cannot be transferred to another concessionaire without the prior approval of the Commission. The concession agreement will cease to exist in the following instances: when it expires in accordance with the law; when a bankruptcy procedure is initiated against the concessionaire; when the subject of concession ceases to exist; and if the concession agreement is cancelled. The concession agreement can be cancelled if the concessionaire becomes insolvent or bankrupt, or fails to comply with its duties.

Procurement Laws

Public procurement in Bosnia and Herzegovina is governed by the Public Procurement Act ("Official Gazette of Bosnia and Herzegovina" No. 49/04, 19/05, 52/05, 08/06, 24/06, 70/06 and 12/09) (the "Public Procurement Act"), the provisions of which are for the most part in accordance with the relevant EU Directives.

The Public Procurement Act regulates the procedure for procurement of goods and services and for awarding a contract for execution of works when such goods, services or works are required by the "contracting authority", (e.g. any administrative authority at State, entitity, Brčko district, cantonal and city or municipal level).

A public supplies, services or works contract shall be awarded by means of one of the following procedures:

a) open procedure;
b) restricted procedure with pre-qualification;
c) negotiated procedure with publication of a procurement notice;
d) negotiated procedure without publication of a procurement notice; or
e) design contest.

The criteria on which the "contracting authority" shall base the award of public supplies, services or work contracts shall be:

a) either the most economically advantageous tender for the "contracting authority", based on stipulated evaluation criteria identified according to the nature and scope of the subject matter of the public contract in question (for example, quality, price, technical merit, functional and environmental characteristics, operating costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion); or
b) the lowest price of a technically compliant tender.

The Public Procurement Agency, an independent administrative organisation with legal characteristics, is responsible for the assurance of the proper implementation of the Public Procurement Act. Its remit includes: proposing amendments to the Public Procurement Act and its implementing regulations; collecting, analysing and publishing information about public procurement procedures and awarded public contracts; developing a nation-wide electronic information system to supplement the Official Gazette to publish tender documents; initiating and supporting development of electronic procurement and communication within the field of public procurement; and publishing training information, manuals and other aids for professional development in public procurement. The Procurement Review Body, an independent administrative organisation with legal characteristics, is responsible for reviewing the appeals of aggrieved bidders.

The Public Procurement Act does not interfere with the concession granting procedure, which is entirely regulated by the Concession Laws, or the Republika Srpska's public procurement procedure for selection of private partners, which is entirely regulated by the PPP Act.

As mentioned above, the Concession Laws explicitly stipulate that the concession agreement cannot be transferred to another concessionaire without prior approval by the Commission. Any contract for the transfer of a concession agreement concluded without the prior approval by the Commission is null and void.

As the practice of PPP projects in Bosnia and Herzegovina is still in its infancy, it is not possible to identify any general trends for challenging the award of a contract.

Local funding market

As mentioned above, the Bosnia and Herzegovina currency (KM) is very stable since it is pegged to the Euro with a fixed exchange rate (KM 1 = EUR 0.51). At the end of 2008, the foreign debt of Bosnia and Herzegovina amounted to EUR 2.09 billion, of which 50% represented a debt of long-term loans obtained from the World Bank, the European Investment Bank (EIB) and the European Bank for Reconstruction and Development (EBRD). The total debt of Bosnia and Herzegovina constitutes 20% of its GDP which means that Bosnia and Herzegovina is a country with low debt.

The current global economic downturn and uncertainty means that now is a difficult time for funding new projects in Bosnia and Herzegovina. Although it is quite stable following restructuring, the banking sector in Bosnia and Herzegovina has a relatively small capacity and funding for any capital project must be sought cross-border.

Security issues

Generally, legislation in Bosnia and Herzegovina will allow lenders to take securities to effect a typical limited recourse project finance structure. Bosnia and Herzegovinian law also sets out the formalities which such securities need to comply with in order to be directly enforceable (e.g. notarisation, registration with a special pledges' registry). Lenders are able to take security over sub-contracts and cash flows. In addition, both pledges and transfers by way of security are available to provide security over shares in the contractor.

Although the security structures available to lenders would allow a typical limited recourse project finance structure, as discussed above, the provisions of the Concessions Law do not allow the transfer of the concession agreement to lenders, a nominee or a replacement contractor without the prior approval of the Commission.

Government response to the financial crisis

With the intention of alleviating the financial crisis, the Council of Ministers of Bosnia and Herzegovina undertook to speed up implementing infrastructure projects, to guarantee the additional support for exports, to conduct regular fiscal coordination and to harmonise legislation of entities in all areas, particularly in the area of direct taxes. It should also be mentioned, that unlike some countries affected by the crisis, in Bosnia and Herzegovina regulation of the PPP sector did not suffer, but developed further with the enactment of legislation in Republika Srpska and Brčko District and with the Federation of Bosnia and Herzegovina having adopted a draft act.

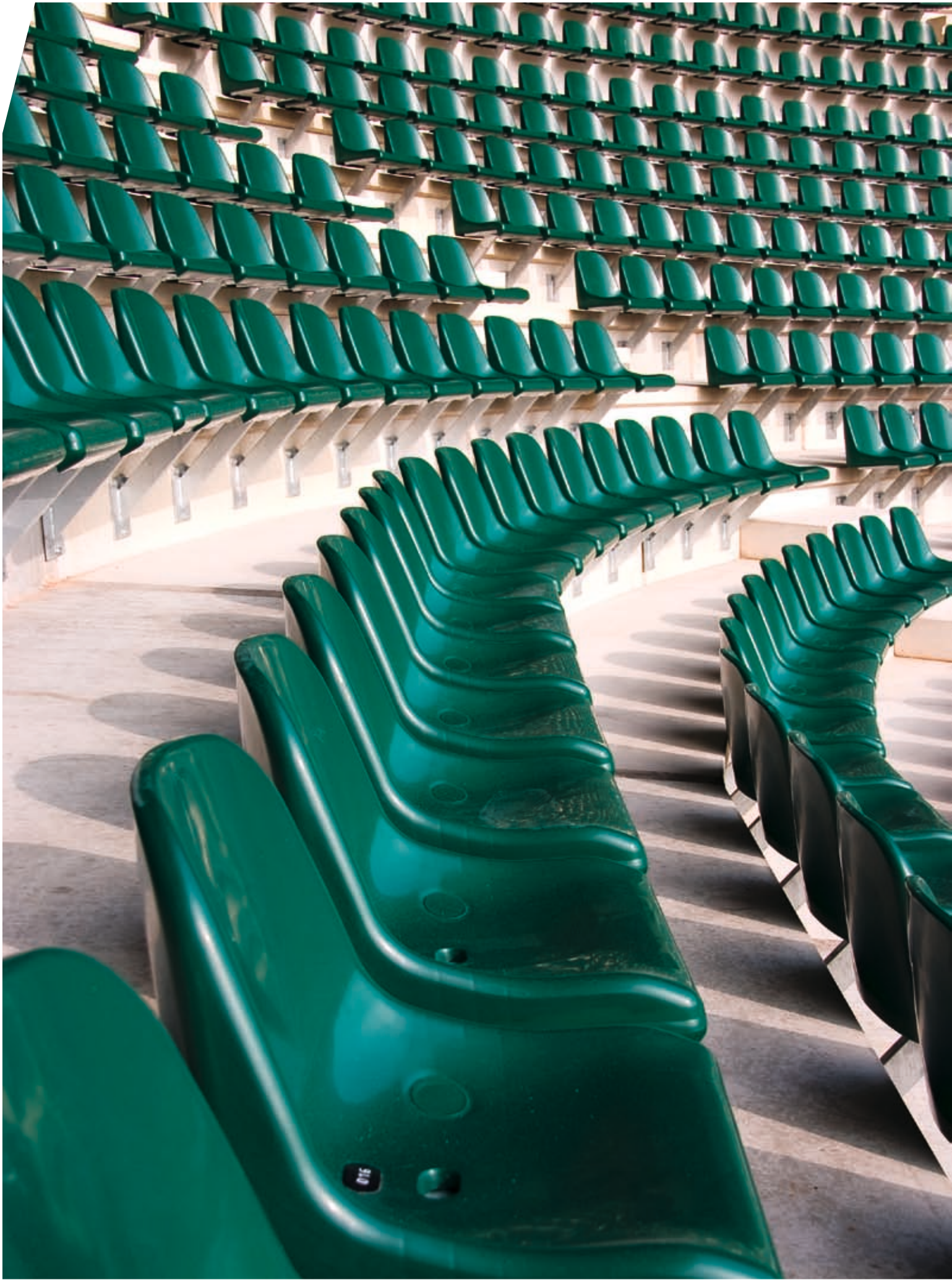
Summary

In June 2009, Republika Srpska, as one of the two entities in Bosnia and Herzegovina, adopted the PPP Act, which became effective on 10 July 2009. A similar law was adopted by the Parliament of Brčko District in January 2010 and is now in force. It is expected that the Federation of Bosnia and Herzegovina, as the other Entity of Bosnia and Herzegovina, will also adopt its PPP law in 2010. The enactment of PPP laws in every organisational unit of Bosnia and Herzegovina would represent a major step towards the harmonisation of the Bosnia and Herzegovinian legislation with EU legislation.

Although there is no large portfolio of closed PPP deals in Bosnia and Herzegovina, the purpose of the new legislation is to promote more of such projects in the future.

CMS experience includes:

Fresenius Medical Care: PPP construction of three dialysis centres in Bosnia and Herzegovina.
Gesellschaft für Sicherheit in der Medizintechnik GmbH: Construction of a cardio-chirurgic centre in Sarjevo.



Bulgaria



Kostadin Sirleshtov, kostadin.sirleshtov@cms-cmck.com

Country overview

Bulgaria is undergoing economic changes, mainly because of the rapid increase in foreign investment during the last two to three years and the country's accession to the European Union in 2007. Bulgaria's economy shrank in 2009 by 5%, but is forecast to grow slightly (by 0.2%) in 2010[1]. The country is still under the Currency Board, which means that the Bulgarian national currency is fixed to the rate of the Euro.

PPPs in Bulgaria are of significant importance for the development of the country's infrastructure, energy capability and transport systems. The first two big PPP projects were launched in the 1990s following the adoption of the modern Bulgarian concession legislation, involving the rehabilitation, reconstruction and subsequent operation of two of the biggest electric power plants in Bulgaria – Maritsa East I (value of USD 1.4 billion) and Maritsa East III. These first significant PPP projects were structured as joint ventures between the State-owned National Electricity Company and a foreign utility company.

PPP projects have closed in Bulgaria in a number of different sectors, including:

— Utilities – concession for the water and sewerage network in Sofia (entered into in October 2000 for a term of 25 years).
— Airports – concessions of the civilian airports in Varna and Burgas (entered into in 2006 for a term of 35 years).
— Roads – concession of the Trakia highway (entered into in 2005). The value of this project has been announced unofficially to be EUR 717.2 million. Note, however, that in May 2008 the agreement was terminated by the Bulgarian government on the grounds that the concessionaire had not invested sufficiently in the construction. The government has now announced a new public procurement procedure for finalising the construction of the highway, but not as a public private partnership. The Luilin highway PPP project is expected to be complete by December 2010.
— Ports – Concessions for public ports have been entered into for the Danube River in Oriahovo, Svishtov and Silistra and at the Black Sea Coast, the Balchik port. In addition, the extension of Varna and Burgas ports have been carried out with financing from the Japanese Bank for Reconstruction and Development.
— Energy – Melrose Resources Bulgaria S.a.r.l., UK is currently the only company extracting gas in Bulgaria, from the continental shelf, under a concession granted in 2001. Belene NPP is estimated to have a project value exceeding EUR 8 billion. The government is still considering various options for financing the project. Political opinion tends to favour construction of the plant with public funds, with traditional State-ownership and operation of the constructed plant.
— Waste – the PPP model was originally used for the operation of a waste management plant in Sofia. However, in March 2009 the Sofia Municipality unilaterally terminated the concession alleging that Novera had not performed its obligations.
— Water – apart from the Sofia water and sewerage network, no other concession agreements in the water sector have been finalised. The government programme for the development of the water sector from 2005 stated that management contracts are a better form of private involvement than concession agreements.

[1] Data from the IMF's World Economic Database, April 2010

There are PPP projects in the pipeline in other sectors in Bulgaria:

— Highways – there is potential for using a public private partnership in the development of some other projects such as the Hemus highway, Struma highway and Rila highway, which are included in the Strategic Plan of the government until 2015. It is likely that there will be some development with these projects now that the new government has come to office following the parliamentary elections in July 2009. The EBRD and EIB are interested in financing PPP road projects in Bulgaria and have previous experience in structuring successful financial packages in the country.
— Airports – the Ministry of Transport initiated a tender procedure for the concession of Russe Airport in the beginning of 2009. This is the second attempt to award a concession for this airport; the first attempt failed due to a lack of interest from bidders. Developments related to Plovdiv airport are also under way.

The government's desire to attract more foreign investment to stimulate the economy, together with the need for modernisation and improvement of infrastructure, means that PPP initiatives enjoy a good level of political support. The State and municipalities are actively participating in the development of various infrastructure, energy, transport and other PPP projects, as shown by the number of recently completed projects.

At present there is no specific PPP promotion body. Under the PPP Bill (see below), national policy for PPPs will be governed by the Minister of Finance, who will be supported by a special administrative section for PPP within the Management of the EU Fund Directorate. A central public register of PPPs will be created under the PPP Bill.

In the 2010 Economic Freedom index published by the Heritage Foundation and the Wall Street Journal[2], Bulgaria was placed 75th overall, lower than in 2008, primarily as a result of losses in investment freedom and freedom from corruption and growth in government spending. Bulgaria is ranked 36th among the 43 countries in the Europe region and its overall score is above the world average, but below the regional average.

Corruption is still an issue which causes some concern. In late 2008, the EU froze about EUR 1 billion in aid ear-marked for infrastructure projects because of concerns about high-level corruption. Some of the funds have since been released.

Overview of legal system

Bulgaria is a civil law jurisdiction operating with a constitution and general civil laws. There is no overarching civil code although certain branches of law are codified and these codes rank alongside acts of parliament.

In spite of the rapid development of legislation in preparation for accession to the European Union in 2007, Bulgaria still has a significant amount of legislative work to do. Many changes to legislation are driven by EU legislative changes or following consultation and development by the relevant ministries. Nevertheless, regulatory frameworks, particularly in relation to concessions, public procurement and PPP significantly improved in the years before and after accession to the EU.

[2] http://www.heritage.org/Index/Country/Bulgaria

Specific PPP/Concession Law

Currently, a Public Private Partnership Bill is pending in the Bulgarian Parliament (the "PPP Bill"). The proposed act will regulate the forms, procedures, subject, terms and conditions of PPPs. The proposed forms of PPP will involve the private partner undertaking some or all of the following in relation to public assets: management, exploitation, design, construction, ownership (with or without transfer to the public partner after the expiry of the PPP agreement), financing and elaboration and implementation of scientific, educational, cultural and other projects, which prepare or support the implementation of the above activities.

Until the PPP Bill becomes law, the Concessions Act, published in State Gazette No. 36, dated 2 May 2006 (the "Consessions Act") is the general law regulating concessions, which are the preferred vehicle for development of PPP projects. The purposes of the Concessions Act law were: (i) the establishment of the principles of publicity and transparency, free and fair competition and the equality of participants in the procurement procedures; (ii) implementation of applicable EU law, particularly the Treaty establishing the European Community and Directive 2004/18/EC; and (iii) unification of the regulation of State and municipal concessions. Concessions for exploration and extraction of underground resources are governed by the Underground Resources Act, published in State Gazette No. 23, dated 12 March 1999, and concessions for extraction of mineral water is regulated, in addition, by the Waters Act, published in State Gazette No. 67, dated 27 July 1999.

Under the Concessions Act, there are three types of concessions:

a) concessions for construction, under which the concessionaire receives the right to construct the object of the concession and to manage, maintain and exploit it. This right may also include the provision of public service through the object of the concession;
b) concessions for provision of public services; and
c) concessions for extraction of natural resources.

The specific requirements set out in the concession laws are:

— the concessionaire's benefit from the concession is the right to commercially exploit the subject of the concession (built asset, public service or extracted resources);
— the risk of exploitation is borne by the concessionaire;
— the concessionaire may be obliged to pay royalties as consideration for the grant of concession rights;
— under the current legislation, the concession does not grant any kind of property rights to the concessionaire;
— the term of a concession can be up to 35 years;
— the concession is granted in an open procedure;
— the concessionaire may not assign its rights under the concession. However, subcontracting is permitted, in which case the concessionaire will be responsible for the acts of the subcontractors; and
— all concessions in Bulgaria are registered at the National Concessions Register, which is publicly available.

The Bulgarian Development Bank Act came into force in April 2008. One of the bank's main objectives is to encourage small and medium sized enterprises to participate in PPPs.

Procurement Laws

Procurement is regulated by the Public Procurement Act, published in State Gazette No. 28, dated 6 April 2004 (the "Public Procurement Act").

The subject matter of the Public Procurement Act includes the: (i) supply of goods, performed by means of purchase,

lease, rental with or without option to buy or hire purchase; (ii) provision of services; and (iii) activities related to construction works and integrated engineering services.

The Public Procurement Act implements the EU procurement directives into Bulgarian law and implements the four methods of procurement identified in EU law:

a) open procedure;
b) restricted procedure;
c) competitive dialogue; and
d) negotiated procedure.

Agreements under the Public Procurement Act, which are signed between suppliers, contractors or service providers and contracting authorities following procurement under the Act should not be for a term longer than four years, or five in exceptional cases.

The Agency of Public Procurements (the "Agency") supports the Minister of Economy and Energy in the conduct of public procurement policy. It also collects statistics regarding granted public contracts. The Agency is the first stage of recourse for challenges to public procurement procedures.

Under the PPP Bill, private partners must be appointed following one of the procedures set out in the Public Procurement Act. However in contrast to the Public Procurement Act the term of PPP agreements concluded under the proposed PPP Bill may be as long as 35 years.

The concession, on the one side, and the public procurement procedures, on the other, do not overlap and are not contradictory to one another. However, in some circumstances a concessionaire may subcontract to third parties only through the procedure under the Public Procurements Act, thus acting with State's powers to grant a public procurement. For example, private (and not public) persons, including concessionaires, that carry out activities related to energy, potable water supply, transport services and networks or universal post services, may, subject to some exceptions, assign to third parties the provision of certain services only by way of public procurement. In addition, under concessions for certain construction works, the concessionaire may only employ subcontractors under the provisions of the Public Procurements Act. The Concessions Act does not regulate the transferability of concession agreements. The Public Procurements Act prohibits any amendment of public procurement agreements, save in respect of the term and contract price under specific conditions.

Although the transfer of concessions is not expressly regulated by the Concessions Act, concession agreements usually prohibit assignment of the concessionaire's rights and obligations. However, the Underground Resources Act provides that the rights and obligations under a concession for extraction of underground resources are transferable with the permission of the Council of Ministers and if the successor to the concession rights and obligations fulfils the specific conditions of the Act.

According to the Concessions Act, in the event of corporate restructuring or termination of the concessionaire company, the successor may apply within three months to step into the concessionaire's rights if it proves that it is trading and fulfils specific conditions of the Concessions Act relating to the good standing of the company and its officers.

Challenges to public procurement procedures are not particularly common in Bulgaria. Decisions can be contested at the Agency, before the Administrative Courts or before the Commission for Protection of Competition. However, the number of challenges is not very high (for example, in 2007 out of 10,610 procedures, the Agency registered only 46 complaints, and about 240 claims were submitted before the courts).

Local funding market

As Bulgaria is a member of the International Currency Board, the Bulgarian lev (BGN) is fixed to the Euro at a constant exchange rate of EUR 1 = BGN1.95583. Therefore, any fluctuations in the Euro's exchange rates are reflected into the rates of the BGN. Because of that, despite the global economic downturn, the Bulgarian currency currently remains relatively stable and inflation is not high. It is true to say that banks, particularly those controlled mainly by foreign entities, have shown more reluctance to provide loans. Nevertheless, it is not the case that funding has been fully closed or become insurmountably difficult to obtain.

Energy projects have several potential sources of funding. The Operational Programme "Regional Development" utilises resources from the European Fund for Regional Development. The Energy Efficiency Fund is itself a PPP, as is the Credit Line for Energy Efficiency and Renewable Energy Sources, in which seven local banks take part.

The Bulgarian Development Bank, established by a special law in April 2008, provides specialised funding for PPP projects developed by small and medium-sized enterprises and municipalities of over 10,000 people. The minimum amount of each loan is BGN 100,000 (around EUR 50,000).

Security issues

Typically, under Bulgarian law, lenders are allowed to take security to finance PPPs. Lenders are able to take security over subcontracts and cash flows, and in addition, both pledges and transfers by way of security are available to provide security over shares and assets in the project company.

Under certain conditions the Bulgarian Development Bank extends loans to PPPs with reduced requirements for collateral (up to 85% of the amount of the loan) under a guarantee issued by the European Investment Fund under the multi-year programme for small and medium-sized enterprises of the European Community.

PPP agreements are regulated by the Bulgarian Commerce Act and the Law on Obligations and Contracts, if there is no other express provision in any specific procurement law. Although the security structures available to lenders would allow a typical limited recourse project finance structure, as discussed above, the provisions of procurement law do not expressly allow the transfer of the project agreement or concession agreement to lenders, a nominee or a replacement project company. This means that the typical direct agreement protections of step-in and replacement of the project company are usually not available.

This will be changed under the PPP Bill, as it provides that lenders can step into the rights of the private partner subject to specific conditions of the PPP agreement. The PPP Bill also provides that alternatively lenders may suggest a successor private partner who will step into the rights and obligations of the initial private partner.

Government response to the financial crisis

The government has on numerous occasions expressed its intent to prepare and apply a package of measures in response to the financial crisis. One of the measures contemplated is the creation of better mechanisms for broader applications of PPPs, including in the infrastructure sector, which would allow better sharing of risk between public and private partners. In addition to this, the government has been making efforts to increase public investment and to facilitate better use of European funds under different EU programmes. The budget of the Ministry of Economy, Energy and Tourism expressly states that PPPs are a priority for the Ministry in 2010. At a local level, the same approach is manifested by the big municipalities as well.

Summary

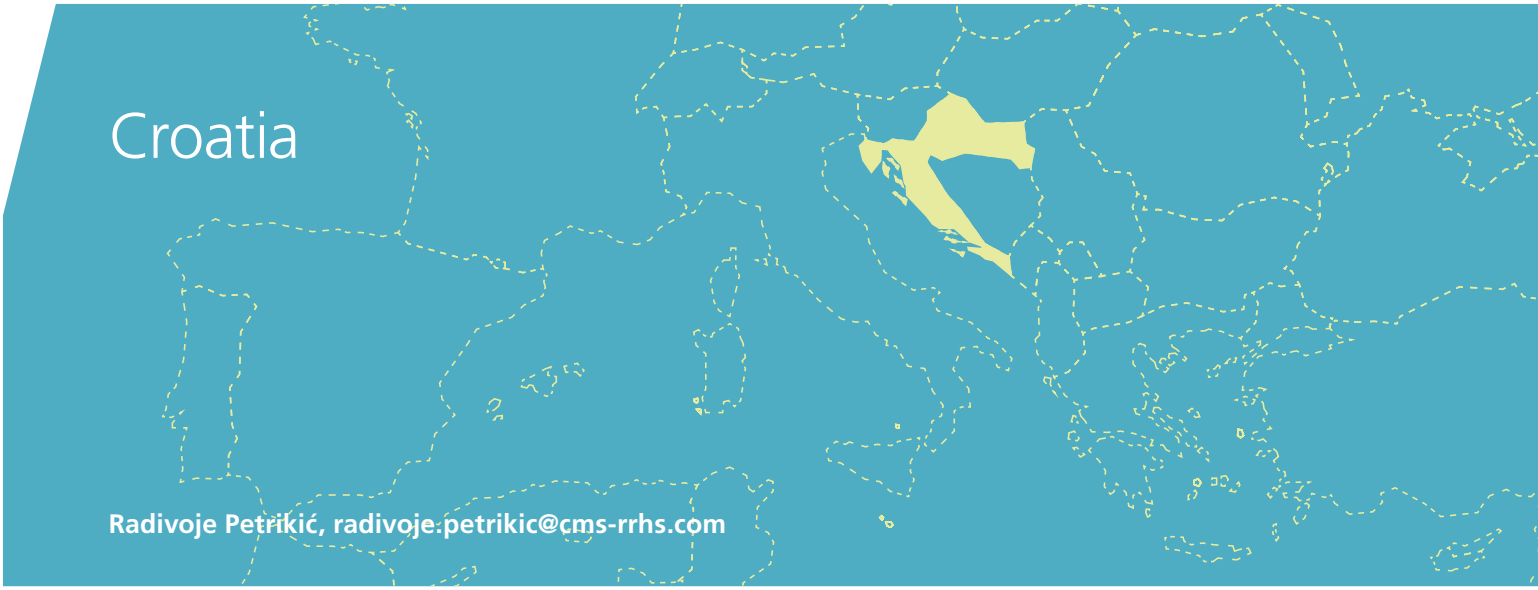
Although Bulgaria does not yet have a specific PPP law, the legislation governing concessions and public procurement, together with other general commercial and civil laws, offers various opportunities for the realisation of PPP initiatives. Municipalities in Bulgaria often pass PPP ordinances, based on which they develop PPP projects, in order to provide legal grounds for PPP schemes. Once the PPP Bill enters into force, more dynamic development of such projects is expected.

The key issues that have arisen in PPP projects in Bulgaria to date are:

— slow and sometimes unclear administrative procedures. The attempts to resolve these problems have mainly been focussed on amending and supplementing the legislation. The results are the recent new Concessions Act and Public Procurements Act, and the PPP Bill. Due to the delay in implementing anti-corruption reforms, corruption is still an issue that may cause concern;
— recently, some sophisticated projects concerning new technologies and resources, mainly in the energy sector, have overtaken legal developments and the regulatory framework is sometimes still not able to respond to certain legal issues raised during project development; and
— in recent years, mainly for political reasons, the development of PPP projects has slowed down.



Croatia



Radivoje Petrikić, radivoje.petrikic@cms-rrhs.com

Country overview

Croatia has a relatively stable economy that has suffered from the global economic downturn, but not as dramaticly as some other neighbouring countries. After the economic growth of 4.5% in 2008, Croatia's GDP fell in 2009 by 5.8%. In 2010, economic growth (expected to be 0.2%) will primarily depend on the success of the Croatian tourist season, as tourism constitutes more than 20% of GDP[1].

Croatia does not have a large portfolio of closed PPP deals and projects.

PPP projects have been closed in the following sectors:

— Roads: In 1995, the Republic of Croatia and Bina-Istra d.d. signed a concession agreement aimed at developing Croatia's road infrastructure (the first PPP project in Croatia). The project involved the design, building, financing, and operation of a 141km road network – the Istria "Y" project. The agreement provided for the taking over of an existing 54km section, including the Učka tunnel, which needed renovation. The agreement was concluded for a period of 32 years, after which the motorway is to be handed over to the Croatian State without any further consideration. The value of the project was EUR 635 million.
— Schools: 44 schools have been built and/or renovated in Varaždin County. There is no available data on the value of these projects. A high school and gym in Koprivnica has been constructed. The value of this project was approximately EUR 35 million.
— Sports halls: Three multi-functional sports halls have been built for the World Handball Championship in 2009: Arena Zagreb, Spaladium Arena and Varazdin Sport Hall.
— The value of Arena Zagreb is EUR 87 million, Spaladium Arena in Split is worth EUR 55 million, while the Varazdin Sports Hall in Varaždin is valued at EUR 16.5 million.
— Tourism: Ingra d.d. and Posedarje Municipality initiated Posedarje Rivijera, a large public private partnership tourist project. Due to the global economic downturn the implementation of the project has been stopped.

Croatia adopted the Act on Private Public Partnership in October 2008 (the "PPP Act"). A register of PPP projects should have been established under the PPP Act. However, the register has still not been established and there is only limited information available on PPP projects.

In January 2009, a Public Private Partnership Agency (the "PPP Agency") was established. The PPP Act gives the PPP Agency a significant role in the PPP process. Among other tasks, its role is to promote PPPs, to provide relevant information thereon and to propose legislative improvements. As the PPP Agency was only established at the beginning of last year, we still have to wait some time before we will be able to evaluate its performance and see the results.

Overview of legal system

Croatia is a civil law jurisdiction operating with a civil code.

Croatia has a rapidly developing legislative system which is changing to adapt to EU law.

[1] Data from the IMF's World Economic Outlook Database, April 2010

Specific PPP/Concession law

The PPP Act came into force on 15 November 2008.

The Concession Act came into force on 1 January 2009.

Key features of the PPP Act

The PPP Act defines PPPs as being a long term partnership between public sector and private partners where:

— the private partner undertakes: (a) to design, construct and/or reconstruct public infrastructure and to finance, maintain and manage such infrastructure; or (b) to provide a public service to final users; and
— the public partner grants to the private partner certain real estate rights and/or a concession and/or pays certain consideration.

The PPP Act recognises contractual PPPs (i.e. where the rights and obligations of the private and public partners are contractually regulated) and incorporated PPPs (i.e. where the private and public partners become shareholders of a special project company through which a PPP project is implemented).

Private partners are to be selected through a public procurement procedure or a concession granting procedure (when PPP projects require the use of a concession – see below for details of when a concession is required).

The newly established PPP Agency has an important role in PPP projects in Croatia. It is mandated to assess and approve PPP projects, as well as supervise projects already concluded with public partners. If the PPP Agency's assessment or approval is not obtained or is missing, the public partner cannot continue with the relevant PPP project.

The PPP Agency

— assesses and approves PPP projects and bidding documentation, and drafts PPP contracts. A project can be qualified as a PPP project only after the PPP Agency has issued a decree confirming its approval. The PPP Agency also issues a decree approving the bidding documentation. Only after such a decree has been issued can the public partner initiate the procedure for selecting the private partner. The public partner has to submit to the PPP Agency a final draft of the PPP contract for approval. The PPP contract can only be executed after the PPP Agency and the Croatian Ministry of Finance have given their respective consents;
— publishes and updates the list of approved PPP projects;
— maintains the PPP Registry, which contains data on all PPP projects; and
— supervises the performance of PPP projects.

In May 2009, the government enacted several regulations implementing provisions of the PPP Act. These include: Regulation on the Criteria for Assessment and Approval of PPP Projects, Regulation on the Content of Public Private Partnership Contracts, Regulation on Supervision of Implementation of PPP Projects and Regulation on Training of Participants in Procedures for the Preparation and Implementation of PPP Projects.

The Regulation on the Criteria for Assessment and Approval of PPP Projects sets out criteria for assessment and approval of proposed public private partnership projects, criteria for assessment and approval of tender documentation and criteria for assessment and approval of the final drafts of the public private partnership contracts.

The Regulation on the Content of the Public Private Partnership Contracts lays down the minimum content requirements of public private partnership contracts. The Regulation on Supervision of Implementation of PPP

Projects governs the powers of the PPP Agency concerning the supervision of implementation of PPP projects, practice in the course of supervision of implementation of PPP projects, as well as the rights and obligations of the contracting parties in the process of supervision of implementation of PPP projects.

The Regulation on Training of Participants in Procedures for the Preparation and Implementation of PPP Projects lays down the training program in the field of public private partnerships, the persons to whom the training shall be provided, the organisation and manner of implementing the training, the content of the acknowledgement of completion of the training program and the certificate of completion of the training program.

Key features of the Concession Act

Prior to the Concession Act coming into force, concessions were regulated by the Concession Act 1992 as well as by several special acts regulating specific areas of concessions. Although the Concession Act is now in force, older regulations governing concessions in specific areas remain effective (e.g. the Maritime Domain and Sea Ports Act specifically regulates concessions in maritime zones). The Concession Act regulates three types of concessions:

— concessions for the economic exploitation of common goods or goods of interest for Croatia, such as natural resources;
— concessions for public works; and
— concessions for public/utility services.

The process of granting concessions is regulated in detail by the Concession Act and consists of: (i) the preparatory stage, (ii) the preparation of tender documentation; and (iii) the selection of the preferred bidder. Provisions of the Public Procurement Act regulate the process of granting concessions for public works, while the granting of other concessions is regulated by the Concession Act. After the most favourable bidder is chosen, the concession agreement may be negotiated.

There are two criteria for choosing the preferred bidder:

— the most economically advantageous bid; and
— the bid with the highest concession fee payable by the private partner.

The period for which a concession is granted cannot be extended, unless the concession is for economic exploitation of common goods or goods of interest for Croatia and the extension is in the interest of Croatia. Any such extension cannot exceed 50% of the original term of the concession. The Croatian parliament would need to decide if such an extension would be in the interest of Croatia.

In cases where the value of a concession for public works is higher than HRK 36,000,000 (approximately EUR 4.9 million) the concessionaire is entitled to sub-contract some works included in the concession to Croatian or foreign companies registered for the provision of such activities. The subcontractor has to perform its activities in accordance with the concession agreement.

According to the Concession Act, the Croatian Ministry of Finance is in charge of monitoring the concession granting procedure and also maintains the Public Concessions Registry.

We are not aware of any new PPP project which has taken place since the recently passed PPP Act. However, PPP projects which closed earlier have proved to be rather successful. It is yet to be seen how new PPP projects will work in the light of the PPP Act.

In addition, the Croatian government is planning to extend the use of concession projects primarily in the energy sector (e.g. wind farms). However, one of the problems associated with concession projects in Croatia is that it is

rather hard to provide the bank with adequate security and this impacts their 'bankability'.

It is a general rule that the land or buildings which are the subject matter of a concession cannot be pledged at all (such as buildings or lands situated in a maritime zone) or only for the duration of the concession. It seems that if the concession agreement is terminated by the grantor before the debt financing has been repaid, the security granted on land or buildings which are the subject matter of a concession would by operation of law automatically terminate.

Procurement laws

The Public Procurement Act (adopted in 2007 and amended at the end of 2008) governs public procurement in Croatia. It has adopted the main principles of the EU Directives with the purpose of simplifying public procurement procedure, to rationalise State business activities and to prevent corruption.

The Public Procurement Act sets out the following methods of public procurement: (i) open procedure; (ii) restricted procedure; (iii) negotiated procedure; (iv) competitive dialogue; and (v) bidding i.e. auction for contract.

Public procurement procedures are controlled by the Croatian State Commission for Control of Public Procurement Procedures. Its mandate is also to provide legal protection in such procedures. Appeals and other legal actions in public procurement procedures are submitted to the State Commission.

The Public Procurement Office established by the Croatian Government is in charge of the development, improvement and coordination of the entire public procurement system, as well as remedying and eliminating irregularities in procedures. The PPP Act requires that a private partner is selected through a public procurement procedure or concession granting procedure (if concession is required for a PPP).

The legal protection rules of the PPP Act refer to the relevant provisions of the Public Procurement Act.

According to the Concessions Act, the procedure for granting concessions for public works has to be in accordance with the public procurement provisions. The legal protection rules of the Concession Act refer to the relevant provisions of Public Procurement Act. In several other procedural matters the Concession Act also refers to the public procurement rules.

The Concession Act prohibits the transfer of a concession agreement to a third party without the prior approval of the concession grantor. If such transfer occurs without such prior approval, the concession grantor is entitled to unilaterally terminate the concession agreement.

A concessionaire can, with prior consent of the concession grantor, establish a pledge or other form of security on a property which is the subject of a concession agreement, in favour of a credit institution or other legal entity for the period of the concession. Rights arising from such pledge or other securities cannot be transferred to a third party without the consent of the concession grantor. Please note that these provisions of the Concession Act are unclear and there is little experience in the market of the registration of such securities or their enforcement.

Both the PPP Act and the Concession Act refer to the Public Procurement Act in respect of challenging decisions and other legal actions.

The Croatian State Commission for Control of Public Procurement Procedures is the body authorised to decide on appeal. It is common practice that unsuccessful bidders challenge decisions. The final decision can be challenged, as well as the decisions taken during the course of the

procurement process. As a result of this, both PPP and Concession procedures can be significantly prolonged.

Local funding market

The Croatian currency has been fairly stable ever since its introduction in 1994. Even in the current financial downturn, the Croatian currency has not depreciated significantly.

Croatia has significant foreign debt. At the end of 2008, Croatia's foreign debt amounted to EUR 39 billion, out of which 18% represents government debt. The total debt of Croatia constitutes 85% of its GDP.

Currently, the financial markets in Croatia are faced with liquidity constraints affecting the availability of financing for large transactions. Even before the financial downturn, local banks were not very keen to get involved in project finance, mainly due to problems in securing the project financing. Local banks prefer to give loans in the form of corporate lending.

Security issues

Croatian laws allow typical limited recourse project finance structures and set out the formalities which such securities need to follow in order to be directly enforceable (notarisation, registration with a special securities' registry, etc). Assignments of contracts, or rights and benefits thereunder, are common in Croatia, as well as pledges over shares and bank accounts.

Although not a European Union member, Croatia has incorporated the provisions of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangement into its new Law on Financial Collateral Arrangements 2008 (the "Law").

The Law provides the lenders with more direct access to the cash flow of a project company and other participants in the project. Despite this, the Croatian banking community is still reluctant to cooperate with lenders and to make the cash deposits of their customers easily accessible to lenders.

However, few Croatian banks are currently providing typical limited recourse project finance. Although the laws and regulations in Croatia allow direct agreements, they are not common in Croatia. Equally, any transfer of the project agreement or concession agreement to the lender's nominee is subject to the authority's prior consent.

Although the law allows the lender to step-in by enforcing its pledge over shares in the project company and transferring the shares to another, more cooperative investor, not many Croatian banks are actually doing this. The most common form of financing is still traditional corporate lending with standard securities over the borrower's assets and with recourse against the borrower's balance sheet and a dominant sponsor.

Summary

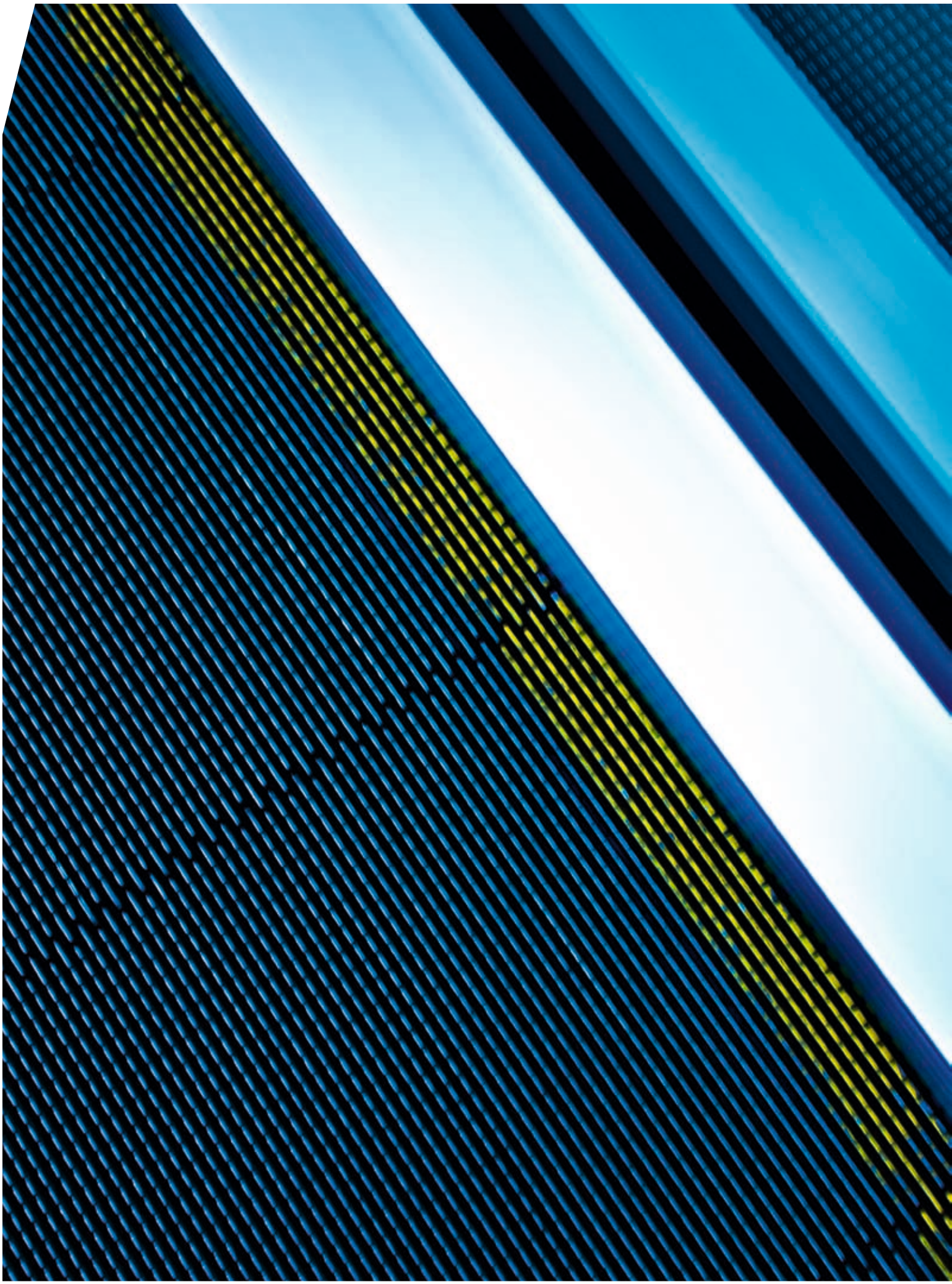
During 2008, Croatia adopted the PPP Act and the Concession Act. In 2009, the government adopted a set of regulations implementing provisions of the PPP Act which provide a solid legislative basis for establishing and carrying out PPP projects.

The PPP Agency has been established in order to promote PPP projects, as well as to monitor the whole PPP procedure. Although the PPP Agency should, according to provisions of the PPP Act, ensure transparency and control of the whole procedure, experience has demonstrated that the additional bureaucracy is prolonging the PPP approval procedure, as the PPP

Agency has to grant its consent to almost every important step during the approval procedure. There is no large portfolio of closed PPP deals in Croatia. Most PPP projects are at a local/regional level.

CMS experience includes:

Ron Brown Highway: PPP highway project in Croatia.



Czech Republic



Tomaš Kruták, tomas.krutak@cms-cmck.com

Country overview

The Czech Republic was significantly affected by the global economic downturn in 2009. After growth of 2.5% in 2008, the economy fell by 4.3% in 2009. It is hoped that economic growth will be restored in 2010. The downturn will also affect entry to the Euro zone, as the Czech Republic failed to meet the Maastricht criteria in 2009.

Projects are planned on governmental and municipal levels. However, as yet no PPP project at governmental level has been completed. Municipal PPP projects have been completed in the following sectors:

- facilities management – thermal energy supply management for the town of Bohumín;
- maintenance of municipal infrastructure/property – maintenance of an all-purpose sports centre in the town of Tachov;
- accommodation projects;
- social services – a meal service for kindergartens, elementary and high schools in the town of Lysá nad Labem; and
- water management services – the lease and operation of a sewage system and water treatment plant in the town of Bruntál.

The Czech Government started its PPP programme with nine pilot projects in 2005 (although three of these projects were later determined to be unsuitable for PPP). The government collapse in mid 2009 slowed down the progress of PPP projects. However, it is expected that progress will be restored after the elections in May 2010.

In the two following PPP projects public tenders have been announced:

- Central Military Hospital in Prague: construction, financing, maintenance and operation of a hotel-type lodging house and car park, with an estimated capital value of CZK 857 million (EUR 34 million). The public tender started in November 2007. The winning bid was selected at the beginning of 2010. The contract for the project was approved by the Czech Government in May 2010. Financial close is expected to take place in three months time.
- Modernisation of the Regional Hospital in Pardubice: reconstruction, financing, maintenance and operation of the central part of the hospital, with a capital value of CZK 2.3 billion (EUR 92 million). The public tender started in March 2008 and was terminated in January 2009 because no bids were submitted.

There is a healthy project pipeline including the following PPP projects for which the public tenders are in preparation:

- Justice Court in Ústí nad Labem: construction, financing, maintenance and operation of the Court House in Ústí nad Labem, with a capital value of CZK 1.4 billion (EUR 56 million);
- guarded prison in Rapotice: construction, financing, maintenance and operation of a new guarded prison, with a capital value of CZK 1.1 billion (EUR 44 million); and
- R3/D3 motorway: construction, financing, maintenance and operation of the D3 motorway and the R3 road, with a capital value of CZK 27 billion (EUR 1.08 billion).

In addition, the concession project (or feasibility study) relating to the AirCon railway link between Prague city centre and the Ruzyně Airport (construction, financing, maintenance and operation) is currently being prepared. This project has a capital value of CZK 20 billion (EUR 0.8 billion). The Ministry of Transport (with the cooperation of the Railway Infrastructure Administration) is in charge of this project. The use of PPP is also being considered for the extension of the Prague metro system.

The Ministry of Finance (in cooperation with the Czech government) has created a PPP promotion and administration body, "PPP Centrum", exclusively to advise public sector clients. PPP Centrum has been established to accelerate preparation of the required legal environment and methodological procedures in relation to PPP projects in the Czech Republic. At present the centre acts as a knowledge centre for implementation of PPP projects and its mission is to apply best practice knowledge in governance and preparation of PPP projects.

Whilst the Ministry of Finance administers the methodological procedures of PPP and is responsible for the financial aspects of PPP projects, the Ministry for Regional Development functions as a legislative guarantor of PPP and is responsible for procurement policy in general. These two bodies do not have a strong working partnership in the sector and overlap to some extent in their policies.

In 2004, the Czech PPP Association was established. Its main aim is the support and development of investments and services by means of PPP in the Czech Republic. The PPP Association is a group of entities that are active in the area of investments and services supplied for the public sector. Its activities include the development of conditions and rules to achieve transparency in PPP, promoting an ethical approach to PPP, boosting confidence in effective public and private sector cooperation and helping its members and the public sector to create rules and principles aimed at the successful implementation of PPP projects.

In the 2010 Economic Freedom index published by the Heritage Foundation and the Wall Street Journal[1] the Czech Republic was placed 34th overall and 17th in the region of Europe. Overall it scores above the regional and global average, and its scores in investment freedom and freedom from corruption are higher than average. The Czech Republic's position in this index places it among the most highly ranked countries in the CEE region.

Overview of legal system

The Czech Republic is a civil law jurisdiction operating with a civil code. A new Civil Code has been prepared, but was postponed as a result of the collapse of the government in mid 2009. The ratification of the new Civil Code by parliament and its entry into force depends on the result of elections in 2010.

Following rapid development of legislation in preparation for accession to the EU in 2004, the Czech Republic legislative system has been relatively stable in recent years. Changes to legislation are driven by EU legislative changes or following consultation and development by the relevant ministries.

Specific PPP/Concession law

The basic legal regulations governing the selection of the private partner for the implementation of PPP are the Public Procurement Act (Act No.137/2006 Coll.) and the Concession Act (Act No.139/2006 Coll.). Both pieces of legislation were adopted in 2006. The Public Procurement Act provides rules governing the award of public contracts, whilst the Concession Act is a special legal regulation for awarding and executing concession agreements (the definition of a "concession agreement" corresponds to the definition of a concession in the European procurement directives).

[1] http://www.heritage.org/Index/Country/CzechRepublic

The mutual interconnection of these regulations is very close in both directions. Certain provisions of the Public Procurement Act also apply to concession agreements, e.g. in relation to the submission and contents of the bids and the competitive dialogue procedure.

Equally, certain significant provisions of the Concession Act, e.g. the obligation to prepare and approve the concession project also apply to some public contracts, the award of which is otherwise regulated by the Public Procurement Act. This is the case for public contracts, the procurement of which is implemented pursuant to the Public Procurement Act provided that (i) the agreement is entered into for a definite period of time of at least five years and (ii) the private partner bears certain economic risks associated with the project that are usually borne by the public authority.

There are some outstanding difficulties with the interpretation of the Concession Act and it is sometimes unclear which act should be primarily applicable in some PPP projects. In November 2008, the Ministry for Regional Development presented the draft of a new Concession Act. It is hoped that the new regulation will resolve present issues regarding the interdependence of both procurement laws and comprehensively regulate concessions in one document, thus facilitating the process, although we note that the drafting may still require some refinement. Whilst the adoption of the new Concession Act cannot be expected in the near future, it is likely that partial amendments to the existing laws (the Public Procurement Act and the Concession Act) will be adopted relatively soon. These amendments may to some extent help to solve the problems related to the unclear relation between the two laws.

In addition, there is a special piece of legislation (Act on Roads) pursuant to which a private partner (the concessionaire) is entitled to finance, construct, operate and maintain highways and "first category roads".

Key features of the Concession Act are:

— before a PPP tender commences, the so-called concession project (this document may be characterised as a feasibility study) must be prepared and approved by the government/municipal councils (if the value of the contract exceeds certain limits);
— only the following public bodies may launch a PPP project: the government of the Czech Republic; a semi-governmental organisation; a territorial self-governing unit or another legal person established for the specific purpose of meeting public interest needs and financed for the most part by the State or other public authority (these are the authorities matching the definition of a contracting authority under European directive 2004/18/EC);
— the concession (concession contract) is characterised as an agreement under which the concessionaire bears "a substantial proportion of risks attaching to the enjoyment of benefits from the provision of services or the exploitation of the executed works." This means that under a concession contract the concessionaire bears all risks (or, at least a prevailing part of the risks) related to the collection of fees or other benefits generated by the project in question;
— the existence of the bidding entity at the moment of commencement of the concession procedure is not required. The concession vehicle can be established in the course of the concession procedure before the submission of the bid or before the execution of the concession contract. This means that the bidding consortium does not need to establish an SPV before they place their bid, but only after the contract has been awarded. However, it has to be noted that this rule would not apply to projects that do not match the definition of concessions and are awarded under the Public Procurement Act;
— the concession contract must be concluded for a definite period (usually for 25 to 30 years), but there are no restrictions on the length of that period. The

concession contract must set out in particular the grounds on which the contract may be terminated prior to the expiry of its term and the rights and obligations of the parties concerning the assets designed for the performance of a concession contract, including early termination arrangements; and

— the concession contract must have the approval of the government or municipal councils. In addition, if the project is at municipal level an opinion must be obtained from the Ministry of Finance regarding the fiscal impact of the contract. The relevant municipal body has to discuss this opinion when approving the contract.

Czech procurement legislation reflects Procurement Directives Nos. 2004/17/EC and 2004/18/EC. The Concession Act allows the parties to stipulate who will be the owner of the property or other assets constructed in connection with or related to the project or define any other legal relationships related to such property or assets, but in practice most use the public ownership model. Under this model the contracting authority remains the legal owner of the property or assets and the private partner may be entitled to income generated by the property/assets, but is not the legal owner. This model is in particular favoured because of the risks associated with the potential insolvency of the private partner. However, the tax regulation in the public ownership model is unfavourable because VAT in respect of the whole value of the investment becomes fully payable immediately upon completion of the construction. Furthermore, there are some restrictions for transfer to and/or long-term use of State-owned property by a private partner pursuant to the Act on State Property. For example, since State-owned property may only be let to a private party for a maximum of eight years, repeated approvals of the Ministry of Finance are required in the event of concession agreements (or other projects) with a longer duration.

If the private ownership model is used, the application of insolvency legislation is problematic as the asset will be considered part of the private partner's estate in bankruptcy should the private partner become insolvent. The new insolvency legislation provides for certain improvements, e.g. the possibility of restructuring which would not result in the liquidation of the private partner; however, this legislation has not been applied in practice very often.

The Concession Act does not prevent other tailor-made solutions regarding the ownership of assets and does not prohibit private sector ownership. Generally speaking, the lack of flexibility is caused by other laws not directly related to the Concession Contracts (such as the restrictions dictated by Act on State Property set out above).

The new Act on Acceleration of Construction of Transport Infrastructure will accelerate the construction of highways in the Czech Republic as PPP projects. Since November 2009 the planning and construction procedures for transport infrastructure have been simplified and shortened. The new law aims to prevent individuals from abusing their ownership or other rights related to property to obstruct construction, which has frequently affected transport construction projects in the Czech Republic in recent years. The key changes include simplification of expropriation proceedings to facilitate construction where the builder is not able to acquire the land plots or buildings needed for the transportation structures by mutual agreement with their current owner.

Procurement laws

The Public Procurement Act of 2006 governs public procurement in the Czech Republic. The Public Procurement Act implements the EU procurement directives into Czech law (along with the Concession Act) and implements six methods of procurement:

— open procedure;
— restricted procedure;
— negotiated procedure with prior publication;
— negotiated procedure without prior publication;
— competitive dialogue; and
— simplified procedure (only for public contracts not triggering the thresholds set by the directives).

The competitive dialogue is very close to the concession dialogue used in the Concession Act.

The legislative provisions implemented by the Public Procurement Act and Concession Act closely reflect the EU requirements for competitive dialogue and will therefore be familiar to those involved in procurement across Europe. Furthermore, EC legal regulation (mainly Directives 2004/17/EC and 2004/18/EC) ensures a modern, flexible and simple legal framework for public contracts and concessions. These directives introduce many concepts that are new to Czech law and were sometimes difficult to incorporate into the Public Procurement Act and Concession Act, such as establishment of clear definitions, complex regulation of above-threshold contracts, the introduction of an electronic (online) granting process and increased transparency.

Principles of transparency, equal treatment, non-discrimination, mutual recognition and proportionality are an issue in particular to ensure legal certainty and prevent corruption. These principles are set out in the EC directives. The new procurement regulation aims for economy, effectiveness and efficiency in the use of public resources and protects competition.

As stated above, the Public Procurement Act and the Concession Act co-exist and often overlap. The relation between the two pieces of legislation may therefore sometimes be confusing. This problem may be resolved by changes to both laws, which may be adopted in the near future.

The Public Procurement Act currently prohibits the transfer of a project agreement or concession agreement. Generally, a new procurement process is required in order to change the private partner. This to a large extent limits the possibility of a direct step-in by or transfer to lenders as part of the security package. The step-in mechanism can however be ensured by giving the lenders the option to take over the control or cause a change of control of the private partner. The Czech government seems to have recognised the need of providing the lenders with a sufficient degree of comfort to avoid an undue increase in financing costs and is likely to agree to execute additional documents common in international practice intended to secure the position of the financing institutions (such as direct agreements with the lenders or undertakings to support the project).

In the Czech Republic aggrieved bidders often challenge decisions taken during public procurement procedures. The unsuccessful bidder must submit its complaint to the public authority within a prescribed time limit and if it is not satisfied with the authority's response it may submit the claim to the Competition Office, along with a pecuniary deposit of up to CZK 2 million (EUR 80,000). The final step is to file a claim with the administrative court. The number of challenges is slowly decreasing, from 334 claims in 2005 to 293 claims in 2006, to 236 claims in 2007 and to 230 claims in 2008.

Local funding market

Demand for PPP projects has existed in the Czech Republic for some time due to the worsening condition of the public finances and the view that PPP projects are a suitable solution despite their potential problems. Current feedback from the market in relation to PPP projects suggests that there still is appetite to finance PPP projects in the Czech Republic. Furthermore, PPP may be used as an instrument to boost the economy (although only in PPP projects where

an availability payment mechanism is applicable). Nevertheless, as with all jurisdictions at the current time, liquidity constraints are affecting the availability of finance for large transactions. In this regard it remains important that multi-lateral institutions such as the EIB and EU funds are involved in financing wherever possible.

Initial indications in 2005 were that there would be no problems obtaining long-term debt in respect of projects in the Czech Republic. Again, since then current projects have been affected by the global economic downturn and in the near future it is likely to prove difficult to obtain debt for the whole life of a project. In the light of these conditions sponsors and lenders are looking for alternate solutions with medium-term debt (seven to eight years) that will require refinancing. Lenders are also seeking guarantees from the State in current PPP projects. There is a need for flexible outline business cases and/or project documentation now more than ever; if the financing solution remains rigid, PPP projects may be abandoned due to an inability to attract funding.

The Czech Republic has not adopted the Euro currency and this will not happen prior to 2015. Depending on the currency of unitary charge foreign lenders need to consider the prospective currency risk connected with financing PPP projects if the Czech Koruna is used.

Security issues

Generally, legislation in the Czech Republic will allow lenders to take security to effect a typical limited recourse project finance structure. Lenders are able to take security over sub-contracts and cash flows and can also pledge movable assets; however, enforcement is only permitted in the form of sale by public auction or sale organised by the court. In addition, both pledges and transfers by way of security are available to provide security over shares in the contractor.

Although a typical limited recourse project finance structure is permitted, as discussed above, the provisions of the Procurement Act and the Concession Act do not expressly allow the transfer of the project agreement or concession agreement to lenders, a nominee or a substitute contractor. This means that the typical direct agreement protections of step-in and replacement of the contractor are not available.

The direct agreement also contains provisions that allow lenders to assume ownership of the contractor and transfer ownership of the contractor in circumstances where traditionally the project agreement would be assigned or transferred.

Clearly, these solutions are not without issues, including the need to explain a non-standard approach to lenders; however, generally they appear to have been accepted by sponsors and lenders.

Government response to the financial crisis

Because no governmental level PPP project has completed in the Czech Republic, public authorities are monitoring practice in neighboring countries (in particular Slovakia) on current projects.

In light of the decreased availability of financing the government seems to be prepared to agree to flexible solutions relating to guarantee mechanisms (underpinning) and refinancing (miniperms) and currency of unitary charge (Czech Koruna, Euro or in both currencies) will be considered in draft payment mechanisms. However, it is unlikely that any solution will be accepted that would increase governmental debt because of the need to fulfil the Maastricht criteria.

Summary

The legal framework for PPP projects in the Czech Republic has been in place since 1 July 2006. While the Public Procurement Act provides regulations of general application, the Concession Act regulates the specifics of concessions and provides for certain deviations from general rules applicable to concessions and long-term projects with transferred risk to the private sector. Whilst there are projects planned at both government and municipal level, no PPP project at governmental level has yet been completed. The first completed (and successful) governmental PPP project should help to accelerate the uptake of the PPP method in the Czech Republic.

The key issues that have arisen in PPP projects to date in the Czech Republic are:

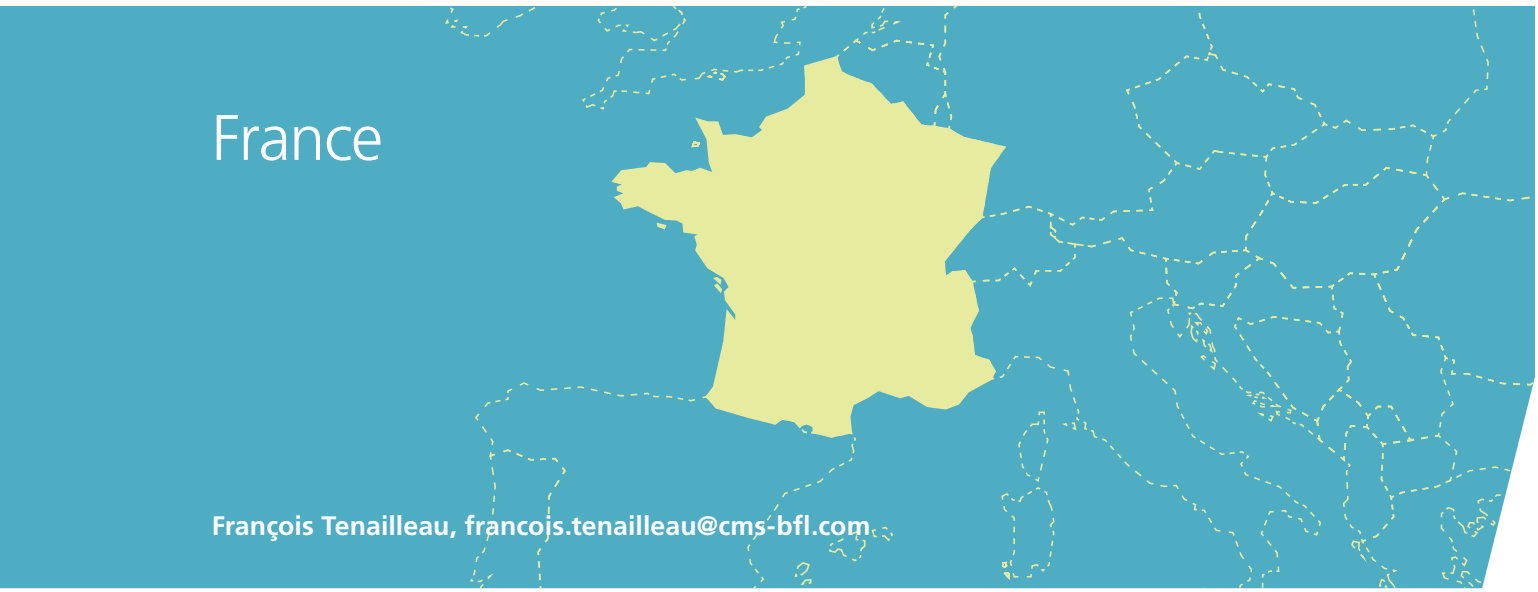
— vague political support for PPP projects in general due to the absence of a successful completion of a governmental PPP project; however, the Slovak road PPP project may increase the support for PPP solutions;
— insufficient management of PPP matters on a governmental level. There is no public sector body with clear overall responsibility for PPP policy and the split between the Ministry of Finance and the Ministry for Regional Development is not clear. PPP Centrum and the PPP Association do not manage PPP procedures and mainly function on their own alongside the ministries rather than with them;
— the absence of proper project management of individual PPP projects on the public sector side (e.g. significant delays with approvals on the public sector side, unrealistic expectations by the public sector in respect of risk transfer and other parameters of the project/concession agreement);
— unfavourable tax legislation depending on the ownership model selected (in the case of public ownership, VAT becomes fully payable upon completion of the construction, but in the case of private sector ownership the payment of VAT can be staggered);
— unfavourable application of insolvency legislation to PPP projects. In the event of bankruptcy of a private partner who owns the asset, the asset will be considered part of the bankruptcy estate (although there have been certain improvements following the new insolvency legislation);
— restrictions on the transfer to and/or long-term use of State-owned property by private entities pursuant to the Act on State Property (e.g. due to a maximum time limit of eight years for a lease of State-owned property, repeated approvals of the Ministry of Finance are required for concession agreements with a longer duration);
— the need for clarification of the relationship between the Public Procurement Act and the Concession Act (which may be solved by the proposed amendments to these laws); and
— the need for alternative financing due to the financial crisis (which may come from institutional investors).

CMS experience includes:

Pardubic Hospital: The largest regional PPP deal in the Czech Republic with a total value of CZK 30 billion. The concession contract is due to last for 30 years and involves the re-construction and construction of the regional hospital.
Justice Courts in Útsí nad Labem and Karlovy Vary: One of the pilot PPP programmes in the Czech Republic involving the construction of justice courts in the Northern Bohemia region.



France



François Tenailleau, francois.tenailleau@cms-bfl.com

Country overview

In France, PPPs can be divided into two categories: concessions (public service delegations and works concessions) on the one hand, and partnership contracts on the other hand. Concessions are financially free standing contracts under which the private sector company takes revenue risk; partnership contracts are used for services sold to the public sector.

Concessions have been used in France since the nineteenth century. The annual turnover of concessions is around EUR 85 billion. Due to their age there is no precise statistical data available on concessions in general.

The annual turnover of partnership contracts is around EUR 1 billion but a turnover of EUR 6 billion per year is forecast for within the next ten years.

Partnership contracts *(contrats de partenariat):*

Since their implementation in 2004, 123 projects have been put out to consultation or tender and 22 deals signed. Three quarters of them were concluded by local authorities.

PPP projects have been closed in France in a number of sectors, particularly:

- urban utilities (47.5%): street lighting, refuse collection, water treatment;
- construction (15%): schools, highways, hospitals;
- cultural and sport infrastructure (15%): stadiums, swimming pools, theatres;
- information and communication technologies (12.5%): broadband, GSMs.

Long leases ("LL": *baux emphytéotiques administratifs*):

These are concluded by local authorities, mainly for real estate projects in the justice and health sectors. There is no precise statistical data relating to the number of general long lease projects which have been launched. However, there are estimated to be around 130 projects. In addition to these general long leases, long leases in the health sector account for 47 projects, of which 36 had been awarded as of 31 December 2008.

Temporary occupancy authorisation – lease with purchase option ("TOA-LPO": *autorisation d'occupation temporaire – location avec option d'achat*):

23 projects have been announced and ten deals have been closed, mainly for real estate projects regarding construction in the justice and defence sectors.

PPP Promotion Body

In May 2005 the French Government established a support task force for the implementation of partnership contracts ("MAPPP": *Mission d'appui à la réalisation des contrats de partenariat).* This task force is exclusively dedicated to: partnership contracts. It has been assigned a three-fold mission (see below) but its primary role is assessing PPP projects before they receive approval from the Ministry of Budget:

- information and promotion, through its website and participation at industry events;
- supporting implementation, by giving assistance to public awarding authorities in preparing and negotiating PPPs, and developing uniform standards; and
- validation of feasibility studies from a legal, financial and qualitative perspective (required for state-sponsored projects only).

In 2006 MAPPP created a French Centre of Expertise for the Observation of PPP)"CEF-O-PPP") in association with the Institute of Delegated Management (*Institut de gestion déléguée).* This centre's main role is knowledge sharing and observation. It currently is engaged in the creation of a "CEF-O-PPP" quality label, the aim of which is to encourage the best offers, particularly in relation to PPP training.

In the 2010 Economic Freedom index published by the Heritage Foundation and the Wall Street Journal, France was placed 64th overall and 20th in the European region[1]. Its overall score has increased slightly since 2009 and is higher than the world average.

Overview of legal system

France is a civil law jurisdiction operating with a civil code.

Administrative law may also apply to a certain number of situations, notably where public contracts, in the wider sense, are involved – such as partnership contracts or concessions.

Specific PPP/Concession law

Each kind of PPP in France is regulated by specific legislation.

Concessions (traditional type of PPP)

— **Service concessions (public service delegations) –** governed in particular by Act No. 93-122 dated 29 January 1993, codified in articles starting with L.1411-1 of the French General Code of public local authorities.

A service concession is an administrative contract entered into by a public person, as principal, and a private, semi-private or public person, as concessionaire, whereby the concessionaire is granted authority to build a public project and/or operate it as a public service on a long-term basis, in consideration for a right to collect fees, tolls or other charges from the end users of the public service. Since the purpose of a concession is to delegate a public service, the contract has to provide specific terms and conditions under which requirements of the public service are taken into account. The tendering procedure is a negotiated procedure.

— **Public works concessions** have given rise to a new law – Ordinance No. 2009-864 of 15 July 2009 relating to public works concession contracts. A public works concession is an administrative contract entered into by a public local authority or public local body whereby building works or civil engineering are carried out by a concessionaire in consideration either solely for the right to exploit the work, or for this right together with payment. Where a concession contract provides for both services and works, it is considered to be a public works contract provided its principal purpose is the carrying out of works.

Partnership contracts (LL, TOA-LPO)

These are long term complex schemes, sometimes in specialised sectors (justice; prisons (in the framework of a specific TOA); hospitals (with Hospital LLs), local fire and rescue services).

— **Non sectorial partnership contracts** are governed by Ordinance No. 2004-559 dated 17 June 2004, codified in Articles starting with L.1414-1 of the French General Code of public local authorities.

[1] http://www.heritage.org/Index/Country/France

A partnership contract is an administrative contract entered into by a public entity and a private, semi-private or public person, whereby the latter is entrusted a mission consisting of construction or refurbishment, maintenance, operation or management of works, equipment or intangible assets which are necessary for public service. It includes full or part financing, except any participation in capital share. This contract may also provide for all or part of the design of the works, equipment or intangible assets, as well as provision of services contributing to the achievement of a public service goal.

The duration of the contract is linked to the duration of depreciation of the investments or the conditions of financing chosen. It allows the contractor to be paid over time by the contracting public authority. The former will be granted temporary land rights, similar to the ones that an owner has, but limited by some provisions of the contract which are aimed at guaranteeing the integrity and the occupation of the public land.

For a partnership contract to be used, one of the following conditions has to be fulfilled:

a) the existence of an urgent need;
b) the demonstration of the complexity of the project; or
c) the demonstration in the compulsory preliminary study of a positive balance between advantages and drawbacks for the public authority.

Generally, the procurement procedure followed by the public authority is competitive dialogue. In any case, the contract is granted to the most economically advantageous offer.

A partnership contract must include 12 compulsory provisions to cover the following:

— duration;
— risk allocation between the public authority and the successful bidder;
— performance targets imposed on the contractor, in particular regarding the quality of services, the quality of works, equipment or intangible assets;
— payment of the contractor, investment, operating and financing costs, payment for variations and terms of payment;
— obligations of the contractor regarding handback of the works and equipment to the public authority;
— terms of control by the public authority of performance of the contract, in particular concerning compliance with performance targets, conditions under which the contractor is obliged to sub-contract some parts of the contract to small and medium enterprises and to craftsmen;
— sanctions and penalties enforceable in case of breach of obligations, particularly for non compliance with the performance targets;
— conditions under which variations to some aspects of the contract or its termination can be made by agreement, or unilaterally by the public authority when no agreement has been reached, particularly to take into account technological innovation or modifications in the terms of financing;
— control exercised by the public authority on the partial or total transfer of the contract;
— conditions under which the continuity of the public service is ensured in case of default by the contractor, in particular when the contract is terminated;
— arrangements on termination or expiry of the contract, in particular regarding the transfer of works and equipment;
— terms of dispute resolution and the use of arbitration.

General long leases *(baux emphytéotiques administratifs)* are regulated by Act No. 88-13 dated 5 January 1988 codified in articles starting with L.1311-2 and following of the French General Code of public local authorities.

Real property belonging to a local entity can be the object of a long lease to carry out on behalf of a public authority a public service or an operation of general interest, or provision of a place of worship, to build sports facilities or in connection with a local rescue and fire service. The duration of the long lease shall be from 18 to 99 years. The design of the project is carried out by the lessee. Long leases are subject to a publication obligation, at a French or European level, depending on the contract value.

The contract must include the following compulsory provisions :

— the purpose has to be of public service or be related to the needs of the public authority;
— the long lease has to be accompanied by a lease agreement that can not be severed from it *(convention non détachable);*
— the transfer of the long lease requires the agreement of the local authority;
— mortgages on the public or private dependency must be approved by the local authority and their purpose must be the guarantee of project loans; and
— mortgage holders have to be identified.

If a lease purchase agreement is concluded, it must contain provisions for the preservation of public services.

The law relating to TOA-LPO (Temporary Occupancy Authorisation Lease with Purchase Option) originates in Act No. 94-631 dated 25 July 1994 and Act No. 2002-1094 of 29 August 2002 referred to as "LOPSI" (Law of orientation for home security), now codified in the French General Code of the property of public authorities.

A TOA-LPO agreement is a contract whereby a public authority grants a contractor a temporary occupancy authorisation over its public domain, with property rights. The property rights granted to the contracting party allow it to exercise the same rights as an owner and lease to the public authority the works and facilities built pursuant to the TOA-LPO. At the end of the authorisation period, the public authority may become the owner of the building. The property rights do not include the right to transfer or assign the occupancy authorisation without approval by the public authority. The works and facilities built pursuant to the contract shall remain allocated to the occupied public domain.

Where the rent is above EUR 1 million, the project has to be subject to a prior assessment aimed at determining which type of public procurement contract is the most favourable, taking into account project characteristics, the needs of the public, or inadequacies and difficulties in similar projects.

Under the LOPSI the government may grant this kind of authorisation for justice, police, defence and civil security training, army or Ministry of Defence services. The rent has to be set according to the amount of investment made by the contractor and the conditions of financing of the operation. There must be provision for depreciation of the invested capital. The contractor may be responsible for the maintenance of the facilities. A provision granting the government the right to terminate the lease agreement at any time has to be included in the agreement, whereas this is only an option in a classic TOA-LPO.

Act No. 2008-735 dated 28 April 2008, was aimed at boosting the use of partnership contracts, and an Act of 17 February 2009 was passed with the broader aim of recovery from the economic downturn. This legislation appears to meet the concerns of both the private companies and the public authorities.

Procurement laws

Broadly speaking in France procurement of public contracts is governed by EU Directives.

Regarding partnership contracts, the provisions of EU Directive 2004/18/CE have been introduced into French domestic law within the laws applicable to partnership contracts. Specific procurement provisions are also applicable to concessions, in particular Act No. 93–122 dated 29 January 1993. The procurement laws do not restrict the transfer of concessions. Under French domestic law, the transfer of public contracts may be carried out with the prior approval of the public entity. Transfer of the concession is possible if the contracting authority has made a prior assessment of the professional and financial guarantees submitted by the new contractor.

Procedures for awarding PPP contracts may be challenged through a review procedure derived from EU Directives, in particular Directive 2007/66/EC of 11 December 2007 which amended Council Directives 89/665/EEC and 92/13/EEC regarding improved effectiveness of public contract award procedures. Case law recently restricted the grounds on which such challenges may be exercised but review procedures are still possible.

Local funding market

In 2006, France was the 4th largest PPP market in the EU when measured by value with EUR 3.964 billion. The PPP market grew by more than 50% compared to 2005 (EUR 2.400 billion).

In January 2008, the French Finance Ministry valued the 44 projects opened or validated by MAPPP at EUR 10 billion. Of this amount, EUR 2 billion were under long leases for the hospital sector, EUR 0.6 billion under TOA mainly for the prison sector and EUR 7.2 million in partnership contracts.

For 47% of the projects, the predicted investment value is below EUR 30 million, and for 76% the investment is less than EUR 150 million.

The vast majority are funded by private banks, but also the *Caisse des Dépôts et Consignants* (a public finance institution controlled by the State) and the European Investment Bank. Tenors of loans depend on the size of the project. Individual banks still can grant loans over periods of 20 to 30 years up to EUR 100–150 million. Above these amounts, club deals and refinancing are used.

The economic downturn has had an impact on the financing of PPP, mainly because of the increased scarcity of liquidities, increased cost of private financing and shorter loan durations. This combination has led to the implementation of new financial mechanisms by the Act of 17 February 2009.

Most of these measures have been aimed at facilitating large scale projects (e.g. South Europe Atlantic high-speed train line project, Seîne-Northern Europe Canal). But the majority of the French PPP market is comprised of medium-sized contracts which do not need to use the framework set up by the relaunching plan, despite the scarcity of the bank finance. Fewer banks are able to provide finance over very long durations, but the opportunity still exists for PPPs up to EUR 100–150 million.

Security issues

For partnership contracts, a special purpose vehicle is normally created, with its only assets being the partnership contract.

Typical securities used in project finance include the assignment of income from the borrower's activities. The holder of the contract is authorised to use its income from the signature of the contract.

Therefore there is enough certainty to organise assignments of income within the framework of securitisation or pledges of income subject to articles L. 313-23 and following of the French Monetary and Financial Code. Assignment shall take effect only from the moment the public authority has certified that the investments have been made in accordance with the terms of the contract. Since the entry into force of Act No. 2008-735 of 28 July 2008, an assignment of 100% of income has been possible but the irrevocable commitment of payment by the authority has been limited to 80 % of income.

Government response to the financial crisis

Act No. 2009-122 dated 17 February 2009 created a State loan guarantee for the most important projects. This is granted to loans financing projects to be carried out under concessions or partnership and contracts only, under certain conditions:

- the contractor shall have its head office in an EU Member State or in an EEA State;
- the contractor shall be sufficiently solvent;
- the construction work or equipment in the contract shall be located in France; and
- this guarantee is limited to contracts entered into before 31 December 2010. However, the French Finance Minister, who had been asked about the potential extension of the mechanism, has said he does not intend to create a new guarantee plan since he hoped it would not be needed. The 'Grand Loan' *(Grand Emprunt)* will take over from the guarantee plan and extend it. The Grand Loan will however only be available to a limited range of projects – those investing in universities and research institutes, renewable energy and the digital economy.

The guarantee has a ceiling of 80% of the amount of each loan. The total amount of the guarantee provided by the government is EUR 10 billion over the whole period. This guarantee will benefit the PPP relating to the South Europe Atlantic Project (building of a new high-speed train line between Tours and Bordeaux, with the final aim of reaching Madrid and Lisbon at the end of the project), launched through a concession.

For a five-year period the government has made available EUR 8 billion in a saving fund managed by the *Caisse des Dépôts et Consignants* in order to facilitate PPPs. The aim is to bring long term assistance to projects under advantageous terms and to be available to every candidate in the tender procedure.

These loans are mainly aimed at large transport infrastructure projects (up to EUR 7 billion) and higher education (up to EUR 1 billion). They can be granted to local authorities, (for up to 50% of the borrowing requirements), and to special purpose vehicles (with a limit of 25% of the amount to be borrowed). The maximum duration of the loans is 40 years or 50 years for large infrastructure projects.

These mechanisms do not have any detrimental effect on competition, since they are made available to all competitors. They should give incentives to small enterprises to participate to public tender procedures.

The government adopted these measures quite recently. Therefore we do not have enough data available to effectively assess their impact on the number of projects reaching completion.

Summary

France has well-developed legislation on PPPs and procurement contracts.

The legislation on PPPs rapidly evolved during 2009. The main reason for this has been the need to counteract the economic downturn, by encouraging public authorities to continue their investments in public services and by providing banks with greater security in order for them to keep lending to private companies and enabling them to meet the public authorities' demands.

The powers specifically granted to public authorities are limited, such as the prior approval in case of transfer of the contract. The project risks are now shared on a more equal basis among parties, thus strengthening legal certainty for private enterprises.

It is hoped that the uptake of PPP contracts will continue to be as strong in France in the future as it was before the economic downturn.

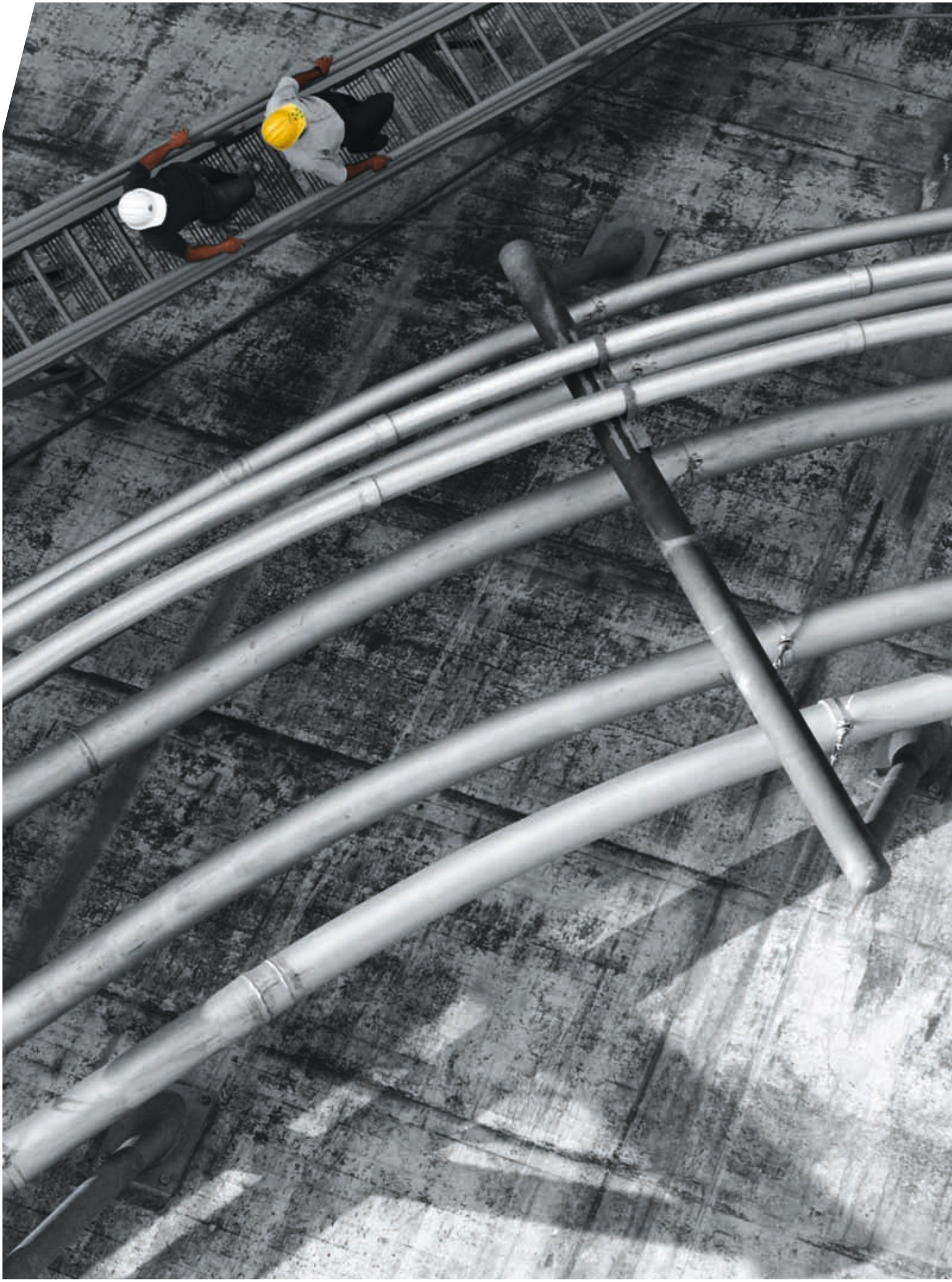
CMS experience includes:

National military police station PPP, France: The construction and maintenance of buildings and equipment for the management of headquarters of the Gendarmerie Nationale at Fort d'Issy in Issy-les-Moulineaux. The project value totals approximately EUR 120 million.

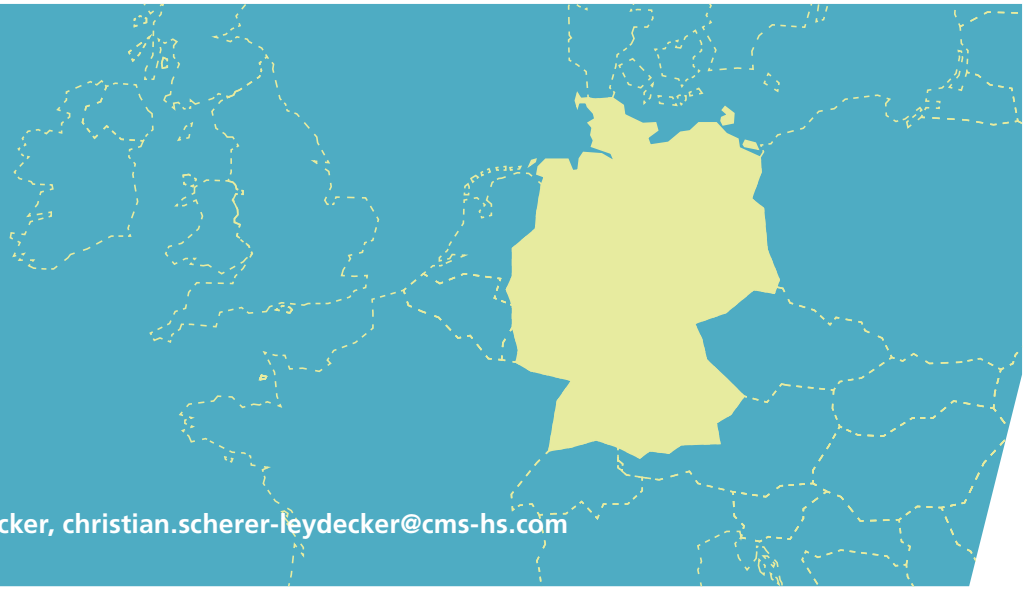
Hospital PPP, Dijon, France: Advising on the financial leasing arrangements for a hospital facility in Dijon.

Sud Europe Atlantique high speed rail link project: A EUR 7.2 billion 303km high speed rail link between Tours and Bordeaux, France. This project is due to become one of the biggest PPP projects to complete in Europe.

A88 Motorway Concession, France: A 2008 road project with an approximate value of EUR 250 million.



Germany



Christian Scherer-Leydecker, christian.scherer-leydecker@cms-hs.com

Country overview

In 2008 the 100th PPP project was concluded in Germany. The German projects database (www.ppp-projektdatabank.de) currently lists 161 projects; 143 of which have closed since 2002. The majority, 48 in total, of these projects are located in the Federal State of North Rhine-Westfalia. These projects cover a number of different sectors in the German market:

- Accommodation (26);
- Culture and sport facilities;
- Defence (2);
- Education (59) (schools have been procured mostly at a municipal level);
- Healthcare (7);
- Leisure/Sports (42);
- Prison Justice (6) – the first prison project funded by project financing was the Burg prison project in 2006;
- Roads (14).

Apart from the projects mentioned in the database, the Federal Ministry is currently tendering the A model BAB A8 Ulm-Augsburg and the availability motorway project BAB A9 Lederhose-State border Thuringia/Hessen (V model). The Federal Ministry has also announced four further motorway projects to be structured as A or as V models:

- BAB A60 Mainz-Laubenheim – A60/A 643, AD Mainz – A 643, AK Schierstein with focus on maintenance;
- BAB A45 State border North Rhine-Westfalia/Hessen – AK Gambacher Kreuz; Schwerpkt. Erhaltung);
- BAB A1/A30 AS Rheine-Nord – AK Lotte/Osnabrueck – AK Muenster Sued; and
- BAB A7 AD Salzgitter – AD Drammetal.

The German government has given strong support to PPP as have numerous PPP promotion bodies. The coalition agreement between the political parties of the federal government dated 26 October 2009 expressly mentions that the government will promote PPP. It is anticipated that investment in PPP in Germany is likely to continue to grow as a result of this support. The PPP promotion bodies include:

- PPP Task Forces which are in most Federal States in Germany (the Federal Task Force was dissolved in connection with the incorporation of Partnerships Germany). Among the most active Federal States task forces are the PPP Task Force of the North Rhine-Westfalian Ministry of Finance, the PPP Task Forces at the State Development Banks (*Investitionsbank*) of Schleswig-Holstein and of Brandenburg, the PPP Task Force at the Ministry of Economic Affairs in Baden-Wuerttemberg and the PPP Competence Centres in Hessen and in Lower Saxony. These governmental bodies promote PPP by giving advice to municipalities and State organisations and supporting them, for example by financing advisers, or by organising workshops.
- ÖPP Deutschland AG (*Partnerschaften Deutschland*/ Partnerships Germany). This is a public private consulting organisation, which was founded under the direction of the federal government and is responsible for strengthening PPPs in Germany. ÖPP Deutschland AG primarily aims to offer advice to the public sector, with a focus on advising in the early stages to identify PPP opportunities. As one of its secondary objectives the organisation is supposed to provide central guidance in the form of manuals and standardisation (see their website: http://www.partnerschaftendeutschland.de). Its main focus is on construction (accommodation, cultural and science and hospitals) and IT PPP projects.

[1] http://www.heritage.org/Index/Country/Germany

— In 2003, the Federal Ministry of Transport established the *Verkehrsinfrastrukturfinanzierungsgesellschaft* (VIFG), a private company founded on the finance received by the Federal State from transport infrastructure. Its task is to manage and distribute income from the heavy vehicles toll and to promote PPP. Its promotion role includes supporting public bodies in connection with the identification, preparation and execution of projects, evaluation of existing projects, systematic development of innovative organisational and financial models, bundling, structuring and documentation of PPP projects in the transport sector and organising transfer and exchange of know-how.
— g.e.b.b. Gesellschaft für Entwicklung, Beschaffung und Betrieb mbH is a company of the Ministry of Defence (BMVg) based in Cologne. Its task is to reorganise civilian services for the German army (*Bundeswehr*) in order to ensure that these services are provided in a more efficient manner. Its aim is to reinforce the *Bundeswehr* in fulfilling its core military tasks by relieving them of non-military service tasks. It focuses on supporting the Federal Ministry of Defence (BMVg) by providing private industry know-how for the corporate conversion of service functions in the *Bundeswehr* and implementing PPPs, privatisations and other forms of partnerships with private industry.

Overview of Legal System

Germany is a civil law jurisdiction. Private law is regulated by the *Bürgerliche Gesetzbuch* (BGB – Civil Code). The Civil Code contains regulations on general contract law and on specific types of contracts such as works contracts (*Werkvertrag*), services contracts (*Dienstleistungsvertrag*) or leases (*Miete*) that may be relevant for PPP contracts. Construction contracts are categorised as works contracts. Most provisions of contract law are not mandatory and may be changed by provisions in a specific agreement.

The public sector applies standard general conditions for construction (VOB) and services and supply contracts (VOL).

Germany has a relatively stable legislative system. Changes to the legislation are driven by EU legislation. In particular, the EU directive on procurement law and consumer protection resulted in changes of law that could become relevant to PPP contracts in the future.

Specific PPP/Concession law

There is no specific PPP law that encompasses all legal requirements relating to PPP projects. There is, however, a specific law on PPP concessions for tolled bridges, tunnels, road sections or mountain passes in the Federal trunk roads network, the Federal Private Road Financing Act of 1994 (*Fernstraßenbauprivatfinanzierungsgesetz*), which regulates the imposition of tolls for roads infrastructure.

The German government has taken a positive approach to PPPs and implemented the PPP Acceleration Act on 8 September 2005; this amended many laws relating to PPP. The PPP Acceleration Act partly transposed Directive 2004/18/EC on procurement law into German national law. The aim of this Act was to remove obstacles and barriers to PPP identified by the government in a Federal Report on PPP.

A new PPP Simplification Act is currently being developed and should take forward the government's current approach by amending the existing legislation to further remove obstacles and by addressing a range of tax issues. This new law has not yet been adopted. The new government has also not yet picked up this legislative project after the elections in September 2009. However, some aspects of the PPP Simplification Law have already been implemented by sector-specific legislation (e.g. the Federal Hospitals Financing Act and or the Federal Investments Act 2008).

Germany has dealt with a number of legal issues and obstacles while implementing PPPs. Some issues encountered have been addressed by the PPP Acceleration Act (see above). Some of the tax regulations that have prejudiced PPP projects have been reformed by the Corporate Tax Revision Act 2008.

There are still a number of regulations that impede implementation of PPP projects. In particular, funding law and tax law discriminate against PPP projects to some extent, for example:

— Public funding laws on municipal roads, hospitals and school financing projects differentiate between the investment for construction and the maintenance and operation costs. This system is not compatible with the PPP life-cycle approach. However, in some areas the relevant regulations have changed or are going to be changed; for example the funding system for hospitals has been amended by federal law, although it still requires implementation in most States. School affairs are regulated by State law and some States have adapted their funding systems accordingly.
— A major issue is the discrimination against PPPs under tax law. Certain PPP services are automatically 19% more expensive than conventional provision of public services by the State because of the tax regime. There is no refund system in place, as such systems are considered unlawful.
— Waste water PPPs are rare because, as a general rule, wastewater disposal is carried out by public entities. Integrated water PPPs including fresh water supply and wastewater treatment are rarely implemented because of the different applicable VAT rates.
— In the hospitals sector, EU State aid law is a major concern. This is because hospitals are often organised as private companies or university clinics, which are separate public entities, whereas banks require the State to be the public partner.

Procurement laws

The award of public contracts is regulated by the fourth part of the Act against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen,* the "GWB"), the Public Procurement Ordinance (*Vergabeordnung*, the "VgV"), and specific regulations for construction contracts, services and supply contracts and contracts in specific sectors, such as transport, water, mining and energy (*Sektorenverordnung*). These regulations were revised in May 2009. The aim of the revisions was to implement EC law, simplify the structure of the regulation and to provide for some changes in legal proceedings.

One new provision which was intended to allow medium sized companies to benefit from construction projects has been greatly criticised by numerous players in the PPP market. There is a general obligation of the public authority to procure services in lots separated according to the amount and kind of works. The authority may procure a project without such separation of contracts if this is justified by technical or economic reasons. In addition, the new provision provides that awarding authorities must ensure by appropriate provisions in the contract that sub-contracts are also split into such lots unless there are technical or economical reasons to procure the project as a whole. Often project agreements contain provisions intended to ensure that small and medium-sized companies are sub-contracted, for example, a contractual penalty if a certain quota of works is not sub-contracted to such companies.

German procurement law is based on the EC procurement directives and applies in particular to contracts on behalf of State or local authorities as well as public entities and entities which were founded with the aim of fulfilling non-commercial tasks in the public interest. The provisions of the GWB are only applicable if the contract value exceeds certain thresholds laid down in the GWB and the VgV and based on EU regulations. The EU procedures used

under German public procurement legislation are the following:

— open procedure;
— restricted procedure;
— negotiated procedure; and
— competitive dialogue procedure.

While the public procurement law shows a preference for open or restricted procedures, PPP projects usually use the negotiated procedure. Recently, however, some PPPs have used the competitive dialogue procedure.

Despite the implementation of the EU procedures, the cost of bidding for PPP projects in the German market is an issue. Companies, especially medium-sized companies, find it difficult to bear the costs of preparing PPP project bids.

There are no specific PPP laws and, therefore, procurement laws are fully applicable to PPP projects. Procurement law, however, does not regulate services concessions, and as a result the rules developed by the ECJ are applied in this context. Some defence or security related projects may be exempt from procurement law, for example, in relation to IT projects. It should be noted that in the future the requirements of the directives for the EU defence package will also be implemented.

Step-in rights are common practice in project financed PPPs. There are a few questions concerning step-in rights that have yet to be brought before the courts, including whether the step-in of a third company is a new contract requiring a public tender and whether there is a potential conflict with insolvency law.

German procurement law provides for legal proceedings in the GWB. This system of legal protection is central to German procurement law. Decisions of the procuring authority to award contracts may be subject to review by the public procurement chambers. Any undertaking that has an interest in the relevant contract and claims that the regulations of the procurement law have not been complied with and that it has suffered or will suffer a loss, can file an application to the procurement chambers when the threshold value is exceeded. The federal government intends to extend proceedings to contracts below the current threshold values. The application must be made within certain time limits. An application to the procurement chambers is only admissible if the bidder raised an objection in relation to the issue in question without delay. There is currently a discussion as to whether this condition is in compliance with recent ECJ case law. Unsuccessful bidders often challenge major PPP projects, but in most cases, such challenges are not successful.

Local funding market

Germany uses the Euro as its currency.

The funding market for PPP includes large private banks as well as public banks. Smaller banks often support smaller projects while large projects also attract the support of international banks. Large projects are often project financed while smaller projects are financed by so-called forfeiting structures.

The forfeiting structure is one where the private partner sells its claims for remuneration against the authority to the bank. These claims are assigned to the bank while the intermediate construction loan is paid back. This structure allows for very favourable interest rates if the authority issues a waiver of any objections against payment of the remuneration.

The German PPP sector has not escaped the impact of the financial market crisis. Some bidders in large projects have had difficulties achieving financial close, although close was ultimately achieved (e.g. A models). Some of the banks which had difficulties slowed down their activities in the

PPP market, however, other banks, both German and foreign banks, remained active. As project financing became more expensive public authorities initiated fewer projects. In addition, public funding programs have resulted in traditional public investments, as the conditions for such funding are not compatible with PPP structures that require more long-term preparation.

Security issues

German law allows typical limited recourse project finance structures. Assignments of contract claims are permitted and are commonly used as security, as are share pledges, pledges of project accounts and subordination agreements. Step-in rights may raise procurement or insolvency law issues; however, this has yet to be brought before the courts (as mentioned above).

There are no specific security issues with respect to PPP financing. However, common law lawyers in particular are often surprised with the number of security packages drafted and negotiated with respect to German financing transactions. The volume of documents is due to the fact that specific types of collaterals require specific documentation.

Another issue that occasionally causes technical problems is the principle of accessoriness. Security interests, such as pledges of bank accounts and shares, require that the relevant creditor is also the owner of the security interest. In the case of syndication, this must be taken into account in connection with the transfer of the rights. However, standard market practices have been developed in this respect. The most common approach is using a parallel debt structure either in the facility agreement or in a separate German law abstract acknowledgement of indebtedness. In both cases, the security agent would be the sole creditor of such parallel debt and this debt would be secured by the pledges. This avoids the necessity of transferring the pledges in case of syndication. Another structure seen in the market is the so-called future pledges clause. Such clause qualifies future finance parties as pledgees already represented by the security agent at the point of time the pledge is taken. The intention is to make a future finance party a party to the pledge agreement without the need for an amendment agreement. Although both structures appear to be feasible one has to be aware that neither has been tested in court so far.

In most cases public auctions to enforce securities can be avoided.

Government response to the financial crisis

The German government's response to the current economic downturn has been to boost spending for transport infrastructure, schools and universities. The Ministry of Transport has pledged a cash injection of EUR 11 billion as part of the German government's recovery programme and has allocated EUR 620 million for railway infrastructure to speed up construction on existing projects and kick-start a pipeline of new projects. The second economic stimulus package agreed by the government in January 2009 included investment of around EUR 18 billion into transport, schools, universities and technology. There were no specific measures to assist PPP, in fact the conditions for the funding of projects aiming to speed up investments were not compatible with PPP structures. The completion of on-going projects has not been affected. There are, however, fewer projects in the pipeline because authorities have had limited resources to prepare projects. These programs will result in large deficits in public budgets and it seems likely that PPPs will become more attractive in the near future as a result.

Summary

The PPP sector has not escaped the effects of the financial market crisis. In the wake of these developments opinions differ as to whether the crisis is aiding PPP or has delivered a fatal blow to this form of procurement. Notwithstanding these difficulties, there were more than 100 concluded projects in 2008, and 2009 produced the first clients for ÖPP Deutschland AG.

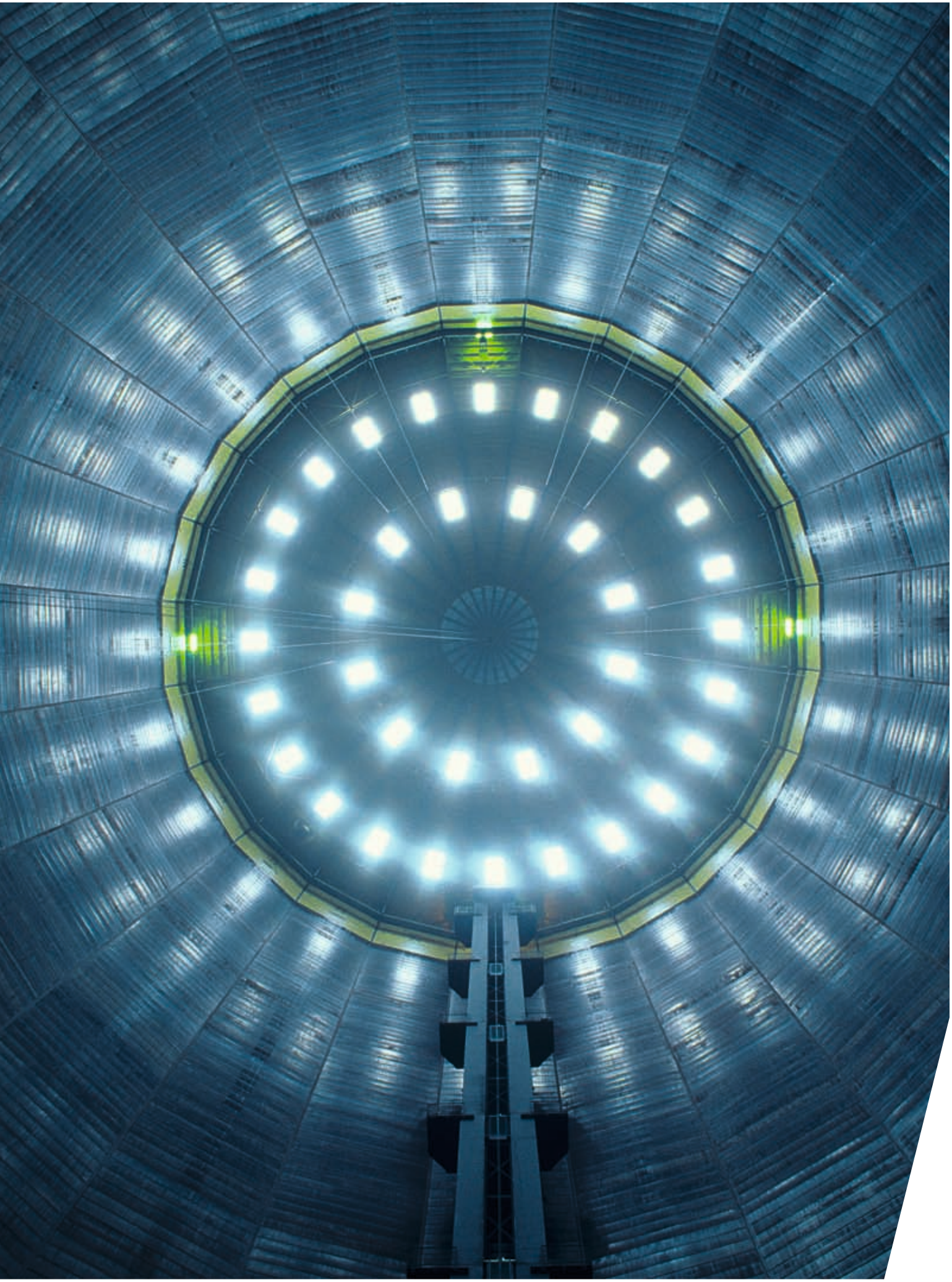
The implementation of PPPs still requires compliance with a number of different laws, as there are no plans to introduce a specific PPP law that encompasses all legal requirements relating to PPP projects. The federal government is, however, expected to continue to amend provisions in various acts that are currently hindering PPPs. The primary issue to be resolved involves VAT, as without a refund system or something of a similar structure, it will prove difficult to show how private involvement is economically feasible. In general, the future development of projects will largely depend on the recovery of the financing market.

CMS experience includes:

City of Halle schools/Major German construction company: The project involved the planning, construction/refurbishment, financing, management and structural maintenance of eight schools. This project has an estimated value of EUR 50 million.

University of Cologne Clinic Complex: This project involved the construction of extensions for the central clinical area of the University's Clinic Complex in Cologne.

A-Model BAB A8 Ulm-Augsburg/Banken: A motorway PPP project with a total value of EUR 330 million.



Hungary



Erika Papp, erika.papp@cms-cmck.com

Country overview

Hungary has built a relatively strong and well-functioning market economy in the past decades, although high State and budget deficits have been a concern in the last few years. These problems have been further exacerbated by the global economic downturn. Nevertheless, such circumstances may provide extra impetus to PPP projects because they do not generally appear on the balance sheet of the State.

PPPs have been increasingly popular in Hungary in recent years, particularly in the following sectors:

— Education – schools and educational accommodation projects;
— Sports and leisure – the Budapest Sports Hall (total development cost approximately EUR 80 million) and other venues outside of Budapest;
— Prisons – prison projects in Szombathely (EUR 40 million) and Tiszalök (EUR 40 million);
— Transport – road infrastructure, including the M5 and M6 motorways (EUR 193 million) and rail projects;
— Urban regeneration; and
— Culture – museums and theatres, including the Palace of Arts project (EUR 212 million).

The Hungarian government has set up an intra-governmental committee to coordinate the PPP projects organised by different ministries (the "PPP Committee"). Government Resolution No. 2028/2007 (II 28) provides guidance as to the role of the PPP Committee and its obligations for proposed PPP projects. The PPP Committee prepares enabling legislation, comments on and assesses planned PPP projects, monitors the progress of PPP projects throughout their lifetime and evaluates such projects once completed.

The PPP Committee is chaired by the Administrative Secretary of State for the Ministry of Economy and Transport and comprises representatives from:

— the Ministry of Economy and Transport;
— the Ministry of Finance;
— the Ministry of Justice and Law Enforcement;
— the Prime Minister's Office;
— the Central Statistical Office; and
— the National Development Agency.

PPP units also exist within some ministries, including the Ministry of Economy and Transport (which has its own department of property management); the Ministry of Finance (which has a PPP working group) and the National Sports Office (which has a PPP project office). This indicates the government's recognition of the importance of continued use of PPPs in Hungary.

In the 2010 Economic Freedom Index published by the Heritage Foundation and the Wall Street Journal, Hungary was placed 51st overall and 24th in the European region[1]. Although corruption is still perceived as present, overall it scores well above the world average and scores particularly highly in the freedoms of business, trade and investment.

Overview of legal system

Hungary is a civil law jurisdiction operating with a civil code. Parliament has recently passed an act on the new Civil Code, which will come into effect in 2010.

Legislation has been boosted by the required harmonisation of law with the existing EC principles before the accession of Hungary to the EU, and is constantly developing in order to ensure compliance with changing EU norms. Discussions

[1] http://www.heritage.org/Index/Country/Hungary

regarding the restructuring of the State budget have been ongoing in Hungary for some time, and any initiatives to that end will impact on the legal environment, in particular on tax and public finance legislation.

Specific PPP/Concession Law

Hungary has no specific PPP law. Although legislation has been amended to facilitate the implementation of PPPs in Hungary and PPP activity has occurred in many sectors, the concept of PPP remains a commercial concept rather than a defined legal term.

Key legislation which has been amended to facilitate PPPs includes Act 38 of 1992 (the "Public Finance Act") and various government decrees. The amendments helpfully treat PPP projects as "long-term financial obligations" and establish a procedure for public sector entities to assume such obligations. However, any new long-term financial obligation may only be undertaken if approved by a public resolution of the government or parliament. The government decrees specify the rules of the approval procedure and various information to be provided for the relevant decision making body.

The legal framework for PPPs in Hungary consists of general PPP law and laws that are specific to individual PPP projects. The general law includes the Public Procurement Act and the Public Finance Act, while specific legislation has been enacted for the Budapest Sports Hall and for the motorway projects.

The key enabling legislation is Act 129 of 2003 (the "Public Procurement Act"), which sets out the entire tender procedure that must be applied to PPP projects.

Act 16 of 1991 (the "Concessions Act") provides additional procedural rules which apply to concessions where the subject matter of the project is exclusively State or local government property under the Civil Code. The Concessions Act provides that concessions must be used for the following activities:

— national roads and their equipment;
— sewage systems;
— mining and related activities;
— pipeline carriers;
— production and trade of radioactive materials;
— gambling; and
— public transport by trolley-bus.

These activities can only be carried out by either:
(i) a company which is controlled by the government (through voting control or as majority shareholder); or
(ii) a private sector investor which has won a tender issued by the government and concluded a concession agreement.

A private sector investor must, within 90 days of the execution of the concession agreement, establish a contractor to carry out the activity. The contractor must be registered in the Hungarian company registry.

The Concessions Act permits the concessionaire to be granted a concession in consideration for the payment of a concession fee to the procuring authority. However, there is no guidance on how the concessionaire is to be remunerated for carrying out its obligations under the concession.

For PPPs implemented at a local level, Act 65 of 1990 (the "Act on Local Governments") is also relevant. The Act on Local Governments requires municipalities to maintain a certain ratio between their revenue and their long-term financial obligations and prohibits them from undertaking any long-term financial obligations in any financial year in excess of 70% of their planned revenue (less the value of the payment obligations becoming due in the given year). The Public Finance Act applies only to central government-

owned public entities and not to local government; however the Public Procurement Act applies to local government as well.

To date, there has been no formal standardisation of documentation for PPP tenders or PPP contracts. However, the Hungarian market has developed sufficiently that procuring authorities generally have regard to typical forms of documentation for road projects and university projects, although they are not called "standard forms".

Procurement laws

The Public Procurement Act is in line with EU legislation and has been in force since Hungary's accession to the EU in 2004. The Public Procurement Act governs, amongst other things, the procurement of two specific types of concessions: building concessions and service concessions.

The Public Procurement Act allows for use of the EU's competitive dialogue procedure and, in certain specified circumstances, also permits use of the EU's negotiated procedure for PPP projects.

As noted above, in some instances, both the public procurement provisions contained in the Public Procurement Act and the tendering procedure set out in the Concessions Act must be applied at the same time. Both Acts contain provisions governing the interaction of the procedures to resolve any inconsistencies.

Certain restrictions on the transfer of concession agreements exist under Hungarian law. Subject to specific rights to transfer the project agreement under lender direct agreements, the contractor is not allowed to assign or otherwise transfer the right of operation or right of use of concession assets because these are, by definition, assets owned by the government or by a local authority. This applies in respect of assets that are either created by the contractor through its own investment and thereafter operated during the concession period or existing assets that are only operated by the contractor. The concession assets return to the government or the local authority at the expiry of the concession period.

Due to a recent amendment, the Public Procurement Act provides that the winning tenderer may establish a contractor for the implementation of the project, but only the private sector investor (or consortium) who won the public procurement tender and signed the public procurement agreement may be an owner of such contractor.

If a contractor is established, the original winner of the tender remains jointly and severally liable for the obligations of the contractor. Importantly, during the term of the project no third party may acquire ownership interest in the contractor, and it may not be merged, demerged, transformed or wound up during the term.

In the case of companies performing concession-related activities, the insolvency of such company automatically terminates the concession agreement. In such case, the concession assets are returned to the relevant governmental/municipal body. The public sector also has a pre-emption right on assets which are not "core assets" (i.e. which came to existence in order to "support" the use of the concession assets), which may be of concern to funders. No concession assets may be sold to satisfy the (secured) claims of the concession company's creditors.

The implication of these provisions is that the consortia will need to create a bankruptcy remote contractor and holding companies prior to tendering for a project to pre-empt the issues surrounding bankruptcy and the transfer of shares.

De-selected, disqualified or otherwise unsuccessful bidders are often keen to contest all decisions at all stages of a public procurement procedure, hoping for the annulment

of the procedure. Understandably, such practices can slow down public procurement procedures.

Local funding market

Historically, Hungary has been criticised for accounting practices that engineer the "off balance sheet" treatment of PPP projects[2].

The Hungarian State Audit Office has also criticised PPP projects on the grounds that the preparatory work on such projects is not sufficient because it does not reveal all of the potential costs of a possible PPP project, and that these hidden costs may endanger the stability of the State budget. The Hungarian State Audit Office is an independent body set up under the constitution for the purpose of supervising financial matters of the Hungarian State, and is therefore politically neutral. It reports to the Hungarian parliament.

Robust criteria must be used to satisfy Eurostat that Maastricht limits are adhered to, and that sufficient preparatory work has been completed on potential PPP projects to ensure they obtain value for money.

Local government and other autonomous local institutions may launch local PPP projects in Hungary if they believe that they will have sufficient financial means to meet their day-to-day business. However, the following types of PPP projects require the prior approval of the Hungarian government and the consent of the PPP Committee:

— certain central government-backed initiatives, for example, student accommodation or sports facilities;
— universities;
— colleges; and
— local PPPs that require additional financial backing beyond that of the local government.

Depending on the value of the project, approval may be required from the Hungarian Parliament (for a project with a value above HUF 50 billion), or from the Hungarian government (for a project with a value above HUF 500 million).

Accounting for property can be problematic on motorway projects in Hungary. The construction sites upon which motorways are built and the completed motorways themselves are the legal property of the government. Therefore accounting questions arise as to whether the asset constructed in the course of the PPP project should be recorded in the books of the contractor, and consequently depreciated by the contractor, or alternatively whether the asset should be recorded in the government property register.

The accounting treatment of the PPP project is relevant for the public sector, as one of the objectives of PPP projects is that the assets involved be classified as non-governmental assets, allowing such assets to be recorded off balance sheet by the government.

When dealing with "availability" PPP projects used for building universities and public cultural institutions, the PPP agreement resembles a long-term "built to suit" lease. The government generally aims to acquire the ownership of the assets on termination of the lease, and therefore these project agreements may be considered as finance leasing, which has two major tax and accounting disadvantages. Firstly, the VAT liability calculated for the whole term of the lease has to be discharged at the beginning of the term and secondly the assets have to be recorded, and depreciated, in the books of the government. The objective

[2] http://ec.europa.eu/regional_policy/conferences/od2006/doc/presentations/d/stefanova_10d08.doc

of the non-governmental classification of the assets involved in a PPP project therefore cannot be reached (i.e. these will not be deemed as being off-balance sheet projects).

In some cases this issue has been dealt with by the government acquiring the contractor instead of the asset owned by the contractor, but this is no longer permitted. There is unfortunately no clear solution for this problem.

Hungarian projects have generally been regarded as bankable projects and commercial banks have often taken part in the financing of major PPP projects. In the current market environment it has obviously become increasingly difficult to obtain long-term funding at realistic prices and the market seems to be exploring the possibility of acquiring financing from multi-laterals in addition to commercial banks. In the long term, however, the market seems to view PPPs and project finance in general as a feasible and relatively safe option (in comparison to other structures e.g. real estate financing) and it is expected that these projects will obtain financing once the global economy begins to recover from the downturn.

Security issues

Financing arrangements in the case of PPP projects are very similar to other, non-PPP structures. It is usual for financiers to implement a full security package including security over assets (real estate and immovable), income, bank accounts and equity. Direct agreements containing step-in rights are also widely accepted.

Due to the nature of the assets in some PPP projects, the assets available for security purposes may be limited. Examples of this are: (i) real estate may not necessarily be encumbered as it is in exclusive State ownership; and (ii) under the Public Procurement Act (as amended 1 April 2009) contractors may not be sold to any third parties, i.e. the original founders have to remain as members of the contractor until the expiry of the project.

Under Hungarian law, the concept of "security trustee" is not recognised; however the Hungarian financing market has developed solutions for this issue and the widely used "joint and several beneficiary", "security agency" and "parallel debt" structures provide the same type of comfort to the banks as is usual in the case of a trustee.

Most types of collateral are registered in public registries (mortgages over real estates, fixed charges, floating charges, etc); however some other types of collateral do not have to be registered, e.g. claim pledges, bank account pledges and security deposits. Such registrations are either very fast (same-day in case of notarial registries) or there may be a side note securing priority for the secured party in case of registrations that take longer (i.e. the land registries and company registry.)

Step-in rights for funders are recognised under Hungarian law, although a complicated contractual arrangement is required in order to implement a step-in agreement. When step-in rights are exercised, there is a risk that the Public Procurement Act may prevent the financing party from: (i) performing the services itself; or (ii) if not providing the services itself, passing the assets gained by perfecting the securities to another enterprise that can provide the public services in question. This issue remains unclear in Hungarian law and has not yet been tested in the courts.

Government responses to the financial crisis

There have not been any specific measures taken by the Hungarian government to assist projects to reach completion during the current global financial crisis. As a result there have been no projects initiated in Hungary since the downturn. The last project to reach financial close

in Hungary was the M6 phase III Junction Dunaujvaros (M8) – Szekszard (M9), in July 2008.

Summary

Hungary's PPP Committee has the task of coordinating PPP projects organised by different ministries. In addition there are PPP units within various ministries. This suggests that the Hungarian government is taking the implementation of PPPs seriously and that there will be continued use of PPPs in Hungary.

Nevertheless there are a number of legal issues and obstacles to the implementation of PPPs in Hungary. These are as follows:

- ownership of property – especially with respect to motorways, questions arise as to whether the ownership of the PPP project's asset should be recorded in the books of the contractor or in the government property register;
- accounting – ownership of property also affects accounting and government budgets, as one of the aims of the public sector is to keep assets off public bodies' balance sheets through use of PPP structures; and
- public sector budgets – as mentioned above, the accounting treatment of PPPs may affect public sector budgets. Hungary has tried to control the impact that PPPs have on public sector budgets by requiring prior approval of either the Hungarian parliament or the central government depending on the size of the project.

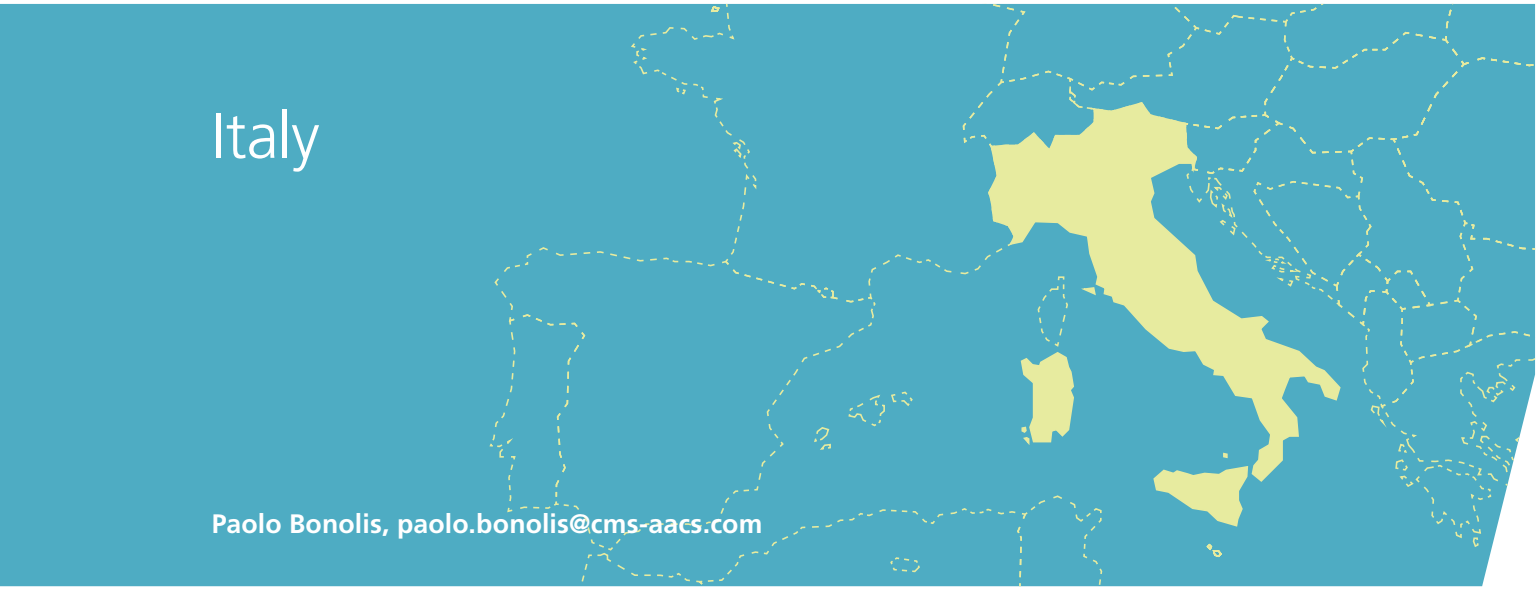
CMS experience includes:

M7 Toll Road, Hungary: Advised on the project financing of a 52km motorway project between Budapest and the Croatian border.

M6 Road Project, Hungary: A 59km road project with a total value of EUR 966 million. This project is one of the largest Hungarian PPPs to date.



Italy



Paolo Bonolis, paolo.bonolis@cms-aacs.com

Country overview

Italy has a relatively stable economy although the recent global economic downturn has affected the nation and caused a GDP fall for 2009 of approximately 5% (the decrease in 2008 was about 1%). Industrial production and investments have been affected by the decrease in foreign demand. Furthermore, in 2008 the current public expenditure reached the highest level since World War 2, and increased by a further 3% in 2009.

In 2010, the Italian government has recently approved a financial plan aimed at reducing the debt/GDP ratio in the next three years down to 3%, in line with Maastricht Treaty requirements. The plan should cut public service related expenditure and prevent fiscal evasion.

Nonetheless, the qualitative indexes of the real economy are slowly starting to show a slowing in the recessionary trend.

The immediate stabilising measures adopted by the government for 2009–2010 include the implementation of fiscal federalism to contribute to expenditure restraint (to be obtained by reducing State costs related to reallocation of public economic resources, which will be kept in the local area from which they originate). Legislative simplification and the optimisation of public intervention will also help to lessen the effects of the unstable economy (currently equal to approximately 15% of the overall economic production).

In addition, paramount importance is being given to the completion and implementation of high speed railways, whose costs are now severely affecting the government balance sheet in comparison to other European countries.

With regard to infrastructure policy, at the end of 2008 the Italian government launched a plan for the construction and development of large scale infrastructure worth more than EUR 16 billion. Part of such investment will comprise new government financing, whilst other projects will be privately financed in order to enhance those projects already defined in 2007 (mainly dedicated to motorways). The government has also allocated a further EUR 11 billion for infrastructure development in 2010, including projects such as the Milan Expo for EUR 1.5 billion, and the enhancement of the Salerno-Reggio Calabria motorway.

In the course of the 2008 infrastructure plan, PPP projects have been awarded in the following sectors:

— Energy and telecommunications: 104 projects awarded for a total consideration of EUR 659 million;
— Sport venues: 50 projects awarded for a total consideration of EUR 146 million;
— Car parks: 44 projects awarded for a total consideration of EUR 149 million; and
— Schools: 36 projects awarded for a total consideration of EUR 131 million.

The trend shows most interest in projects worth less than EUR 1 million (approximately 38% of the awarded projects), although in certain sectors a small number of high value projects were awarded, such as transport and roads, where two projects were awarded for a total consideration of EUR 2.2 million.

Many PPP projects were awarded in 2009, specifically in sectors such as:

— Motorways: improvement of "A4" motorway Novara-Milano; "Asse Pedemontano" road (Piemonte Lombardia – Veneto Regions);
— Transport: large costly bridge infrastructure aiming to connect Calabria and Sicily Regions;
— Rail: underground railway improvement in Naples and new construction in Monza and Brescia; and
— Seaport Hubs (with private financing amounting to approximately EUR 100 million).

— Law no. 144 of 17 May 1999, set up the *Unità Tecnica Finanza di Progetto* ("UTFP"), a promotional body with the aim of promoting within the public administration the use of infrastructure financing techniques with recourse to private capital.

This organisation is responsible for supporting local authorities in identifying which of their infrastructure project needs are suitable to be financed with private capital, providing good value for money. Furthermore, the UTFP aims to assist local authorities in assessing projects proposals issued by promoters, filing the required documentation and the announcement of tendering for the project.

In the 2010 Economic Freedom Index published by the Heritage Foundation and the Wall Street Journal, Italy was placed 74th overall and 35th in the European region. This score was up from 2009 and places Italy slightly above the world average[1].

Overview of legal system

Italy is a civil law jurisdiction operating under a set of codes and other acts.

Italy has a largely stable legislative system and amendments are usually carried out to implement EU legislative changes or following consultation and development by the relevant ministries and other governmental bodies.

The most recent reform of Italian legislation occurred on 18 June 2009, with amendments made to the civil procedure code and the civil code, to simplify the legal system.

Specific PPP/Concession law

The basic rules governing PPP projects under Italian law were set out in Law No. 109 of 1994 (Law on Public Works) from time to time amended and then replaced by Legislative Decree 163 of 2006 (Code of Public contracts for the implementation of Directives no. 2004/17/CE and 2004/18/CE), and its subsequent amendments (the "Code").

Plans to carry out public works whose value exceeds EUR 100,000 are arranged through a three-year programme, with annual updating set out by the awarding authorities, drafted and published pursuant to the applicable town planning legislation and the current system of laws. Such programmes must provide for priority projects.

PPP projects may be carried out through various procedures.

Project finance

One stage procedure: in order to realise the public works or the works of public interest which are listed by the three-year programme and are suitable for being privately financed, the awarding authorities may grant a concession on the basis of a call for competition based on a feasibility study issued by the awarding authority. Any economic operator (called *Promotore*) may submit a project drafted on the basis of such a feasibility study.

The awarding authority shall select the preferred project and may ask the relevant *Promotore* to make any amendments to such project. Should the preferred *Promotore* not accept the suggested amendments, the awarding authority may request the same amendments to the project of the *Promotore* which ranked second on the selection.

[1] http://www.heritage.org/Index/Country/Italy

Two stage procedure: the awarding authorities may also publish a call for competition, clarifying that the procedure will not determine the award of the concession to the selected *Promotore*, but a chance for it to be preferred to the best tenderer, should it adjust its offer to that considered as more favourable. Such right is granted to the *Promotore* for a 45 days period. Shall the selected *Promotore* exercise its pre-emption right, having previously amended its offer in line with any incidental better offer, the best tenderer will obtain the reimbursement by the *Promotore* of the expenses faced for its participation at the competition. The same reimbursement is granted to the *Promotore* which does not exercise its pre-emption right as specified above, at the tenderer's expenses.

In any case, the reimbursement amount shall not exceed 2.5% of the value of the investment as set out in the feasibility study on which the call for competition is based.

Concessions

A "public works concession" is a contract of the same type as a public works contract except that the consideration payable to economic operators consists mainly of the right to economically exploit the infrastructure.

The concession typically lasts up to 30 years and entitles the concessionaire to operate the built infrastructure and receive the proceeds of operation. The procedure to grant the concession is carried out through a public call for competition whose participants must meet technical and economic requirements. The tender is awarded on the basis of the "most economically advantageous offer" criteria.

Public procurement

Public procurements are regulated in Italy by the Code, which implemented EU Directives 2004/17 and 2004/18.

In order to award concessions, the procedure can be carried out as:

a) open procedure: each tenderer submits the offer pursuant to the terms and conditions set out in the call for competition; and
b) restricted procedure: in this procedure each candidate must submit an expression of interest in line with the conditions set out in the call for competition and, after this step, the economic operator meeting the requirements makes its tender based on the specifications provided in the invitation to tender issued by the awarding authority.

The Code also regulates awarding procedures for public works, services and supplies. Under these procedures the awarding Authority seeks economic operators to carry out works, services and supplies by paying directly for delivery of service activities. This is the basic difference between these procedures and the PPP, where preferred tenderer is remunerated through the operation of the built infrastructure.

The Code provides for different kind of procedures to be used to award public contracts, by selecting the best tender on the basis of the lower price or the most economically advantageous tender.

Such procedures, in addition to those provided for concessions above are:

a) negotiated procedure: consisting of procedures whereby the awarding Authorities negotiate the terms of the contract with a selected number of candidates;
b) competitive dialogue: competitive dialogue is used for complex public procurements (i.e. when the awarding Authority is not able to precisely determine the specific requirements for the planned public works, services or supplies) and it takes place in several stages in order to reduce the number of solutions to be discussed during

the dialogue stage by applying the awarding criteria set out in the call for competition.

The Italian Authority for the Supervision of Public Contracts (the "AVCP") has been established by Law No. 109/1994 to supervise public contracts. The AVCP is an independent self-organised body in relation to its functions, evaluation and administrative responsibility. The AVCP supervises the whole public procurement system, both at national and regional level, in order to ensure compliance with the principles of fairness and transparency in awarding procedures, effective and expedient execution of contracts, and compliance with the competitions rules set out in each single tender. In particular it regulates the correct application of laws and regulations, while monitoring regularity of awarding procedures and economic efficiency in contract execution, through sample surveys.

In both project finance and public contracts, in Italy it is quite common to challenge awarding decisions. The challenge has to be brought before a Regional Administrative Court and a significant proportion of challenges are successful.

According to Art. 246 of the Code, in case of awarding works considered of public interest by the Ministerial Committee for Economic Planning ("CIPE"), no challenge aiming at revoking the awarding decision can cause the termination of the contract executed between the awarding authority and the selected tenderer. The challenging party will only be entitled to obtain compensation.

Article 246 of the Code has been recently amended by Legislative Decree no. 53 of 12 April 2010, which implemented EU Directive 2007/66/EC (relating to the effectiveness of review procedures in the awarding of public contracts).

Article 245-*bis* describes serious violations following which the contract could be declared ineffective namely if: a) the awarding authority has granted a contract without prior publication of a notice in the Official Journal of the EU or in the Italian Gazette; b) the awarding authority has granted a contract with a negotiated procedure without prior call for tender in circumstances not admitted by the Code; c) an infringement of the standstill period occurred, and such infringement deprived the challenging tenderer of the possibility to pursue pre-contractual remedies, and affected its chances of being awarded the contract; or d) the contract has been executed in breach of the standstill period. In these circumstances the final award could be revoked and the contract could be declared ineffective. The immediate consequence of such ineffectiveness will be the cessation of the execution of the works.

Local funding market

Italy has been part of the Euro zone since 1999 and officially introduced the use of the Euro in 2002, with a fixed exchange rate established at 1 Euro for 1936.27 Italian Lira. Any fluctuation in the Euro's exchange rate will only be relevant for commercial relationships with countries outside the Euro zone.

The inflation rate in Italy is not subject to significant fluctuations.

PPP project funding is based on private financing, consisting mainly of the private partner's own assets and debt (i.e. bank loans and bonds). These funding sources are supplemented by European infrastructural funds and private equity funds.

With the global economy currently suffering a downturn, the financing of highly expensive infrastructure is facing a substantial reduction. On the other hand, public procurements are only seeing a minor decrease, in view of the fact that public works, services and supplies by economic

operators are paid directly by public authorities. The role of financing parties is therefore less relevant to such projects.

Security issues

Pursuant to Article 113 and Article 75 of the Code, any tender submitted for a competition must include the following guarantees:

— a deposit worth 2% of the contract value; and
— a deposit or a first demand guarantee issued by a bank or an insurance company (bond) worth 2.5% of the contract value.

However, when the final selected tenderer is a certified entity pursuant to the European standards of ISO 9000 rules, such guarantees may be reduced by 50%.

Once the selected tenderer has been awarded the contract, it must provide a first demand guarantee issued by a bank or an insurance company worth 10% of the contract value, to be gradually reduced to 75% of the initial secured amount during the progress of the works.

Such guarantee is provided in order to secure the performance of the contract by the selected tenderer and the remaining 25% is released when the test certificate or the certificate for the proper performance of the works has been issued. Adjustments to the amount of the guarantee may apply.

Together with the above guarantee, the selected tenderer shall provide a deposit worth 10% of the annual operating costs related to the relevant public work, in order to ensure proper payment of any applicable penalty in case of breach of contract.

As regards the security package usually required by the lenders, Italian banks are usually prepared to finance on a full-recourse or limited-recourse basis. Typically the security package comprises securities over assets (mortgages on building lease rights, properties, lands, pledges over shares of the contractor) and over income from exploitation of the infrastructure, as well as personal guarantees provided by the shareholders.

The legislation applicable to PPP procedures also grants lenders a step-in right in relation to any agreement entered into by the contractor, including the concession contract.

Government response to the financial crisis

The Italian government response to the financial crisis has included a set of measures, most notably Resolution No. 32009 of 6 March 2009, issued by the CIPE, providing for additional public funds to be allocated in order to carry out infrastructure considered as a strategic asset for national economic and social progress.

Such increase has resulted in a further amount of EUR 5 billion to be invested in school safety, prison building, archaeological and museum infrastructure, environmental recovery and strategic and mobility infrastructures, with a commitment of 85% allocated to Southern regions and the remaining 15% to Northern regions.

At this stage it is not possible to evaluate the effectiveness of these measures as they have not been actually implemented yet.

Summary

The Code of Public Contracts provided for by Legislative Decree 163 of 2006 constitutes the legal framework both for public procurement and PPP. Under its procedures, many PPP projects were awarded in 2008 and 2009 with a trend showing major interest in projects worth less than EUR 1 million.

At present the main issues concerning PPP in Italy are as follows:

— a substantial reduction in procurement of highly expensive infrastructure projects due to the global economic downturn; and
— a lack of certainty concerning the awarding procedures, in light of the frequency of challenges to awarding decisions, which can trigger the suspension of the relevant works.


EXIT

The Netherlands



Eduard Scheenstra, eduard.scheenstra@cms-dsb.com

Country overview

Since the end of the 1990s, enthusiasm for PPP has been developing gradually in the Netherlands. PPP is now viewed by the Dutch government and market participants as being a tool to enable the government to implement projects faster and more efficiently when compared with purely public ventures.

Whilst developing its strategy in relation to PPP, the Dutch government has mainly focused on the lessons learned in the UK PPP market. Based on these experiences, the Dutch Government developed a three-way strategy in order to maximise the benefits of PPP in the Dutch market:

— develop regulations first before earmarking projects as suitable for Design, Build, Finance, Maintain and Operate ("DBFMO") or Design, Build, Finance and Maintain ("DBFM");
— start by setting up pilot projects, mainly in infrastructure; and
— focus on the development of standardised documentation in order to keep transaction costs to a minimum. The Dutch government has, together with market participants, developed standard form DBFM and DBFMO contracts. An updated version of these contracts was published in July 2009. English translations of these contracts were published in October 2009 with a view to encouraging foreign participation in the Dutch PPP market.

Following the introduction of a number of pilot projects at the end of the last decade, many sector experts believed the Dutch PPP market was following the lead of more mature PPP markets such as the UK and Germany. However, although initially numerous projects were deemed suitable for PPP, the Dutch PPP market did not fully deliver on its promising start. This now appears to have changed, as in recent years the Dutch government has earmarked a growing number of projects as suitable for DBFM such as the EUR 1.4 billion Second Coentunnel and the EUR 0.5 billion A2 Maastricht motorway. In addition, a gradual increase in the number of PPP projects is now becoming visible.

Political support/promotion body

Over the years PPP in the Netherlands has gained widespread support in both in the public and private sectors. This increased support for PPP can to a large extent be attributed to the activities of the Kenniscentrum, the knowledge centre for PPP which had been actively involved in supporting the promotion of know-how and sharing experiences with respect to PPP in the Dutch market.

Having concluded in 2006 that both the Dutch government and the various ministries involved in PPP were supportive of PPP, the Ministry of Finance decided to alter the role of the Kenniscentrum by making it a part of the Ministry of Finance itself. The department is now called PPS Asset Management and acts as information centre for and advisor to governmental agencies. In addition, it provides general information to the private sector. PPS Asset Management initiates and stimulates co-operation between the public and private sector by sharing know how and by developing regulations and guidelines. As a consequence, this body no longer performs its promotional role. Therefore, the public sector currently lacks a true promotional body. Hoewever, the Private Sector Infrastructure Financing Committee, an independent advisory body created by the Minister of Transport, Public Works and Water Management and the Minister of Finance in November 2007, chaired by former Dutch Minister of Finance Onno Ruding (the "Ruding Committee") has in its report on the status of the Dutch PPP market of 19 June 2008 urged the reinstatement of the Kenniscentrum.

The private sector on the other hand has developed several PPP promotional platforms, such as PPS Netwerk Nederland and OPPS. These platforms provide education and

networking opportunities and share best practices on PPP projects.

Closed deals

PPP projects in the Netherlands have closed in a number of different sectors, including:

- **Accommodation**
  - Kromhout Barracks Utrecht. This EUR 193 million PPP project involves the construction of an institutional complex that is to have office space for 2,000 personnel with accommodation, sports and medical facilities;
  - Doetinchem Tax Office. The project involves the DBFMO of a tax office in Doetinchem, over a period of 15 years, and is the first tax office PPP to be launched in the Netherlands;
  - Groningen Tax Office. The EUR 185 million project involves the DBFMO of an office building in Groningen, the Netherlands; and
  - Dutch Ministry of Finance Building. The EUR 105 million scheme involves the complete renovation of around 66,000m² of the Ministry's buildings in The Hague on a DBFMO structure;
- **Bridges and Tunnels** – Second Coentunnel Amsterdam. This EUR 1.4 billion project involves the construction of an underwater tunnel along the A10 ring road around Amsterdam and the renovation and maintenance of the first Coentunnel which opened in 1966. The concessionaire will be reimbursed via availability payments over the 30-year contract. Construction is expected to take five years;
- **Education** – The Montaigne School in The Hague. This was the first PPP education project to be procured in the Netherlands;
- **Prisons** – Rotterdam Airport Detention Centre. This EUR 70 million project involves the DBFMO of a detention centre at Rotterdam Airport;
- **Rail** – The EUR 6.3 billion High Speed Line South between Amsterdam and the Belgian border, which together with the Belgian HSL 4 forms the Schiphol – Antwerp High-Speed Line. This is still the largest PPP project ever to reach financial close in the Netherlands;
- **Roads**
  - N31 Leeuwarden to Drachten. The EUR 78 million project involved the DBFM of 13km of motorway – doubling (to 2 x 2 lanes) of N31 Leeuwarden – Drachten; and
  - A59 motorway project. The EUR 218 million project involved the DBFM of 9km of the Geffen – Rosmalen motorway;
- **Water/Wastewater** – Harnaschpolder wastewater purification. The EUR 400 million project consists of a 30-year concession, which includes the design, construction and operation of a new wastewater treatment plant. Currently this is the largest wastewater plant in Europe.

Deal pipeline

There is an increasing number of PPP projects in the pipeline in the Netherlands. A number of the prospective projects have been listed below:

- **Accommodation** – A new military museum at the former military air force base of Soesterberg;
- **Infrastructure** – Five infrastructure projects in the Schiphol – Amsterdam – Almere area, which include improvements to the A1, the A6, the A9 and A10 motorways;
- **Prisons** – Zaanstad Prison – A new prison complex in Zaanstad, a municipality north of Amsterdam;
- **Roads** – Several motorways including the A12 Utrecht – Veenendaal, the A15 Maasvlakte – Vaanplein and the A4 Delfland motorway; and
- **Utilities** – Improvement of the Afsluitdijk Dam between the Provinces of North Holland and Friesland and also the development of up to 70 medium sized wind farms.

In the 2010 Economic Freedom index published by the Heritage Foundation and the Wall Street Journal, the Netherlands was placed 15th overall and 6th in the European region[1]. Its overall score is two points worse than in 2009, although it remains above the world and regional averages.

Overview of legal system

The Netherlands is a civil law jurisdiction operating with a civil code.

The Netherlands has a stable legislative system. Changes to the legislation are generally driven by EU legislative changes or following consultation and developments by the relevant ministries and other authorised bodies.

Specific PPP/Concession law

In the Netherlands, there is no legislation that deals with PPP specifically. However, under the current legislation PPP projects are allowed in principle. Depending on the sector involved (e.g. infrastructure, construction, culture, education, health care, social infrastructure, defence, waste removal or development) multiple laws and regulations on a national, provincial and communal level can apply. Public awareness of the desirability of PPP projects has very much increased over the past years. The current political discussion is more about stimulating and facilitating than about dealing with questions of permissibility. It is therefore not foreseeable that a specific Dutch PPP Act will be developed in the coming years.

Procurement laws

In the Netherlands public procurement is regulated by the Public Procurement (Tendering Rules) Decree (Bao) (the "Procurement Decree") and the Tendering (Special Sectors) Decree (Bass) (the "Special Sectors Decree") (together, the "Decrees"). The Procurement Decree implements Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. The Special Sectors Decree implements Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. Both decrees came into effect in December 2005.

The Procurement Decree is only applicable if:

- the public sector client is a contracting authority (classic government institutions, such as the central and local government, provinces and water authorities as well as public bodies);
- the procurement concerns a contract in writing for consideration; and
- the amount is above the threshold amounts, which are:
  - EUR 4,845,000 for works; and
  - EUR 125,000 (central government) or EUR 193,000 (other local government agencies) for services and goods.

Above these threshold amounts the public procurement has to be compliant with the European procurement rules (i.e. with the Procurement Decree).

[1] http://www.heritage.org/Index/Country/Netherlands

In the Netherlands, five different procurement procedures can be used:

— open procedure;
— restricted procedure;
— published negotiated procedure;
— unpublished negotiated procedure; and
— competitive dialogue.

The contracting authority can use the competitive dialogue when a public contract is very complex. The EU legislator is of the opinion that competitive dialogue is the most suitable procedure for the public procurement of public private partnerships.

The Procurement Decree also contains rules for concession works. The public procurement rules for concession works are more flexible than the rules for a public works contract. The contracting authority is allowed to choose the public procurement procedure of their choice. Under certain circumstances, a concessionaire may sub-contract to third parties but only through the public procurement procedure. The rules for the concession mentioned in the Procurement Decree are only applicable for works with a value above the threshold figures mentioned above.

The Decrees are not applicable to concessions for services. These concessions and the concessions for works with a value below the threshold amounts are subject to the EU Directives and the general principles of equal treatment, transparency, reciprocal recognition and proportionality.

Procurement law currently prohibits the transfer of a project agreement or concession agreement to another party. This is because changing the private sector counter-party to an agreement or a concession can be seen as a significant change of the contract, which would require a new procurement process.

Due to the fact that in the Netherlands the Decrees only are applicable above the thresholds, there are additional national rules for the public works contracts whose value is below the thresholds. These rules are contained in the Procurement Regulations for Works 2005 (*Aanbestedingsreglement Werken 2005* or "ARW 2005").

The public works contracts of:

— the Ministry of Housing, Spatial Planning and the Environment;
— the Ministry of Transport, Public Works and Water Management;
— the Ministry of Defence; and
— the Ministry of Agriculture, Nature and Food Quality,

which always have to be put out to tender, irrespective of the value of the works. These ministries are obliged to apply the ARW 2005. The other ministries or governmental institutions often use the ARW 2005 voluntarily.

Unsuccessful or de-selected bidders can challenge the outcome of a public procurement procedure in civil court. Challenges of public procurement procedures are becoming more and more common. A study in 2007 of public procurement lawsuits shows that the contracting authorities are likely to prevail over the bidders (56% successful against 35% for the bidders; in 9% of the cases there was no obvious winner).

Local funding market

The Netherlands officially went into recession in early 2009. The economic recession and liquidity constraints are currently affecting the PPP market. In particular, attracting senior debt is proving to be very difficult, which affects the ability to obtain the necessary funding for PPP projects. The problems can be summarised as follows:

— Less liquidity in the capital markets results in banks being more and more selective as to which projects they wish (and are able) to finance;
— Banks appear not to be able to underwrite the entire financing risk on their own and therefore now choose to finance projects through club deals;
— Margins are widening. Banks are no longer willing to charge 80bps but now tend to charge 250bps or even higher. Widening margins could, depending on the development of the base rate, lead to higher funding costs;
— The tenor of the loans is no longer sufficient to cover the life of the project. Generally loans are now entered into for a period of eight to ten years, as opposed to tenors of up to 25 years that were previously common. Shorter tenors automatically result into the need to refinance during the life of the loan. An important question that needs answering in this respect is who bears the refinancing risk;
— The 'market disruption risk' has become real and as a result banks are now considering invoking market disruption clauses in their facility agreements to claim their actual costs of funds when faced with shortfalls from funding below the relevant interbank market offer rate; and
— Monolines have all but disappeared and wrapped products are no longer available. Therefore, parties once again need to look into 'classic' financing solutions.

Despite all this, there remains considerable will on the part of the Dutch government to implement new PPP projects, with such investments being heralded as an antidote to the economic crisis. In addition, international financial institutions such as the European Investment Bank and the European Bank for Reconstruction and Development may take up an active role in providing finance to infrastructure projects which are struggling to obtain the necessary (committed) private sector funding under the current market conditions. Also, a one-off pre-payment by the Dutch government at the completion of the project is seen as a possible solution to solve the current funding difficulties.

Security issues

One of the key characteristics of DBFMO and DBFM contracts is the "limited recourse" or "non-recourse" character of the financing. The financiers of the project will therefore not (or will only to a limited extent) be able to exercise their rights under the loan agreement *vis-à-vis* the shareholders of the project vehicle. As a result, the financing by the lenders is not based on the solvency of the project vehicle's shareholders but is based on the expected (uninterrupted) cash flows that stem from the project. In order to secure repayment, Dutch law permits financiers to take security, which supports a typical limited recourse project finance structure.

Often a combination of different types of collateral is used. Collateral may include real estate, ships and aeroplanes, inventory and moveable property, securities such as shares, bank account receivables, key agreements, cash-flows and intellectual property rights such as patents, trademarks, designs and copyrights. However, in PPP projects the creation of mortgages on government buildings can often not be realised due to the public function of such buildings.

The conventional security package is often supplemented by a direct agreement between the financiers, the contracting authority and the project vehicle. This restricts the public sector partner from terminating PPP contract prior to giving the funders the option to step-in to rectify a default, and/or to transfer the rights under the PPP contract, or the shares in the project vehicle, to a suitable substitute contractor.

Government response to the financial crisis

On 2 July 2009 the Dutch Minister of Finance sent a letter to the Chair of the Dutch parliament in which he outlined which measures will be undertaken by the Dutch Government to battle the effects of the financial crisis in respect of DBFMO and DBFM projects. This letter set out three elements on which the Dutch government will focus in respect of PPP projects:

— Reducing the number of required financiers. Currently the Dutch government requires each of the three selected consortia to arrange fully committed financing. Given the fact that banks are currently only prepared to participate in the loan for a relatively small amount, such a requirement could, in the event of a EUR 500 million project, result into each consortium having to arrange committed financing from up to 20 commercial banks. In order to prevent this, the Minister of Finance is currently looking into organising debt funding competitions, as developed in the UK market, which would mean that only the winning consortium has to arrange committed financing;
— Reducing credit dependence. This can be achieved by the government making a one off payment at the time of the completion of the project. However, it is of importance that such a payment should not be too substantial as the lack of risk involved will then make it more difficult for private sector parties to achieve the desired added value. In addition, the EIB has expressed an interest in financing projects in the Netherlands. Finally, the Ruding Committee has advised the Dutch government to look into the possibility of institutional investors becoming involved in the financing of DBFMO and DBFM projects; and
— Fine-tuning contracts to take into account the current market developments. This could be achieved by no longer requiring consortia to provide binding offers for a period of up to 12 months. Given the extreme fluctuations of the interest rates such long periods are now deemed unworkable by the Dutch government and need to be brought in line with the current market circumstances.

In addition, the Dutch government published a bill, the Crisis and Recovery Act (*Crisis- en herstelwet*), which has entered into force as of 1 January 2010 and will be effective until 1 January 2014. The Crisis and Recovery Act will provide for shorter and more efficient procedures for certain types of project and will result into a large number of projects being brought forward in order to stimulate both the economy and employment. The Act is mainly focused on infrastructure works and promoting the use of sustainable energy.

Summary

The Netherlands was one of the first European countries to explore the benefits of PPP. However, after a promising start the Dutch PPP market did not really live up to the expectations. In recent years, however, the Dutch PPP market has been gradually picking up as a result of both the financial crisis, which has resulted in the Dutch government bringing forward the procurement of a large number of works that are now being considered suitable for PPP as well as the acceptance by many that privately funded projects are beneficial to both public as well as private market parties. Therefore, market observers deem the success of the projects that are currently procured in the Netherlands as crucial for the future development of the Dutch PPP market.

CMS experience includes:

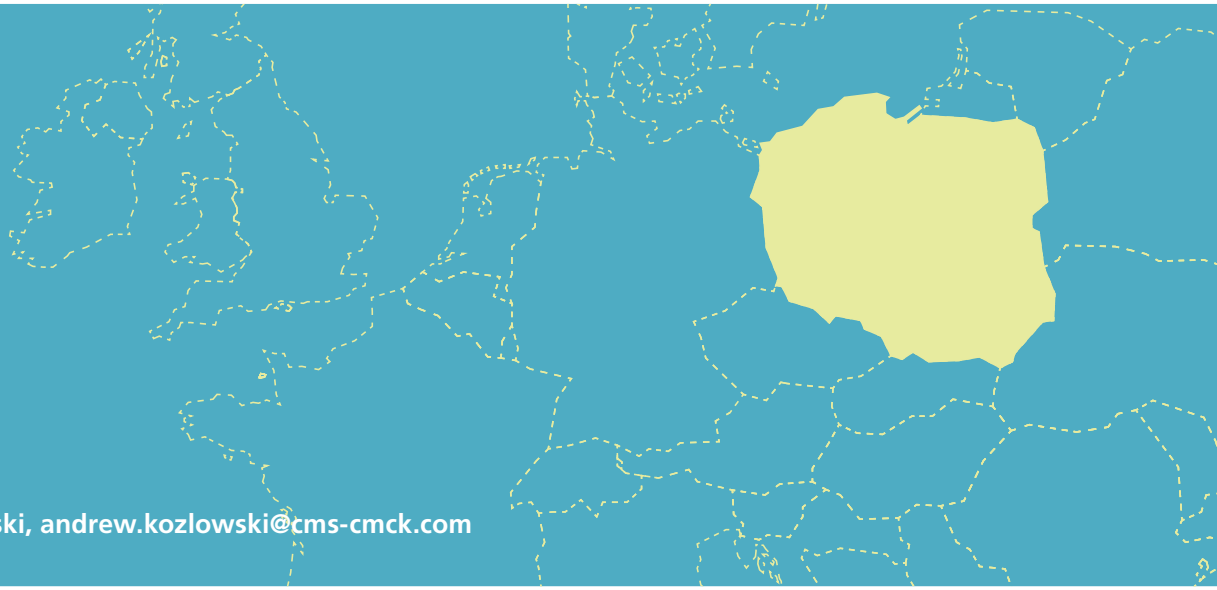
Rijnhavens House of Design complex: Advised on the project documentation for a PPP project in Rotterdam.

Zutphen – a Dutch healthcare institute: This project involved the construction of a healthcare facility and integrated apartments for the elderly in the eastern part of the Netherlands.

A2 motorway, Maastricht: Advised on the tender for the construction of the tunnelled section of the A2 motorway and its surrounding areas in Maatricht-East area.



Poland



Andrew Kozlowski, andrew.kozlowski@cms-cmck.com

Country overview

Poland still has a growing economy, but growth has slowed significantly as a result of the global economic downturn. According to data from the Central Statistical Office, in 2009 Poland had economic growth of 1.8%. According to an OECD report, the economic growth forecast for Poland for 2010 is 3.1%. However, it remains uncertain when Poland will enter the Euro zone. It is unlikely to occur before 2015 at the earliest.

Poland is one of the most developed markets in Central and Eastern Europe for PPP. Although no PPP projects were closed under the Old PPP Act, Poland has closed a number of PPP projects under other regulations, principally in the roads sector. These include:

— the A1 Motorway – Rusocin to Nowe Marzy section (EUR 660 million) and Stryków to Katowice section (EUR 200 million);
— the Stryków to Konotopa section of the A2 Motorway (EUR 1,000 million); and
— National Highways no. 62 (EUR 220 million) and no. 19 (EUR 220 million).

The new Public Private Partnership Act of 19 December 2008 (the "New Polish PPP Act") should help streamline the process of developing future PPP projects in Poland. There is a healthy project pipeline, including the following PPP projects which are likely to have significant capital value and attract international investors:

— 62km Nowe Marzy-Czerniewice section of the A1 Motorway (EUR 1,070 million);
— 106km Nowy Tomyśl-Świecko section of the A2 Toll Motorway (EUR 1,560 million);
— construction of a new hospital in Warsaw;
— a light rail link – Warsaw-Łódź Rail Link (EUR 310 million);
— construction of a high-speed railway – section from Bytom to Pyrzowice (EUR 400 million);
— construction of a high-speed railway - from Toruń to Bydgoszcz (EUR 200 million);
— construction of a waste recycling system in Warsaw (EUR 150 million);
— construction of a waste recycling system in Białystok (EUR 100 million);
— construction of the "Route Słowackiego and Sucharskiego" road from the airport to the seaport in Gdańsk (EUR 300 million);
— construction of a multifunctional sports arena Czyżyny in Kraków (EUR 100 million);
— construction of a tram line in Płock (EUR 100 million);
— construction of a tram line in Szczecin (EUR 100 million);
— projects in the leisure sector including a multifunctional 13,000 to 15,000 seat sports hall in Wroclaw and a multifunctional 14,000 seat sports hall in Sopot (EUR 80 million); and
— a number of other significant projects to construct and refurbish sport stadia, leisure facilities and car parking projects.

PPP projects have received strong governmental support in Poland and public sector partners have included the Ministry of Infrastructure (for rail projects), the General Directorate for National Roads and Motorways (for roads projects) and the Ministry of Health (for hospital projects), as well as local municipalities for other local PPP projects.

Future PPP projects will benefit from enhanced support and co-ordination at a governmental level. The Minister of Economy is charged under the New Polish PPP Act to popularise and promote PPPs and to monitor and report both on the functioning of closed PPP projects and the viability of future PPPs, including the prospects and conditions of financial commitment from the private sector.

There are also some promising non-governmental initiatives to promote PPP projects, such as the establishment of the PPP Centre in July 2008. The PPP Centre comprises some

leading international and Polish consultancy firms, law firms, banks, agencies, associations and business entities and aims to promote and monitor the development of PPP projects in Poland. The PPP Centre actively cooperates with the Ministry of Economy and local municipalities. It organises conferences to clarify issues relating to the New Polish PPP Act and aims to produce draft documentation to standardise forms of PPP agreements and procurement procedures.

In the 2010 Economic Freedom index published by the Heritage Foundation and the Wall Street Journal[1], Poland was placed 71st overall and 33rd in the European region. Overall it scores better than the world average and scores in investment freedom and freedom from corruption are higher than average.

The procurement of some new projects planned to be implemented under the New Polish PPP Act or the Concession Act has already been announced by the local authorities. Some projects (e.g. those in Poznań, Wrocław or Kraków) concerning construction and operation of car parks are at the stage of selecting the concessionaire. Other projects (e.g. those in Warsaw, Katowice or Bielsko-Biała) are still in the preparatory stages (e.g. at the stage of preparing construction designs or conducting relevant analysis).

Overview of legal system

Poland is a civil law jurisdiction operating with a civil code.

Poland has a relatively stable legislative system. Changes to legislation are generally driven by EU legislative changes or following consultation and development by the relevant Ministries and other authorised bodies.

Specific PPP/Concession law

The New Polish PPP Act came into effect on 27 February 2009 and replaced the Public Private Partnership Act of 28 July 2005 (the "Old PPP Act"). The Old PPP Act had been heavily criticised for being overly complicated and adding too many layers of "red tape" to the implementation of PPPs. In the past, the market overcame such problems by procuring PPPs through other procurement methods, particularly in the roads sector, where PPPs were structured on a DBFO basis and procured under the Act on Toll Motorways and National Road Fund.

The New Polish PPP Act is designed to set a legal framework for Poland's rapidly developing PPP market and should improve the PPP process. For example, the New Polish PPP Act removes the need for a detailed and expensive analysis, which, under the Old PPP Act, significantly increased project costs. The New PPP Act includes a description of the main assessment criteria to be followed by the public and the private partner when implementing a PPP to assess whether the services offer value for money. There is also a short list of essential issues that a PPP agreement should cover to ensure that the key risks are properly allocated between the partners.

The New Polish PPP Act specifies which entities can take part in a PPP. The private partner may be a Polish or foreign business entity. The public partner may be, broadly, a public finance sector unit, its associate or a specially created entity which is owned or controlled by the public finance sector unit or its associate.

In accordance with the New Polish PPP Act the public partner's main obligation under the PPP Agreement is to cooperate with the private partner in order to implement the project, which in particular includes

[1] http://www.heritage.org/Index/Country/Poland

making its own contribution. The private partner is obliged to implement the project for appropriate remuneration and to incur the project's costs in whole or in part himself (unless incurred by a third party).

A PPP agreement may also stipulate that the relevant public and private partners may jointly establish a company in accordance with the provisions of the Polish Commercial Companies Code in one of the four legal types envisaged in the New Polish PPP Act: a limited partnership (*spółka komandytowa*), a limited joint-stock partnership (*spółka komandytowo-akcyjna*), a limited liability company (*spółka z ograniczoną odpowiedzialnością*) or a joint-stock company (*spółka akcyjna*). The purpose and business of such a company cannot go beyond the scope specified in the PPP agreement.

There are two ways to award a project to a private partner under the New Polish PPP Act. The first method is under the Act on Concessions for Construction of Works and Services of 9 January 2009 (the "Concession Act") which came into effect on 20 February 2009. The Concession Act will only apply if the private partner's remuneration is derived from the right to exploit the subject of the private public partnership or is primarily derived from such right but also includes payment. In all other instances, the PPP agreement will be awarded under the Polish Public Procurement Act of 29 January 2004 (the "Polish Public Procurement Act").

The Concession Act is intended to support the PPP framework specified in the New Polish PPP Act. However, it may also be used as separate, alternative legal basis for implementing PPP transactions. The key requirements/ rights specified in the Concession Act are:

— the concession applies to both construction works and services (if applicable);
— the term of the concession agreement must not exceed a maximum period – generally 30 years for construction works and 15 years for services. There is one exception to this rule: if it is envisaged that recovery of the capital outlay connected with the implementation of the concession will take longer than indicated above, the concession agreement may be concluded for a longer period;
— remuneration for the completion of the construction works derives from the right to exploit the constructed facility, or from such exploitation right together with additional payment from the contracting authority;
— where the concessionaire is remunerated in part by the contracting authority, such payment cannot be set at a level which guarantees recovery of the concessionaire's costs incurred in performing the concession;
— a concession must transfer most of the economic risk connected with the project to the private entity;
— the concession agreement must cover certain issues, such as a description of the subject of the concession, the construction period, the term of the concession, the method of the concessionaire's remuneration, the allocation of risks between the parties, the conditions and procedure for terminating the concession agreement, etc.; and
— the contracting authority may take into account various criteria in awarding the concession, including the length of the construction period, the term of the concession agreement, the bidder's contribution to financing the construction, the amount paid by third parties for services connected with using the facilities, the environmental aspects, the technical value and quality of the facilities and the characteristics of a bidder, such as its technical and economic strength.

The public partner owns the concession object and the private partner has possession and the right to use it and derive benefit from it.

The Concession Act does not regulate compensation on termination but provides that responsibility for improper

performance and the termination procedure must be set out in the concession agreement.

In 2009, public partners commenced procurement of 40 PPP projects under both the New Polish PPP Act and the Concession Act. To date, all are still in the procurement phase.

Procurement laws

Public procurement law in Poland is governed primarily by the Polish Public Procurement Act and supplemented by secondary legislation. Polish public procurement legislation has undergone some major changes in recent years in order to implement EU public procurement directives into Polish law, in particular Directive 18/2004/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as well as Directive 17/2004/EC of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal service sectors. The Polish Public Procurement Act implements the methods of procurement identified in EU law, including the open procedure, restricted procedure, negotiated procedure and competitive dialogue. Although competitive dialogue is well suited to all complex projects (not only concession agreements), the numbers show that awarding entities have been afraid of using this procedure (under the old Polish Public Procurement Act concessions for construction works could only be awarded by the open, restricted and negotiated procedures).

Poland's public procurement law, despite recent changes in 2008, is still very formalistic. Awarding entities have tended to be very strict and even a minor mistake often leads to rejection of a bid. Although the time-limits for applying remedial procedures are still very short, many decisions of the awarding entities are challenged by way of complaint (in the first instance), appeals to the National Appeal Chamber and, finally, to court. In 2008, more than 1,500 appeals to the National Appeal Chamber were filed and 34% of them were successful. Almost 300 of the appeals were then submitted to court and 18% of them were found in favour of the challenging entity.

Some recently implemented changes to the Polish Public Procurement Act relaxed the public procurement regime to some extent. Those which are particularly beneficial from a PPP perspective include plans to allow reliance on the financial capacities of entities other than the bidder, regardless of the legal nature of the links which it has with them. This change is in line with Directive 18/2004/EC.

The New Polish PPP Act introduces some modifications to the Polish Public Procurement Act For example, the New Polish PPP Act modifies the restrictions imposed by the Polish Public Procurement Act in relation to amending the PPP agreement during its term. Such amendments will now be permitted where the amendment is needed to address circumstances which were impossible to predict on the date of concluding the PPP agreement.

Local funding market

Poland, like many countries in the CEE region, is suffering from the economic recession and liquidity constraints are currently affecting the ability to finance large transactions, particularly for the life of the project. Sponsors and funders are looking to mini-perm solutions with medium-term debt that require refinancing. Until recently, payments had to be made in Zloty with the equivalent value in Euros expressed in agreements. However, due to recent amendments to legislation, it is now possible to make payments in Euros.

There remains considerable will on the part of the Polish government to implement new PPP projects in Poland, with such investments being heralded as an antidote to the economic crisis. The General Directorate for National Roads

and Motorways is currently one of the most significant investors in the Polish market and its budget for 2009 for road projects was about PLN 23 billion.

In addition, International Financial Institutions, such as EIB and EBRD, have been active in providing finance to infrastructure projects (such as motorway projects) which have been struggling to obtain private finance in the current market conditions. Also, breaking down specific projects into a number of smaller value/phased projects is seen by the government as a way of providing more competition and facilitating financing for infrastructure.

Security issues

Generally, Polish law permits funders to take a security package which supports a typical limited recourse project finance structure. Funders are able to take security over any real property in the project, key agreements, shares and cashflows. Importantly, Polish law does not restrict the ability of the funders, the project vehicle or the public sector partner to enter into a direct agreement which restricts the ability of the public sector partner to terminate the PPP agreement prior to giving the funders the option to step-in to rectify a default and/or to transfer the PPP agreement or the shares in the project vehicle to a third party.

In Poland, there are several different ways to secure receivables of the funders to a PPP project. What kind of security is used will depend on the specific character of the PPP project and on the requirements of the funders. Below are some examples of funder protection.

One way to secure receivables is through a "mortgage" on a property in favour of the funders. Such a mortgage will be regulated by the Act on the Land and Mortgage Register and Mortgages of 6 July 1982. In accordance with the New Polish PPP Act, both public and private partners may contribute property to the special purpose vehicle established for the purpose of implementing the project. Where property is contributed, the funders can take a mortgage over this asset. The process of registering the mortgage generally takes between two weeks to two months depending on the court.

The second possible form of security is a "registered pledge" regulated under Polish contract law and the Act on Registered Pledges and the Pledge Register of 6 December 1996. A registered pledge can be established in order to secure receivables of State legal persons, domestic and foreign banks and business entities. They can be established over movables or disposable property rights and, in particular, receivables or shares. To establish a registered pledge a written agreement is required and the pledge will need to be registered in the pledge register. Generally, the process of registration should take approximately one week.

Another way of securing funders' receivables is to establish a "financial pledge". Financial pledges could be established in favour of the funders over funds credited to the project vehicle's bank accounts. This way of securing funders' receivables is frequently used in PPP projects in Poland and requires only the execution of the relevant agreement between the project vehicle and the funders. No registration is required.

Government response to the financial crisis

As a response to the world economic crisis and as a result of the European Commission recommendation included in the "European Economic Recovery Plan" (EERP) of 26 November 2008, on 30 November 2008 the Polish government presented the "Stability and Development Plan" that already is and will continue to be enforced in future in order to mitigate effects of the weak economic situation in Poland caused by the world economic crisis.

This plan assumes that relevant steps will be taken including:

— stabilisation of the financial sector (e.g. by guarantees and security granted by the State Treasury);
— demand stimulation (in particular investment demand stimulation) by maximising use of EU funds granted to Poland for years 2007–2013; and
— stimulation of consumer demand by reducing taxes and protecting the labour market.

In future, to mitigate deterioration in the Polish economic situation, the Polish government intends to limit the budget deficit and growth of public debt by reforming public finance and privatising a number of state enterprises and other assets owned by the State Treasury. The government has already started the process of privatising companies such as Polish Shipyards (*Polskie Stocznie*) and energy company Enea S.A.

Summary

The Old PPP Act was complicated and restrictive. As a result, no PPP projects were implemented under the framework of the Old PPP Act. Instead, other procurement methods were used.

It is expected that under the New Polish PPP Act and the Concession Act, the PPP process will be streamlined and this will assist more PPP projects to achieve financial close more quickly and that this will be a stimulus to economic growth in Poland. However, until the new PPP rules are applied to some pilot projects, the rules remain as yet untested.

The Polish government appears to have the political will to implement new projects using the PPP formula and there has been a significant change in the climate for PPP investments in the Polish market. The Ministry of Economy, is a great supporter of all PPP initiatives. The Polish government has also undertaken some legislative initiatives to simplify the procedure of starting a business, which will facilitate international investors entering the Polish PPP market.

CMS experience includes:

Gdansk Oil Refinery: Advised on the EUR 1.75 billion upgrade and extension of an oil refinery in Gdansk.
A4 Road, Poland: A 2009 toll road project with a total deal value of approximately USD 83.3 million.
A1 Motorway, Poland: EUR 1.7 billion project involving the construction, operation and financing of the A1 Motorway from Gdansk to Torun.



Romania



Gabriel Sidere, gabriel.sidere@cms-cmck.com

Country overview

Romania's economic performance has been remarkable in recent years and the country is steadily approaching EU standards for income, competitiveness, and living. Romanian economic growth, the fastest in the EU in the third quarter of 2008, slowed dramatically in the last quarter. Following real GDP growth of 7.3% in 2008, the effects of the global economic crisis and policy tightening resulted in negative growth of -7.1% in 2009. The rescue package agreement with the International Monetary Fund ("IMF"), signed in late March 2009, responded to Romania's needs but also imposed cuts in pensions and salaries in order to reduce the budget deficit to a level acceptable by the IMF. According to the IMF, there is hope that it may result in positive growth of 0.8% in 2010 and 5.1% in 2011.

In 2009 Business Monitor International forecast Romania's construction industry to be worth RON 32.62 billion (USD 13.31 billion). The sector's value is forecast to continue increasing and we expect it to be worth approximately RON 43.13 billion (USD 18.12 billion) in 2012. However, to date no major PPP work has been started in Romania.

A number of major infrastructure projects have been planned or are under way in Romania. Foreign companies such as Bouygues, Astaldi and Strabag have a strong presence in the Romanian construction industry. New companies such as General Electric and AFI Europe are entering Romania to take advantage of the growth potential of the economy. The outlook for Romania's infrastructure is positive, with major governmental and EU investment plans in the pipeline, which should encourage foreign investment.

Romania's efforts to implement better strategies in the field of PPPs are coordinated by the PPP Central Unit. The PPP Central Unit, which is run by the Ministry of Economy and Finance, drafts the Romanian government's policy and strategy in order to promote and implement PPP projects, establishes and promotes identification and structuring procedures, supports public and local authorities in drafting and implementing PPP projects and keeps a database on central and local PPP projects and concessions of public works, public services and goods.

In 2010 Economic Freedom index published by the Heritage Foundation and the Wall Street Journal[1], Romania was placed 63rd overall and 29th in the Europe region, and its overall score is higher than the world average.

Overview of legal system

Romania is a civil law jurisdiction, governed mainly by the Civil Code of 1864 and the Commercial Code. The two codes are currently considered obsolete and the government has set in motion the process to produce a modern Civil Code intended to better respond to the requirements of a modern society. The aim is to unify the two codes in one Civil Code and abrogate the existing Commercial Code.

The draft of the new Civil Code was adopted in 2009 by the government, and currently is pending before the Parliament, the code being expected to enter into force in one or two years. There may however be opportunities to accelerate the legislative process.

[1] http://www.heritage.org/Index/Country/Romania

Specific PPP/Concession law

Romania does not currently have a specific PPP law but is in the process of enacting one (see below). Following the EU's recommendations, in 2006 the Government Emergency Ordinance No. 34/2006 on public procurement contracts, public works concession contracts and services concession contracts ("GEO No. 34/2006"), was enacted in order to transpose in the Romanian legal system the provisions of EU Directives 17/2004 and 18/2004. The unitary law facilitates usage by all participants in the public acquisition process. In addition there is a separate law on concession of goods in the public domain.

The main guidelines and features of the new unitary law are set out below. The question of whether the law will be successful in the PPP context is a difficult one to answer until such time as it is tested, but there is a general consensus in Romania that the new law is an improvement on that prior to EU accession.

Draft PPP Law

Given the need for a specific PPP regulation in Romania, a new piece of legislation on PPPs has been recently approved by the Senate and is now pending approval of the Lower Chamber of the Parliament (the "Draft PPA Law[2]").

The Draft PPP Law makes the distinction between a concession of public works and services, a concession of public assets already regulated by the current legislation as described above and a PPP agreement. The latter will not be governed by public procurement laws or public concessions but exclusively governed by the Draft PPP Law and implemented by means of incorporation of a contractor.

According to the Draft PPP Law, there will be three key elements in the development of a PPP project: i) the pre-project agreement; ii) the PPP agreement; and iii) incorporation and operation of the contractor.

The Draft PPP Law envisages the following main types of agreements:

a) *Design – Construction – Operation Agreements* – the investor undertakes to design, construct and operate the project for the entire term of the agreement and may undertake to also provide certain services;
b) *Construction – Operation – Renewal Agreements* – the investor finances the construction and operation and ensures the maintenance of the project in exchange for fees paid by the users of the public assets/service. The fees charged by the investor are those included in its offer made to the state entity and cannot be reviewed during the term of the agreement. However, at the date of expiration of the original term of the agreement, the investor may renegotiate the fees and renew (extend) the agreement;
c) *Construction – Operation – Transfer Agreements* – the investor finances the construction, operation and maintenance of the object being entitled to profit from the public use of the object on contractual terms agreed according to the law. At the end of the term of the agreement the assets are transferred to the public entity with no possibility for an extension;
d) *Lease – Development – Operation Agreements* – the investor leases certain public assets from the public entity, develops and operates the project;

[2] A draft law approved by the Senate has to be also passed by the Lower Chamber of the Parliament, promulgated by the President and then published in the Official Gazette. It will enter into force in five days from its publication in the Official Gazette, or at another date if so provided in the text of the law.

e) *Renovation – Operation – Transfer Agreements* – the investor finances the renovation, operates and maintains the project during the entire contractual term.

The above mentioned structures are examples given by the legislator, which shows flexibility and allows the parties to negotiate any other structure of agreement provided that it observes the mandatory provisions of the law.

The maximum term of a PPP (including any renewals/ extensions) is 49 years.

As a procedural matter, the Draft PPP Law requires the approval of the Romanian government or the public entity entering the agreement as a condition for validity of the agreement or any amendments thereof.

At the termination of the contract, regardless of the cause, all assets arising from the PPP are automatically transferred to the public entity party to the agreement, free of any charges and encumbrances.

In the case of termination, the investor is under an obligation to ensure continuity of the public service until the public entity or the new investor takes over its contractual obligations. In the case of unilateral termination by the investor, there is no compensation due from the public entity or the contractor for the part of the investment executed by the investor based on the PPP agreement up to its termination date.

With regard to financing, the Draft PPP Law provides that any asset (movable or immovable) arising from the PPP may be encumbered or mortgaged for the duration of the PPP agreement. In case of default by the private investor, the PPP agreement shall not terminate if the lender is willing to replace the private investor by undertaking all its rights and obligations under the PPP Agreement ("step in").

Special rules are put in place for the operation of the contractor as follows:

— the contractor shall be incorporated only for the duration of the PPP agreement; at the termination of the PPP the contractor shall be liquidated and its assets transferred to the public entity;
— the PPP assets shall be managed by the contractor based on a management and services agreement concluded by the contractor with both of the PPP partners (the public entity and the investor);
— the contractor's main object of activity is established as being the operation and arrangement of all the stages of the PPP project until the transfer of assets to the public entity; and
— the contractor may not decide on matters related to the change in ownership status of the assets contributed by the public entity or on the assignment of its contractual rights.

The competent authority for coordinating implementation of PPP projects in Romania, the PPP Central Unit is to reorganised and transferred under the direct subordination of the General Secretary of the government.

The government decision dealing with the above mentioned reorganisation and transfer as well as the methodology for implementation of the Draft PPP Law is due to enter into force within maximum of 90 days from the date of entry into force of the Draft PPP Law.

Procurement Laws

The guidelines of the procedure established by GEO No. 34/2006 are the following:

— promoting free competition amongst bidders – this means that the tender requirements should be drafted so that they promote and enable competition

(e.g. indication of budgets, technical requirements that can be met by numerous companies);
— guaranteeing equal treatment and non-discrimination among bidders – i.e. all participants should be assessed by the same standard and the requirements indicated in the tender documents should be drafted so that certain potential participants are not ruled out on discriminatory grounds;
— efficient utilisation of public funds - this means that the contracting State authorities are bound to acquire the most efficient services/products, tailored to their needs, for the most convenient price available on the market;
— transparency – the procedures have to be available to everyone and easily monitored by any interested party; and
— proportionality – the requirements included in the tender documents have to prove reasonable/adequate to the final goal of that tender.

As regards the specific procedures that may be followed for awarding the procurement contract, they are:

a) open auction (takes place in one single stage, any interested supplier, contractor or provider is free to submit an offer);
b) limited auction (takes place in two distinct stages, only the candidates selected in the first stage being permitted to participate in the second one);
c) negotiation with a single source (the contracting authority discusses and negotiates the contracting clauses, prices included, with a specific supplier, contractor or provider; only candidates selected by the contracting authority in the first stage will be invited to make an offer in the second stage);
d) offer request (a simplified procedure according to which the contracting authority requests offers from several suppliers, contractors and providers);
e) solutions contest (allows the contracting authority to obtain, especially in the territorial planning, urban and zoning field, a plan or a project selected by a jury on a competitive basis);
f) negotiated procedure with prior publication of a contract notice;
g) negotiated procedure without prior publication of a contract notice;
h) request for tender;
i) design contests; and
j) competitive dialogue.

The latter is applicable only in the case of complex contracts when the contracting authority is not objectively able to define the technical means capable of satisfying its needs or objectives and/or is not objectively capable of specifying the legal and/or financial make-up of a project.

In Romanian legislation the classical PPP concept is replaced with a contractual PPP concept. Generally a private contractor is selected through the bidding process. The contractor designs and builds a facility for a fixed fee, rate or total cost, this being one of the key criteria in selecting the winning bid. The contractor also assumes risks involved in the design and construction phases. Usually, in this type of arrangement there is no strong incentive for early completion of a project.

Both procurement contracts and public works concession contracts can be awarded under the provisions of the GEO No. 34/2006. The public works concession agreement has mainly the same features as the procurement contract, but in addition it gives the contractor the right to exploitation and administration of the public works.

Obligations arising under a contract that was subject to the public procurement procedure and the contract itself are not transferable. However assets used in performing the agreement are transferable, provided that they are not within the public domain of the state. For those belonging to the private domain of the State certain restrictions may apply. Deciding whether assets are in the public or private domain is an important but sometimes a difficult distinction to make.

Assets in the public domain are generally assets which are used to supply services and infrastructure in Romania without a commercial basis. Obvious examples are roads, waterways and national parks. These assets can never be transferred to private ownership as they are fundamental elements for the supply of essential and indivisible infrastructure. However, it may be possible to transfer certain State assets from the public to the private domain where circumstances have changed. For example, land may have been set aside with the purpose of building roads or rail in anticipation of future development and demand. Where this development and demand never materialised, such land may be transferred into the private domain and ultimately sold to private interests.

Assets in the private domain are assets controlled by the state that have some commercial basis. This will include assets used by State-owned enterprises in the supply of goods and services that have some commercial, income-generating business model, whether or not that business actually produces a profit for the State. Examples include the generation of power, the transmission of power or telecommunications (including broadband internet), the rolling stock and concessions for the operation of public transport or the management of state facilities, such as hospitals and prisons.

Over 5,000 challenges against the contracting authorities organising tenders under the GEO No. 34/2006 were filed in 2008. This was the result of very permissive legislation: the stamp taxes were very low and any interested person (i.e. bidders or any other person) could challenge the tender either before the National Council for Settlement of Challenges, a jurisdictional body entitled to solve only disputes arising out of pubic tenders or before the courts at law. The immediate result of the challenge was the suspension of the tender. Therefore, numerous public tenders were delayed or cancelled because of bidders making excessive use of the possibility to challenge them at a very low cost and with virtually no threat of being fined or otherwise sanctioned for filing groundless challenges.

In early 2009, the GEO No. 34/2006 was amended to put an end to unreasonable challenges that blocked the tenders. Consequently, only a limited category of interested parties may challenge the tender (i.e. bidders having a legitimate interest and suffering loss as a consequence of the contracting authority's acts). This category of interested parties may challenge the tender before either the National Council for Settlement of Challenges or the courts at law but only when the contract to be awarded is a services or construction contract for the national transportation infrastructure.

Other categories of interested third parties, who claim they suffered harm due to an administrative act issued by the contracting authority, may challenge the tender only before the courts at law. A stamp duty of 2% of the procurement contract value must be paid by interested parties who wish to file a challenge against a tender. This stamp duty is intended to discourage groundless challenges. In addition, the challenge no longer automatically suspends the tender; it only postpones the award of the contract.

Local funding market

Under Romanian legislation all State bodies aiming to enter into public procurement contracts, public works concession contracts and services concession contracts are under an obligation to organise a tender (i.e. public procurement procedure) to award the contract. The majority, if not all, projects completed or under way have been financed from the public sector budget following the passing of a law for each specific project approving the additional expenses in the budget of the contracting authority. The government is currently looking for alternatives in financing such projects (e.g. the Romanian government is negotiating with the European Bank for Investments regarding the financing for

the Bucharest-Ploiesti motorway). As mentioned above, no major PPP work has been completed in Romania and therefore we do not yet know whether local or international banks are likely to get involved in the future.

There are certain VAT exemptions for public entities acting in their capacity as holders of public power. The general rule, with caveats (the situation may be different depending on assets/services transferred), is that the transfer of assets from public to private sector is subject to VAT when public entities are acting in their non-public capacities. The transfer of ownership of assets is generally subject to VAT (with certain exemptions for real estate). The applicable VAT rate is 19%.

Stamp duty applies to real estate transfers; depending on the value of the transferred assets, the stamp duty cannot exceed 0.5% for real estate transactions among legal entities. Note that there is no special VAT or stamp duty regime applicable to concessions in Romania.

Security issues

The types of security instrument available under Romanian law are as follows:

a) mortgage over real estate, buildings and certain interests in real estate;
b) security interest over shares;
c) security interest over bank accounts;
d) security interest over receivables arising under contracts (including the right to claim and receive damages), including, for example, the proceeds of insurance policies; and
e) security interest over present and future movable assets (including equipment, inventory, etc.).

A typical limited recourse project finance structure is permitted under Romanian law and, while it is not common in Romania for lending banks to insist upon 'direct' or 'three-party' agreements with project counterparties, this has been achieved in certain project financings for key project contracts. However, we are not aware of any of these features having been used in a PPP context in Romania to date.

Generally, a valid security interest can be created over any type of movable assets, present or future, tangible or intangible (e.g. bonds), but there are certain anomalies, including:

— it is not clear whether security may be taken over a building in the course of construction before it is registered at the relevant land registry in Romania;
— it is not clear whether a security interest over receivables arising under a contract can extend to pass the exercise of the rights, powers and discretions arising under that contract (for example, to terminate it) to the security holder;
— the service of notice of security interest on a third party (including account banks, insurers and counterparties to project documents) does not automatically cause rights to arise as between the security holder and the third party, for example for the security holder to claim a receivable directly from that third party. This will, however, occur on enforcement of the security interest (provided notice is properly given);
— the right to exercise voting rights on shares is not capable of transfer or alienation, and so will not accrue to a security holder under a share pledge;
— a mortgage may only be enforced through a court-supervised auction process; and
— no receiver, administrative receiver, manager or equivalent is provided by Romanian legislation.

All security interests above are subject to registration, which establishes the priority ranking of security interests. Once registered, the security is "opposable to" (similar to "binding upon") third parties.

Government's response to the financial crisis

The government's response to the financial crisis has been to introduce new measures. As already mentioned above, GEO No. 34/2006 was recently amended in order to implement the EU's recommendations on public procurement. The amendments aim to improve the public procurement system and make it more flexible by reducing bureaucracy and the duration of public procurement proceedings.

These amendments include:

— the provision of measures to speed up infrastructure works contracts;
— the obligation of the contracting authority to award the public procurement contract within 20 days as of the date the offers are opened (extension may be granted in exceptional circumstance); and
— measures to discourage ungrounded challenges of the awarding process.

Furthermore, the National Authority for the Regulation and Monitoring of Public Procurement has issued various orders and guidelines aiming to support the public procurement process. For example, Order 51/2009, dealing with restricted competitive tender and its negotiation, and the publication of a contract notice, expressly provides for the right of the contracting authority to speed up the public procurement proceedings, especially in the current economic downturn.

However, there are currently no specific provisions in relation to PPP. As stated above, the current Romanian legislation does not cater for every type of contracts and arrangements to be made between public and private entities. Since the beginning of 2009, there have been discussions, at an institutional level, to introduce new project laws exclusively in relation to PPP. However, due to political reasons, these discussions are likely to be deferred.

Currently, Romania does not use the PPP type agreements for public infrastructure projects. There are three ongoing projects for the construction or completion of highways and a number of smaller projects. The type of contracts used for these projects is a combination of a public procurement contract and a concession agreement. No significant negative impact on the completion of these projects has been noticed since the beginning of the economic downturn.

Summary

Two years after accession to the EU, Romania has an emerging economy and there is an urgent need for investment in infrastructure in general. Although there have been discussions on the need to implement PPP specific legislation, the Draft PPP Law is still awaiting the approval of Parliament. Until the enactment of the PPP legislation, the current legislation on public procurement continues to be applicable for all projects initiated by public bodies. The procedure is quite slow and the risk suspension of tenders due to challenges was high until the beginning of 2009. The government is taking measures to optimise the current procedure and is also looking for external financing.





Russia

Stephen Cozens, stephen.cozens@cmslegal.ru

Country overview

Russia has not been immune to the global economic crisis and experienced an economic downturn in 2008 and 2009. The PPP sector was no exception. By way of example, two high profile PPP projects in St. Petersburg (the Orlovsky Tunnel and the Light Rail Express) were suspended due to constraints on the public finances of the St. Petersburg government. A number of regional PPP projects were also put on hold.

However, with signs of economic recovery, 2010 is seeing an increase in activity in the realisation of PPP projects in Russia. This is motivated by a need to modernise Russia's infrastructure, which is in very poor condition and continues to deteriorate.

Three key PPP projects have reached financial close in the first half of 2010:

— the Moscow – St. Petersburg Highway (section 15–58km);
— the new link road between the Moscow ring road and the federal motorway "Belarus" Moscow-Minsk (the M1 highway); and
— the development, reconstruction and operation of facilities at Pulkovo airport (St. Petersburg).

There is also a healthy pipeline of projects which are at the development or procurement stage, including:

— the Yanino domestic waste management plant near St. Petersburg;
— the Volgograd toll road;
— the Moscow region central ring road;
— the Moscow – St. Petersburg toll road (section 58–684km);
— several municipal water treatment projects, including in the cities of Sochi, Rostov-on-the-Don and Yaroslavl; and
— the operation and maintenance of facilities at Sheremetevo airport (Moscow).

Russian federal and local authorities are becoming increasingly engaged in the development of PPP. At a federal level both chambers of the Russian parliament have established and operate PPP councils. Several federal ministries are also managing PPP councils, including the Ministry of Transport, the Ministry for Economic Development and Trade and the Ministry for Culture.

There are also a number of federal ministries procuring PPP contracts in their relevant areas of responsibility, namely:

— Roszheldor (the federal agency responsible for procuring railway projects); and
— Rosavtodor (the federal agency responsible for procuring federal roads projects).

Recent trends show that the federal government views the PPP sector as a leading area for development and the attraction of foreign investments.

In addition, there are now three regional PPP centres in Russia and several regions have adopted local PPP legislation (including Dagestan, Kemerovo, Omsk, Stavropol, St. Petersburg and Tomsk). Several other regions (such as Volgograd) are in the process of adopting their own PPP law. In 2009 regional projects were initiated in the following sectors: the reconstruction and construction of waste plants, the renovation of electricity and water supply facilities and the reconstruction of childcare centres and public gardens.

In July 2009 President Medvedev signed the federal law "On State Company Rosavtodor", which immediately entered into effect. Under this law, Rosavtodor is responsible for the design, construction and repair of the roads designated to it. Rosavtodor is able to enter into PPP projects for those roads for which it is responsible.

In August 2009 the Investment Commission responsible for the pre-approval of financing from the Russian Investment Fund approved three significant infrastructure projects: Belkomur (a railroad in Siberia), the construction of a mining and smelting facility in the Amur river region and the construction of an electricity transmission line in Magadan.

In the 2010 Economic Freedom index published by the Heritage Foundation and the Wall Street Journal Russia's economic freedom score is 50.3, ranking it 143rd overall in the 2010 Index. Russia is ranked 41st out of 43 countries in the European region, and its overall score is below the world average. Its score is down 0.5 points from last year's rating, reflecting reduced scores in six of the ten economic freedoms, especially business freedom, investment freedom, freedom from corruption and financial freedom. Still, Russia scores above the world average in fiscal freedom and government size, partly because of earlier taxation and budgetary management reforms.

State involvement in economic activity remains considerable and may add to the cost of doing business in Russia. Foreign investment may face official and unofficial hurdles, including inconsistency in law enforcement and bureaucracy.

Construction inflation remains high, although it has stabilised mostly due to the slowdown in economic growth.

Overview of the legal system

The Russian Federation is a civil law jurisdiction operating under a civil code.

Specific PPP legislation

At a federal level, PPP projects are regulated by:

— the Law "On Concession Agreements" (the "Concession Law");
— the Land Law Code and laws regulating land issues;
— the City-Planning Code and laws regulating construction activity; and
— special laws and decrees (i.e. the Law "On Motorways"; the governmental decree "Rules of budgeting and use of budget funds of the Investment Fund of the RF").

It is to be noted that a number of projects have been procured by the St. Petersburg government under the law "St. Petersburg's Participation in Public Private Partnership" and the list of proposed projects in St. Petersburg that are based on local PPP legislation is growing.

The Concession Law was adopted in 2005, and was subsequently amended in June 2008, June and July 2009. Further amendments are expected in 2010. These amendments mainly relate to the procurement of concession projects in the housing and utilities sectors. Further amendments are being proposed to stimulate PPP development in other sectors such as sea-ports, waste, electricity, education and healthcare.

The Concession Law applies to the following assets:

— roads;
— pipelines;
— sea and river ports and vessels;
— airports;
— water treatment facilities;
— facilities for the generation, transfer and distribution of electricity and heat;
— railways, subways and other public transport;
— public communal infrastructure and other public utilities;

— public health facilities; and
— education, culture and sport facilities.

The Concession Law sets out the general rules for entering into concession agreements, including the material terms to be set out in the agreements.

A concession tender will specify some or all of the following:

— any time limits for the construction and/or renovation of the asset;
— the required output of goods, levels of work or provision of services when the asset is fully built or operated and time limits for achieving this output;
— the amount of the concession payment; and
— the maximum price/tariff for goods that are produced and services provided and also any amounts payable by the concessionaire to the procuring authority.

The Concession Law also imposes a number of restrictions, which can create bankability issues. Such restrictions include:

— limits on the concessionaire's choice of bank and insurance arrangements;
— a prohibition on the resolution of disputes taking place outside Russia, although an *ad hoc* arbitral panel can hear disputes and international arbitration rules can apply as long as the process takes place in Russia;
— a prohibition on the substitution/change of the concessionaire at the construction stage; and
— a prohibition on the pledge of the concessionaire's rights under the concession agreement.

The Concession Law also has a number of notable omissions, for example, it is silent about whether the procuring authority can enter into a direct agreement with funders (although a number of procuring authorities have already offered a limited form of direct agreement) and there is no procedure in place for resolving technical disputes between the procuring authority and the concessionaire.

It is worth noting that a number of the limitations of the Concession Law are addressed in St. Petersburg's PPP law, which is considered by many to be a more progressive statute.

Procurement law

A procurement law exists in Russia, but it does not extend to concessions entered into under the Concession Law and relates only to the placement of "traditional" contracts for the purchase by the State of goods, works and services. Concession arrangements are not expressly carved out from the procurement law, but the procedure of entering into concession agreements is governed by the Concession Law.

Local funding market

As a result of the recent economic crisis infrastructure projects (other than the notable exceptions mentioned above) are currently experiencing problems securing funding.

Nevertheless, international financial institutions such as the World Bank, the International Financial Corporation, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development and the European Investment Bank remain interested in financing infrastructure projects in Russia and are becoming increasingly important as a source of funding.

The role of development banks is also increasing. In Russia this role is performed by the State corporation "Bank for development and foreign economic affairs" *(Vnesheconombank). Vnesheconombank* provides

financing for projects which are deemed to be important to the State and which are carried out on a PPP basis, including those partially financed from the Russian Investment Fund. As *Vnesheconombank* is not a commercial bank, it is not obliged to make a return on its investments and therefore can offer financing to projects on more favourable terms than commercial institutions. *Vnesheconombank* participates in infrastructure projects by providing guarantees, suretyships, loans as well as equity.

In addition, certain export credit agencies have expressed interest in providing guarantees to effectively "wrap" commercial bank lending where a national of the relevant agency is the sponsor and/or a major sub-contractor to the project and there is therefore significant national interest in a successful financing of the project.

It is expected that federal authorities will shortly adopt the law "On infrastructure bonds" that is currently being developed and discussed. When adopted, this law should provide for the ability to raise funds through the issuing of infrastructure bonds.

Security issues

Financing organisations are interested in reforms to legislation to specifically allow for the concept of direct agreement arrangements to secure their investments. In particular, financing organisations are seeking amendments which would allow lenders to assume the rights and obligations of the concessionaire under its key commercial contracts (which is currently restricted under the Concession Law) rather than having to seek to enforce security at an offshore holding company level. At the moment a draft law covering this issue is being discussed within the State Duma PPP council.

In addition, lenders are seeking amendments to abolish the prohibition on the concessionaire pledging its rights under the concession agreement.

Government response to the financial crisis

The Ministry for Economic Development and Trade has drafted substantial amendments to the Concession Law and other legislation that are aimed to stimulate growth of concession projects in the water, waste and electricity sectors. These activities are State-regulated and require the application of complicated tariff scales. The proposed amendments address tariff regulation procedures aimed at making private investments more secure. A substantial breakthrough is that these amendments will allow a concessionaire to pledge the asset of the PPP agreement or assign and pledge the PPP agreement itself.

Summary

In conclusion it can be seen that the Russian federal and regional authorities recognise the need for the development of infrastructure projects on a PPP basis and are taking determined steps to create the legal framework necessary to attract investors (both foreign and domestic) to such projects.

CMS experience includes:

Pulkovo Airport: This project has an approximate value of USD 1 billion and involved the upgrade and extension of the Pulkovo Airport.

NADEX/St Petersburg light rail project: This project involved the finance, design, construction and operation of a 22km long light rail line. This project has an approximate value of USD 420 million. This project is part of a long-term programme for the development of the fast tram system in St. Petersburg.

Orlovsky Tunnel project: A toll tunnel project under the Neva River that involved advising on the finance, design, construction and operation of the project. This approximate deal value is USD 1.2 billion.

Moscow – St Petersburg toll road: A 2010 toll road project that involved the expansion and development of 43km of the Moscow – St. Petersburg express highway. The total value of this project is approximately USD 2 billion.



Serbia



Radivoje Petrikić, radivoje.petrikic@cms-rrhs.com

Country overview

Serbia, as one of the last Eastern European countries to undergo the transition to democracy, has enjoyed relatively strong economic growth since political changes in 2000. However, the current global economic downturn has not bypassed Serbia and the government forecast of 3% growth in 2009 was optimistic (GDP shrank by almost 3% in 2009). GDP is expected to grow in 2010 by almost 2%[1]. The vulnerability of the Serbian economy is also reflected in the severe devaluation of the national currency, the Serbian Dinar, which has lost around 20% of its value over the last six months.

To date only one PPP project has been attempted in Serbia, the Horgos to Pozega highway, which had an estimated value in excess of EUR 1 billion. This project was terminated two years after signing because financial close had not been achieved. The concession agreement for the highway was entered into in 2007 with a major international consortium and, after a series of controversies, was terminated in early 2009. Those opposing the project claimed that it had not been concluded in a sufficiently transparent manner and that the Concession Law had not been fully respected.

Despite the failure of the only PPP project so far, the government has announced that it will not abandon concessions as a way of financing infrastructure development and will seek opportunities to reopen the concession procedure for this route and others.

There is currently no government PPP promotion body in Serbia.

In the 2010 Economic Freedom index published by the Heritage Foundation and the Wall Street Journal[2], Serbia was placed 104th overall and 38th in the Europe region. Overall it ranks below the world average, although it does score above the world average in trade, fiscal and labour freedom. The low score in freedom from corruption, combined with a poor ranking in investment freedom, is the greatest concern for Serbia and these are areas in which Serbia is working hard to improve.

Overview of legal system

Serbia is a civil law jurisdiction in which the civil law has not been codified.

Following political changes in 2000, Serbia entered a period of rapid changes to the legal environment in its endeavours to harmonise its legislation with EU regulations. Despite significant progress there is still a great deal of legislative work to be done before Serbia is in a position to join the EU.

Specific PPP/Concession law

Serbia has a specific Concession Law that was enacted in 2003 *("Official Herald of the Republic of Serbia" No. 55/2003)* (the "Concession Law"). However, Serbia does not have a specific PPP law that allows other forms of public-private partnerships apart from concessions.

The Concession Law regulates the manner and procedure of granting the following types of concession: (i) for the utilisation of natural resources; (ii) for goods in common use designated by law as the property of the Republic of

[1] Data from the IMF's World Economic Database, April 2010
[2] http://www.heritage.org/Index/Country/Serbia

Serbia; and (iii) for performing activities of general interest. It also regulates the subject of the concession, the duration of the concession, the terms of the concession contract, the concession fee, materialisation of concession rights and duties, the founding and operation of the concession enterprise, the transfer of the concession and any other matters relevant for the realisation of the concession. The Concession Law sets out generally applicable regulations. The terms and conditions of each specific concession are regulated in detail by a particular concession act made by the government for each specific project and in the concession contracts concluded between the concession grantor and the concessionaire in line with the terms and conditions stated in the specific concession act.

Under the Concession Law, a concession means a contract relating to one of the activities above, ceded by the Republic of Serbia or by a local self-government unit to a domestic or foreign private person for a definite period of time, under the conditions prescribed by the Concession Law and against payment of a concession fee by the concessionaire.

The subject of a concession may be the exploration and exploitation of all kinds of mineral raw materials or it may relate to the building, renovation, modernisation, restoration, maintenance and/or utilisation of:

— water resources management facilities, including dams and storage lakes, water supply and water distribution systems, irrigation and drainage systems, and sanitary condition systems;
— roads;
— public railroad infrastructure;
— facilities for air traffic, equipment and airports;
— river navigation facilities and harbours;
— telecommunication facilities;
— oil pipelines, gas pipelines, storage facilities, transport and distribution of gas;
— municipal facilities for the purpose of performing utility activities;
— power-supply and other facilities for the purpose of production, preservation, transfer and distribution of electric and heating energy;
— river and lake shores;
— healthcare institutions and providing healthcare services;
— sport and recreational facilities, sports grounds and spaces for sports and recreation, including centres for sports and cultural activities;
— thermal springs for health and production purposes;
— facilities in spas, areas with natural curative properties and other natural values, for the purpose of their utilisation; or
— tourist trade infrastructure facilities.

The subject of concession may also include the performance of other activities that are designated by law as activities of general interest. Such concessions may be granted for a term not exceeding 30 years.

The procedure for granting a concession is initiated by a proposal from the competent ministry, a local self-government competent authority or an interested party.

The ministry in charge then prepares a draft concession act for the proposed concession taking into account the views of the government and/or the national assembly and various economic, financial, social and other indicators. The concession act is then passed by the government of the Republic of Serbia and published in the "Official Herald of the Republic of Serbia".

Under the Concession Law a public tender procedure for granting a particular concession must be initiated by a public tender advertisement, which is published in specified publications.

The concessionaire must be chosen by the government within 30 days of completion of the public tender procedure and the decision on the choice of concessionaire published.

A concession contract must be concluded in line with the requirements of the Concession Law and the particular concession act within 60 days from the date the concessionaire is chosen. The contract must be concluded by the government, on behalf and for the account of the Republic of Serbia (or by a local self-government competent authority on behalf of a local self-government unit) and the concessionaire.

A concession contract, a concession grantor and a concessionaire may conclude a separate contract with banks and other financial institutions to regulate in detail the matter of financing the concession. This separate contract may provide that, if bankruptcy or winding-up proceedings are brought against the concession enterprise, at the proposal of a bank or other financial institution, the concession grantor may replace the concessionaire with another concessionaire who meets the requirements provided for by the particular concession act.

The concession fee payable by the concessionaire is fixed depending on the kind, quality, category, quantity, purpose and market price of the natural resources or the goods in common use, and/or depending on the kind of activity, business conditions in the market, term of concession, risk assessments and expected profit. Funds raised by the collection of concession fees contribute to the revenue of the Republic of Serbia or the local self-government unit, as appropriate.A concessionaire must perform the concession activity through a separate limited liability or joint-stock company, with its head office in the Republic of Serbia. All rights and duties of the concessionaire, set forth in the concession contract, are transferred to the concession enterprise (SPV) after its incorporation. Various tax and customs duty relief and exemptions can be extended to the concessionaire or the concession enterprise.

Procurement Laws

Public procurement in Serbia is governed by the Public Procurement Act *("Official Herald of the Republic of Serbia" No. 116/2008)* (the "Public Procurement Act"), which has been enacted in order to ensure that the public procurement system in Serbia complies with the relevant EU Directives.

The Public Procurement Act regulates the procedure for procurement of goods and services and for awarding a contract for execution of works when such goods, services or works are required by governmental authorities, other publicly-funded organisations, mandatory social insurance organisations and public enterprises as well as, subject to certain conditions concerning their affiliation with the aforementioned entities, other legal entities performing activities of public interest. The Public Procurement Act provides for six different public procurement procedures depending on the circumstances:

a) open procedure;
b) restricted procedure;
c) negotiated procedure with prior publication of a contract notice;
d) negotiated procedure without prior publication of a contract notice;
e) tender for drawings procedure; and
f) small-value public procurement procedure.

The contract award criteria are "lowest price" and "economically most advantageous tender".

The Public Procurement Office is responsible for implementing the public procurement system. Its remit includes preparing laws and by-laws, monitoring public procurement procedures, protecting the public interest, collecting statistical data and publishing and distributing technical literature. A new state authority, the Republic Commission for Protection of Rights in Public Tender

Procedures, is to be formed but it will only be responsible for reviewing the appeals of aggrieved bidders.

The Concession Law and the existing procedure for the grant of concessions, as described above, is considered to be sufficient to realise concession PPP projects in the Republic of Serbia. The Public Procurement Act does not interfere with this procedure, as the granting of concessions is regulated solely by the Concession Law.

The Concession Law explicitly stipulates that an awarded concession can be transferred to another person in accordance with the concession contract and with the consent of the concession grantor. Any contract for the transfer of a concession concluded without the consent of the concession grantor is null and void.

As the practice of PPP projects in Serbia is still in its infancy, it is not possible to identify any general trends for challenging the award of a contract.

Local funding market

The current global economic downturn and uncertainty means that now is not a good time for funding new projects in Serbia. Although it is quite stable following restructuring, the banking sector in Serbia has a relatively small capacity and funding for any capital project must be sought cross-border.

As mentioned above, the only State level PPP project so far failed due to the fact that financial close could not be achieved after the concession contract had been signed.

Security issues

Generally, legislation in Serbia allows lenders to take security to effect a typical limited recourse project finance structure. Security over sub-contracts and cash flows can be taken. In addition, pledges over shares in the concession enterprise can be established in favour of lenders. Although the security structures available to lenders would allow a typical limited recourse project finance structure, as discussed above, the provisions of the Concession Law do not allow the transfer of the concession contract to lenders, a nominee or a replacement concession enterprise without the consent of the concession grantor. However, the details of the terms under which the transfer of a concession can be effected can be directly agreed between the concessionaire, concession grantor and the financial institution in a separate financing contract.

Summary

Serbia does have a specific legal framework for implementing PPP projects in the form of its Concession Law. However, as the legal framework has not been tested in practice it is not possible to give any assessment of its adequacy or to point out any major flaws in the current legislation.

Serbia is currently facing commercial and political hurdles rather than legal obstacles to the successful implementation of PPP projects. However, bearing in mind the continuing budget deficit Serbia is facing, PPP projects may be the most attractive financing tool for infrastructure development in Serbia in the future.



Slovakia



Ian Parker, ian.parker@cms-cmck.com

Country overview

Although affected by the recent financial downturn, Slovakia is maintaining a relatively strong economy. Following a decline of approximately 6% in 2009, a relatively strong growth is expected in the years to come. The relative strength of the Slovak economy is evidenced by it becoming the second of the accession countries to join the Euro, on 1 January 2009.

Whilst details of PPP projects in Slovakia have been prominent in the industry media over the last year, Slovakia does not have a large portfolio of closed deals. Many projects are in the pipeline, however, and the PPP method of procuring transport and social infrastructure is becoming increasingly popular.

Transport projects are at the forefront of Slovakia's move towards using PPP as a procurement tool. A PPP to introduce electronic toll collection equipment for HGVs was the first deal to reach contract close in January 2009. The R1 Nitra – Tekovské Nemce, Banská Bystrica, nothern bypass project, with a capital value in excess of EUR 1 billion, was the first road infrastructure deal that closed in Slovakia. Financial close was achieved in August 2009 and the project was named the 2009 Infrastructure Deal of the Year by Project Finance International.

Separately, the Ministry of Telecommunications and Transport is currently procuring two major road schemes as PPPs:

— D1 – Dubná Skala – Ivachnová, Jánovce – Jablonov, Fričovce – Svinia, with a capital value in excess of EUR 2 billion. This project reached commercial close in April 2010 with financial close expected in summer 2010.
— D1, Phase 3 – Hričovské Podhradie – Dubná Skala with a capital value in excess of EUR 2 billion. Commercial close was reached in February 2010 and financial close is expected in autumn 2010.

In the longer term, the Ministry of Telecommunications and Transport has also announced that it is to look at PPP as a way of procuring parts of the Bratislava ring road. If this project goes ahead it will also have a significant capital value and is likely to attract international bidders.

Current projects that are currently proposed or the subject of feasibility studies in Slovakia include:

— creative center in Košice.
— large hospital project in Bratislava.

The current road PPP projects being undertaken in Slovakia have attracted significant political support at the highest levels. This support and the pragmatic approach taken by the government, particularly the Minister of Telecommunications and Transport, has been a factor in the continued support of the private sector for the projects despite the size of the projects and current market conditions. It is to be expected that if PPP is introduced in other sectors this will be with the support and involvement of officials and politicians from the relevant departments at the highest levels.

There is currently no government PPP body in Slovakia, although the Ministry of Finance and Ministry of Telecommunications and Transport both have separate PPP units. There is also a private sector PPP Forum created to promote PPP and provide information and understanding of PPP within Slovakia.

In the 2010 Economic Freedom Index published by the Heritage Foundation and the Wall Street Journal[1], Slovakia

[1] http://www.heritage.org/Index/Country/Slovakia

was placed 35th overall and 18th out of 43 countries in the Europe region. Overall it scores better than the world average, and scores in investment freedom and freedom from corruption are higher than average. Slovakia's position in this index places it as the highest ranked country in the CEE region.

Overview of legal system

Slovakia is a civil law jurisdiction operating with a civil code.

Following rapid development of legislation in preparation for accession to the EU in 2004, Slovakia has had a relatively stable legislative system. Changes to legislation are driven by EU legislative changes or following consultation with and development by the relevant Ministries.

Specific PPP/Concession law

Slovakia does not have a specific PPP or concession law.

The Procurement Act (see below) does set out some requirements in relation to concessions, however these are generally related to identifying a project as a concession rather than restricting other types of procurement.

The specific requirements set out in the Procurement Act are:

— the concession period commences the first day following the occupancy permit or following the issue of the opening permit or following another event set out in the concession agreement provided that the concessionaire already had or could have revenues from the exploitation; and
— if significant building works are to be tendered by the concessionaire and not carried out by an affiliate of the concessionaire or member of the consortium, certain provisions of the public procurement act will need to be followed by the concessionaire in procuring those works. This includes publishing a notice and applying transparent tendering processes.

If the original notice of procurement identifies the project as a concession, the various requirements of a concession will need to be met by the contracts. The road projects identified above are being procured as concessions, using a so-called concession dialogue procedure which generally mirrors the competitive dialogue procurement procedure.

The absence of a PPP or concession law has not prevented the implementation of PPP projects in Slovakia. Legislation has not generally impeded the introduction of PPP contracts based on international practice for risk transfer. There are a limited number of issues that arise from legislative provisions in relation to VAT and transfer of the project agreement or concession agreement (discussed below); however, these have been addressed by the Slovak government in current projects and should not impede the success of these projects. Moreover, the Ministry of Finance is currently implementing the results of a review of the existing legislation in order to remove the remaining obstacles to PPP projects.

Procurement laws

The Procurement Act of 2006 (the "Procurement Act") governs public procurement in Slovakia. The Procurement Act implements the EU procurement directives into Slovak law and introduces the four methods of procurement identified in EU law:

— open procedure;
— restricted procedure;
— negotiated procedure; and
— competitive dialogue.

The Procurement Act as interpreted by the Slovak procurement office also allows the so-called concession dialogue procedure which can be designed by public authorities respecting the fundamental principles of the Procurement Act. The legislative provisions implemented by the Procurement Act closely mirror the EU requirements for competitive dialogue and will therefore be familiar to those involved in procurement across Europe.

It is however worth noting that the approach to interpretation of the Procurement Act and EU procurement rules in general can be rigid and qualification criteria can require considerable administrative and formal steps to be taken. Technical failures to comply with criteria, however minor, can often lead to disqualification from procedures and attention to detail in complying with requirements is required at all stages of procurement.

Public procurement procedures are overseen by the Slovak procurement office and challenges and appeals to evaluation decisions are carried out by the procurement office.

The electronic toll project was procured using the restricted procedure. However, the road PPP projects are all being procured under a concession dialogue procedure which generally mirrors the competitive dialogue procedure. It is expected that future PPP projects will be procured using the same procedure or the competitive dialogue procedure.

As stated above, the Procurement Act contains some specific provisions relating to the characteristics of a concession. The concession provisions provide limited additional considerations to the standard procedures set out in the Procurement Act and as such there is no contradiction or requirement to marry up the two processes.

The Procurement Act effectively prohibits the transfer of a project agreement or concession agreement as a new procurement process is required in order to change the counterparty to the project agreement or concession agreement. This restricts the availability of step-in or transfer mechanics to lenders as part of the security package. The Slovak government has recognised the restrictions and limitations that these provisions of the Procurement Act could have on financing of PPP projects and, in the current PPP projects, have sought to address these issues through the direct agreements with lenders. Further discussion of the approach taken is set out below in relation to security issues.

One feature of public procurement in Slovakia is that unsuccessful or de-selected bidders routinely challenge decisions at all stages of public procurement procedures. The electronic toll PPP project has been delayed by a number of challenges and appeals to the Slovak procurement office and all of the road projects have been affected by challenges to the procurement office of decisions to disqualify bidders. This culture of challenges is not unique to the PPP market and is a feature of involvement in public procurement procedures in the country.

Local funding market

Current feedback from the market in relation to the road PPP projects suggests that there remains appetite to finance PPP projects in Slovakia, although as with all jurisdictions at the current time, there are liquidity constraints affecting the availability of finance for large transactions. In this regard it remains important that multi-lateral institutions such as the EIB and EBRD are involved in financings where possible.

The original intention of the Ministry of Telecommunications and Transport was to achieve financial close on all three of the road projects mentioned within one year. Even without the impact of the financial downturn there were indications that raising over

EUR 5 billion of debt to support PPPs in one year was ambitious. Going forward a clear market strategy to ensure a consistent deal flow that does not generate competition between projects in the country or region may need to be adopted. The first of the road projects, namely the R1 project, was closed in August 2009. It is expected that the two remaining projects will close in 2010.

Security issues

Generally, legislation in Slovakia will allow lenders to take security to effect a typical limited recourse project finance structure. Lenders are able to take security over sub-contracts and cash flows. In addition both pledges and transfers by way of security are available to provide security over shares in the contractor.

Although the security structures available to lenders allow a typical limited recourse project finance structure, as discussed above, the provisions of the Procurement Act do not expressly allow the transfer of the project agreement or concession agreement to lenders, a nominee or a replacement contractor. This means that the typical direct agreement protections of step-in and replacement of the project agreement are not available.

This anomaly in the Procurement Act may be addressed as part of the legislative initiative mentioned before. However, in the road projects this issue has been addressed by providing alternative solutions in the form of direct agreements to be entered into with lenders.

Rather than lenders being given the opportunity to step-in to assume joint and several liability with the contractor, the direct agreement envisages that lenders will be able to implement a remedial plan and exercise controls over the contractor including replacement of management or sub-contractors and applying a standstill period during the operation of a remedial plan.

The direct agreement also contains provisions that allow lenders to assume ownership of the contractor and transfer ownership of the contractor in circumstances where traditionally the project agreement would be assigned or transferred.

Clearly these solutions are not without issues, including the need to explain a non-standard approach to lenders. However, they appear to have been accepted by sponsors and lenders in the current road projects.

Summary

Although Slovakia does not currently have a specific PPP law, the legal system does not contain significant hurdles to the implementation of successful PPP projects. The Ministry of Finance's work to review the legal framework for PPP's may also result in further amendments to legislation to address issues that have arisen in relation to the current projects. This review has already been approved by the Slovak government and the proposed amendments will be passed into law during 2010 and 2011.

The key issues that have arisen in PPP projects to date in Slovakia are:

— the Procurement Act provisions which do not expressly allow, and so effectively prevent, the transfer of a project agreement or concession agreement to a third party without a new procurement. This impacts on the flexibility to allow for transfer of projects by lenders or step-in by lenders in a default scenario. In the current PPP projects, this issue has been addressed through provisions in the direct agreement; and
— Under Slovak VAT legislation, VAT becomes payable on the value of a building or asset on its transfer to the public authority even if payment for the construction is being deferred (e.g. through future availability payments). This has the potential effect that the

contractor or concessionaire would need to fund a VAT payment to the tax authorities with debt facilities. It has been recognised that this structure does not provide value for money and this issue has currently been addressed by providing that the public authority will pay this VAT liability to the contractor or concessionaire immediately prior to payment becoming due to the tax authorities.

CMS experience includes:

D1 Motorway, Slovakia: A concession involving the design, build, finance, maintenance and operation of 75km of the D1 Motorway in central and eastern Slovakia. The project itself concerns five new sections of the D1 motorway between Zilina and Presov regions, connecting the country's principal cities Bratislava and Kosice.

R1 Speedway, Slovakia: This project involved advising on the design, build, finance, maintenance and operation of 40km of motorway in central Slovakia. This project involved the development of four new sections of the R1 speedway. The R1 Speedway project was the first PPP project to close in Slovakia.



Slovenia



Aleš Lunder, ales.lunder@cms-rrh.com

Country overview

The Slovenian economy has enjoyed strong growth in recent years – 6.8% in 2007 and 3.5% in 2008. Gross domestic product (GDP) decreased by 5.5% in the fourth quarter of 2009 compared to the fourth quarter of 2008. This was only the second decrease of GDP since the second quarter of 1993. According to predictions of the IMF, GDP growth in 2010 will amount to 1.4%.

The Government Council for Public Private Partnership issues a report on closed PPP projects every year. The last report that set out details of PPP projects for 2008 was published in April 2009.

The report shows that around 67% of all municipalities in Slovenia have entered into at least one PPP project in the relevant period. The sectors, excluding the health sector, in which most PPP projects have been awarded, are:

— waste management;
— drinking and waste water management;
— funeral services; and
— distribution of earth gas.

Contractual partnerships are the most common form of municipal PPP, with 256 concessions entered into in 2007, and 367 in 2008. There also have been five examples of PPP projects in the form of institutional or equity partnerships in 2008. An example of a recent major municipal PPP project is a project known as "Stožice", where the Municipality of Ljubljana is the public partner in the project to build and operate a multifunctional football stadium, sport centre and a commercial marker.

Contractual partnerships are also the most popular at national level. To date, most PPPs have been entered into by the Ministry of Justice, the Ministry of the Environment (passing more than 200 concessions) and the Ministry of Health. These have included such projects as:

— court services;
— waste and waste water management;
— hydro electronic electricity generation; and
— more than 310 specialist outpatient clinics.

Pursuant to the Public Private Partnership Act (*Zakon o javno-zasebnem partnerstvu,* Official Gazette, No. 127/2006; hereinafter the "PPP Act") the Slovenian Government passed a decision (*Odlok o Svetu Vlade Republike Slovenije za javno-zasebno partnerstvo;* Official Gazette of Republic of Slovenia, No. 61/2007 and 36/2009) establishing a Public Private Partnership Council. The Council's role is studying key policy issues surrounding public private partnership projects and identifying problems and deficiencies of the system in this area. The Council is led by the Ministry of Finance and formulates proposals and initiatives; however, the Council is not a promoting body. The department for PPP operating within the Ministry of Finance monitors and promotes the use of PPPs and drafts expert proposals for amendments to legislation. Other Ministries do not have separate PPP units.

In 2010 the Economic Freedom index published by the Heritage Foundation and the Wall Street Journal[1] ranked Slovenia 61st overall and 27th out of 43 countries in the Europe region. Slovenia's economic freedom score has improved by 1.8 points since 2009, due to improvements in trade freedom, fiscal freedom, government spending, investment freedom, labour freedom and freedom from corruption, and its overall score is well above the world average.

[1] http://www.heritage.org/Index/Country/Slovenia

Slovenia ranks 27th out of 180 countries in Transparency International's Corruption Perceptions Index for 2009. In the Economist Intelligence Unit's Index of Democracy for 2008 Slovenia ranks 30th out of 167 countries and is ranked as a full democracy.

Overview of legal system

Slovenia is a civil law jurisdiction operating with a civil code.

Slovenia has had a relatively stable legislative system since rapid development of legislation in preparation for accession to the EU in 2004. However, changes to some parts of legislation have been dramatic. Some of these changes are politically influenced, but mostly they are driven by EU legislative changes.

Specific PPP/Concession law

In 2006, the National Assembly passed a specific PPP law; the PPP Act entered into force in March 2007 and is an umbrella act for all PPP projects. Concessions relating to public utility services are also regulated by the Public Utilities Act (*Zakon o gospodarskih javnih službah,* Official Gazette of Republic of Slovenia, No. 32/1993 et al; hereinafter the "Utilities Act") and concessions with elements of public procurement are regulated by the Public Procurement Act (*Zakon o javnem naročanju,* Official Gazette of Republic of Slovenia, No. 128/2006; last amendment: Official Gazette of Republic of Slovenia, No. 19/2010).

The PPP Act systematically regulates the system of private investments in construction, maintenance and/or operation of structures and facilities of PPP and other projects that are in the public interest. The PPP Act aims to provide the contractor with stability and security of investment, the possibility of effective and safe financial investment and the return of its investment. At the same time, the purpose of the PPP Act is to ensure that public private partnerships are performed in the public interest.

The PPP Act applies on a subsidiary basis, meaning that it only applies when certain PPP issues are not otherwise regulated in another specific act, for example in the Public Procurement Act or the Utilities Act. Provisions regarding special or exclusive rights, the competitive dialogue, rules on public works concessions, assumptions for the existence of public procurement or a public procurement partnership, withdrawal conditions and consent for the transfer of status are primarily set out in the PPP Act, which prevails over departmental legislation on these matters.

The key principles of the PPP Act include non-discriminatory treatment of candidates at each stage of the procedure, transparency of procedures and competition between the candidates.

Pursuant to the provisions of the PPP Act, public private partnerships may be carried out:

- as a contractual partnership in the form of (i) a concession (the economic risk is mainly born by the private partner); or (ii) a public procurement relationship (the risk is mainly or entirely borne by the public partner).
- As an institutional or equity partnership by: (i) establishing a legal person or other entity under the conditions provided by private law; (ii) an interest in a public company being sold by the public partner; (iii) purchasing an interest in an entity of public or private law – recapitalisation; or (iv) transfer of the exercise of rights and obligations under the public private partnership.

The basic characteristics of the procurement procedure for a PPP are common to all forms of the PPP. The public partner shall carry out a preliminary procedure to determine whether the PPP is justifiable and if so, to define the fundamental elements of the PPP. The public partner

issues a call to potential promoters, as a rule once a year, to submit applications of interest in operating the PPP project (where the conditions are met for public co-financing of a private project or where there exists an interest in private investment in public projects).

The procedure for selecting the private partner and other elements of an individual public private partnership relationship are determined by regulations. The PPP contractor is selected on the basis of a public tender in which an expert committee reviews the applications and ranks those that fulfil the conditions. The public partner will select the private partner based upon the report of the expert committee.

Irrespective of the form and the regulation of the PPP procedure, the public partner may use competitive dialogue to select the most economically advantageous bid. Slovenian law must be applied to the relationship between the public partner and the PPP contractor and the end relationship with users. All matters deriving from the relationship between a public partner and the PPP contractor shall lie within the exclusive jurisdiction of the locally competent court in Slovenia (due to the prohibition on deferring to a foreign court or arbitration).

The PPP Act mirrors the regulation of PPP at EU level and gives a solid legislative base for better risk allocation, reduced life-costs, faster implementation and improved quality of public works and services. However, more than two years after its implementation it is apparent that the Slovenian public sector is not yet ready to move away from being a direct operator towards the role of organiser, regulator and controller within the framework of PPPs.

Public procurement is still the most common form of relationship between the public and private sectors. Further, private partners need to be more closely involved in the assessment of the eligibility of PPP projects and preparation of project documentation.

Procurement laws

Public procurement in Slovenia is governed by:

— the Public Procurement Act;
— the Public Procurement in the Water, Energy, Transport and Postal Services Act (*Zakon o javnem naročanju na vodnem, energetskem, transportnem področju in področju poštnih storitev,* Official Gazette, No. 128/2006; last amendment: Official Gazette, No. 16/2008, hereinafter the "Second Procurement Act"); and
— the Auditing of Public Procurement Procedures Act (*Zakon o reviziji postopkov javnega naročanja,* Official Gazette, No. 78/1999; last Amendment: Official Gazette of Republic of Slovenia, No. 19/2010; hereinafter the "Public Audit Act").

On 3 March 2010, amendments to the Public Procurement Act, the Second Procurement Act and the Public Audit Act were adopted in order to: (i) implement Directive 2007/66/EC[2] and part of Directive 89/665/EEC[3] into Slovenian legislation; (ii) remedy insufficiencies which have been identified in the course of exercising legislation; and (iii) rationalise the procedure for the award of contracts. The main amendments include: (i) clarification of a sub-contractor's role in the enforcement of the contract;

[2] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.
[3] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, last amended with Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts Text with EEA relevance.

(ii) abandonment of the price criteria as the principal criteria for the selection of the most advantageous tender; (iii) clear separation between procedures to award a public contract of a smaller value in which the offers are collected on the basis of an invitation to tender to at least three tenderers and the procedures in which offers are collected on the basis of publication of an invitation to tender on a procurement portal; (iv) the procedure for the tender examination under which the contracting authority shall initially assess tenders and classify them based on set criteria and then examine only the most advantageous tender; (v) in addition to calling a halt to proceedings and rejecting all tenders, a new possibility to resign from signing the contract after a decision on selection of the best tender has been issued is introduced; (vi) a new rule that each decision on the award of contract must contain a legal caution; and (vii) establishment of an inspectorate of public procurement within the Ministry of Finance.

The Public Procurement Act lays down the obligations of contracting authorities and tenderers awarding public supply contracts, public service contracts and public works contracts. Pursuant to the Public Procurement Act the contracting authority shall award public contracts in accordance with one of the following procedures:

— open procedure;
— restricted procedure;
— competitive dialogue;
— negotiated procedure without prior publication of a contract notice;
— negotiated procedure with prior publication of a contract notice;
— tender collection procedure with prior publication of a contract notice; and
— tender collection procedure.

The fundamental principles of the Public Procurement Act are economy, efficiency and effectiveness; competition among tenderers; transparency of public procurement; equal treatment of tenderers; and proportionality. The provisions of the Public Procurement Act closely mirror the provisions of the EU procurement regime.

The Public Procurement Act does not apply to public contracts in the water, energy, transport and postal services sectors, which are regulated by the Second Procurement Act.

Public procurement procedures are overseen by the National Audit Committee *(Državna revizijska komisija)* (the "Committee"), which provides legal protection to tenderers over and above the public procurement procedure. The Committee operates in accordance with the provisions of the Public Audit Act. Pursuant to the Public Audit Act, parties to a case may not challenge the decision of the Committee before the regular court; however, they may file a damages claim before the regular court.

If the public partner bears the majority or all of the commercial risk involved in operating a PPP project, the PPP shall be deemed not to be a concession, but to be a public procurement contract. In this case, instead of applying the provisions of the PPP Act on public tenders, direct award and legal and/or judicial protection in the procedure for awarding concessions, the selection of the PPP contractor will be regulated by the Public Procurement Act or the Second Procurement Act.

In cases where the PPP contractor bears the majority or all of the commercial risk involved in operating a PPP project (a concession agreement) relating to public utilities, the public tenders or direct agreements, selection of PPP contractors, legal and judicial protection in these procedures and concession contracts and the awarding of works to third parties shall be governed by the Utilities Act.

Pursuant to the provision of the Utilities Act, the concessionaire may transfer the concession agreement only if the transfer is permitted in the concession agreement or

if the public partner consents. The public authority may entirely or partly transfer the concession agreement only in cases established by law or determined in the concession agreement or with the agreement of the concessionaire.

Pursuant to the provisions of the Public Audit Act each act of the public authority, irrespective of the stage of the procurement proceeding, may be challenged before the Committee. Every person with an interest in the award of the public contract, who can prove to the Committee that he is likely to suffer loss if the challenged decision is allowed to stand, has the capacity to sue. Due to this broad right to challenge decisions of the public authority, one feature of public procurement in Slovenia is that unsuccessful or de-selected bidders routinely challenge decisions at all stages of public procurement, thus slowing the procedure significantly.

Local funding market

On 1 January 2007, Slovenia joined the EMU (Economic and Monetary Union) as the first new EU Member State and abandoned its currency (the Tolar).

According to the statistics of the Bank of Slovenia, currently 20 banks are operating in Slovenia, of which one is in liquidation; three banks are subsidiaries of foreign banks and two are representative offices of foreign credit institutions. In addition, three savings banks as well as three branches of EEA States' credit institutions and approximately 280 EEA States' credit institutions have notified their operation in Slovenia.

Slovenia has been unable to escape the global economic downturn and unfortunately recession now seems inevitable. There remains an appetite to finance PPP projects in Slovenia but the current economic conditions have created liquidity constraints affecting the availability of finance for large transactions.

Security issues

Generally, legislation in Slovenia will allow lenders to take security to effect a typical limited recourse project finance structure. Lenders are able to take security over sub-contracts and cash flows. In addition, both pledges and transfers by way of security are available to provide security over shares in the project company.

However, the transfer of the project agreement or concession agreement to lenders is restricted by law. The PPP contractor may not transfer activities that are the subject of the PPP in part or entirely to a third party, unless it has obtained in advance the written consent of the public partner. Pursuant to the provisions of the PPP Act a new procurement process is needed to change the private partner in an equity partnership. The exception to this is the transfer of an equity partner relationship, where provisions regulating the transfer of the concession agreement apply.

In the case of works concessions or services concessions, in the event of bankruptcy, liquidation or dissolution of the concessionaire, the awarding authority shall have the right, upon payment of the appropriate portion of the value of excluded property into the estate in bankruptcy or liquidation, to exercise the right of exclusion (i.e. the structures and facilities, as determined by the awarding authority, are excluded from the estate). Where the concession contract has not provided for transfer of the concessionary structures and facilities to the awarding authority on termination, the authority must pay the entire value of the structures and facilities to the estate (after deducting any money it is owned by the concessionaire). The PPP Act states that persons of private law who have invested their own property in the equity partnership are entitled to a portion of the profits of the equity partnership and have the right to the return of their investment or to an appropriate portion of the remaining property following liquidation or bankruptcy of the equity partnership.

However, in the event of bankruptcy of an equity partnership, the investor has the right to reimbursement of the value of its investment prior to dividing up the remaining property among interest holders. Investors have the right to demand the annulment of a contract and the reimbursement of the value of their investment in the event of a change in the activity of the equity partnership, a transformation of its status, amendments to the founding instrument, articles of association or statutes where they would significantly affect the interests of the investors, and for other well-grounded reasons.

Pursuant to the Act on Physical Assets of the State, Regions and Municipalities *(Zakon o stvarnem premoženju države, pokrajin in občin,* Official Gazette of the Republic of Slovenia, No.14/2007), the property of the State or municipality can only be encumbered for consideration. However, a State or municipality may use its property as security without consideration if it is in the public interest (as determined either by the government or municipality council).

Pursuant to the Financing of Municipalities Act *(Zakon o financiranju občin,* Official Gazette of the Republic of Slovenia, No. 80/1994, last amendment: Official Gazette of the Republic of Slovenia, No. 57/2008), a municipality, as well as a public company founded or co-founded by the municipality, may only incur debts up to the statutory prescribed limit of 20% of the realised income in the year before debt was incurred and only if the repayment of the capital and interest in a single year is not more than 5% of such realised income. However, this limit does not apply to municipal debt for finance projects relating to elementary schools, house building, water supply and public infrastructure for waste management if the projects are co-financed by EU funds and if the repayment of capital and interest does not exceed an additional 3% of realised income in the year before the debt was incurred.

Government response to the financial crisis

The government has not to date adopted any measures to promote conclusion of new PPP projects or to assist the completion of existing PPPs which may be facing difficulties due to the financial crisis.

The financial crisis has already had an impact on a major PPP project "Emonika". The private partner in the project was and still is unable to obtain financing.

Summary

The PPP Act mirrors the regulation of PPP on the EU level and gives a solid legislative basis for establishing and carrying out PPP projects. However, in spite of this new specific PPP law, few federal PPP projects have been closed in Slovenia in recent years. Most PPP projects are at a local level. It has been suggested that PPPs may be established where public procurement is not economically justifiable in order to take public services and works "off balance sheet". However, it is argued that promoters should do more to emphasise the benefits of PPPs, especially as the Slovenian public sector appears reluctant to move away from being a direct operator towards the role of organiser, regulator and controller within the framework of PPPs.

Two years after the implementation of the PPP Act, not enough time has yet passed to allow a fair judgement of its success. However, it is already apparent that changes to the PPP Act are required to ensure adequate and efficient supervision by the public sector. The 2008 report of the Council highlights that there is insufficient knowledge of the provisions of PPP Act and its relationship with departmental legislation, resulting in mistakes and inconsistencies and the implementation of the PPP Act (e.g. failure to carry out a tender procedure).



Spain



José Antonio Rodríguez García, joseantonio.rodriguez@cms-asl.com

Country overview

As is the case with many other European countries, Spain has a growing economy which has been greatly affected by the global economic downturn. Following growth of 3.6% in 2007, the economy has gradually shrunk, resulting in negative economic growth for 2009. However, this scenario may have a positive effect on the number of PPP projects, as public accounts will be unable to cope with the necessary development of infrastructures, especially after the estimate by the Spanish government of an approximately EUR 6 billion reduction in infrastructure investments during 2010 and 2011 (following the public deficit reduction approved by Royal Decree Law on 20 May 2010). This may prove to be an opportunity for the construction sector, one of the sectors which has been most affected by the impact of the crisis, especially in terms of unemployment.

Since 1960, the private sector in Spain has been involved in developing and managing highway infrastructure. This practice continued without any specific regulation until 1972 when the Spanish government recognised the need for a general legal and regulatory framework and passed Act 8/1972. In 2003 this was replaced by Act 13/2003 on Public Works Concessions, which modified the consolidated text of the Public Administrations Contracts Act approved by RDL 2/2000 (the "Previous Act") in order to cater for the new circumstances and practices. It also enhanced the Previous Act (for example, it clarified the law in relation to allocation of concession risks and elevated the concession model as the main vehicle for the development of PPP in Spain).

The recent Act 30/2007 on Public Sector Contracts (the "Public Sector Contracts Act") also includes a specific section concerning public works concession contracts. The main development in the Public Sector Contracts Act was the introduction of a legal definition of PPP, introduced by adopting a new form of public procurement contract (Article 11 of the same specifically considers partnership agreements between the public and private sectors) (the "Collaboration Contract").

The lack of a central public entity which promotes PPPs (as exists in other countries) has not hindered the strong growth of the utilisation of PPP schemes in recent years at a local, regional and national level. Historically, various sectors in Spain have benefited from PPPs, including:

— Social Services and equipment, such as hospitals, administrative buildings, courts, prisons, public offices and waste disposal; and
— Transportation: roads, railways, airports, ports and public infrastructure. Spain has a 15-year national plan from 2005 to 2020 for transportation infrastructure, giving priority to high-speed rail. Roughly 25% of the required financing for national highways, roads and railways during this period is expected to be provided by concession and PPP arrangements (as opposed to budgetary sources).

In the 2010 Economic Freedom index published by the Heritage Foundation and the Wall Street Journal, Spain was placed 36th overall and 19th in the European region[1]. Its score is slightly lower than in 2009 but is still well above the world average.

Overview of the legal system

Spain is a civil law jurisdiction, operating with civil and commercial codes enacted in the 19th century.

[1] http://www.heritage.org/Index/Country/Spain

The Spanish legal system has been relatively stable in recent years, despite the transposition of EU Directives and compliance with EU Regulations.

Specific PPP/Concession law

As mentioned above, the basic legal regulation governing concessions and PPPs in general is the Public Sector Contracts Act (Act 30/2007, of 30 October), which transposed EU Directive 2004/18/CE. Its enactment modified the Spanish legal framework and repealed the Previous Act (with the exception of Articles 253–260 on the financing of public works concessions).

The Spanish government has produced a bill, which if enacted will repeal the remaining articles of the Previous Act and will regulate the financing of the main types of PPP vehicles in Spain (concessions, Collaboration Contracts and mixed economy companies). However, any public contracts awarded under the Previous Act as well as those initiated before the entry into force of the Public Sector Contracts Act will continue to be regulated by the earlier legislation.

The Public Sector Contracts Act does not apply to contracting procedures carried out by State agencies and public entities which operate in any of the excluded sectors (water, energy, transport and postal services) (in accordance with Act 31/2007 of 30 October on excluded sectors).

In addition, there are other acts which regulate concession contracts in other sectors are currently still in force:

— concession contracts for public infrastructures are regulated by additional provisions of Act 13/2003 of 23 May;
— the construction, conservation and exploitation of motorways under concession regimes are regulated by Act 8/1972 of 10 May on execution of the Roads Act (roads and motorways sector);
— concession contracts for the development of hydraulic public infrastructures are regulated by the Waters Act (approved by Legislative Royal Decree 1/2001 of 20 July);
— concession contracts for public port infrastructures are regulated by Act 48/2003 of 26 November on economic and services provision at ports of general interest; and
— concession contracts for public railways infrastructures are regulated by Act 39/2003 of 17 November on the Railways Sector.

Although the traditional, and currently the most prevalent, way to develop public infrastructure in Spain is by concession, as mentioned above, the Public Sector Contracts Act has also introduced a legal definition of PPP by adopting a new and distinctive form of public procurement contract, the Collaboration Contract. This reflects the express acceptance, for the first time under Spanish law, of this particular form of cooperation between the public sector and the private initiative.

The key features of a Collaboration Contract are that:

— it may only be signed by and between a public administration and a private entity. The concept of 'public administrations' in the Public Sector Contracts Act is narrower than the concept of 'awarding authorities' (which are any of the entities referred to in the Public Sector Contracts Act. For instance, a public entity whose main source of income arises from private market activities is not considered a public administration but it may be an awarding authority);
— the object of the contract should be 'the fulfilment of a global and integrated action' (i.e. not a single works project or the delivery of a service). The object must be a complex one, and may include, in addition to provision of the necessary financing, the construction of equipment or systems, their maintenance, exploitation and management, the integral management of complex installations, or the manufacturing of goods or provision of services through specifically developed technology;

— it may only be used when the relevant public administration makes it clear, during the evaluation phase, that the needs intended to be covered cannot not be satisfied through any other procurement contract (as stated in Article 118 of the Public Sector Contracts Act); and
— it will normally be awarded through the competitive dialogue procedure.

However, it should be noted that since the Public Sector Contracts Act came into force on 1 May 2008, only two projects have been executed as a Collaboration Contract: the Madrid lighting PPP contract, which is in progress, and a PPP contract for the refurbishment of an avenue in Alcoy, which is currently suspended.

Therefore, it is still important to examine the public works concession contract, regulated by the current Public Sector Contracts Act, which has permitted the construction of the majority of transportation and social infrastructures in Spain and remains the most common contract in relation to infrastructures and PPPs in Spain. The main features of Spanish regulation on public works concession contracts may be summarised as follows:

— A public works concession contract can only be executed at the initiative of a public administration, such as national or regional governments or municipal councils, which also prepare and approve the corresponding concession project.
— The concessionaire bears a substantial proportion of risk attached to the benefit obtained from the provision of services or the exploitation of the executed works. The concessionaire will receive an income or a price for assuming these risks.
— The concessionaire can delegate the total or partial execution of the contract to a third party.
— The public works concession contract must be concluded for a definite period (set out in the schedule of administrative clauses) with a limit of 40 years.
— The concessionaire can incorporate a new special purpose company ("SPV") for the development of the contract.
— In certain circumstances, which may affect the financial equilibrium of the concession, the administration is obliged to restore such balance. This means that if the public administration modifies the term of the concession or other contractual clauses of an economic nature, due to public interest reasons, or if such equilibrium is altered directly due to *force majeure* causes or by acts of the administration itself, the financial equilibrium of the concession must be restored (by adjusting the fees, reducing or increasing the term of the concession or amending any of the economic provisions of the concession).
— In the event of an early termination of the concession, which is not due to a breach by the concessionaire, the concession must be returned to the public administration, which will compensate the concessionaire for the investment value.

Procurement laws

There is no specific procurement act in Spain. Procurement provisions are included in the Public Sector Contracts Act. This Act regulates several procurement systems, which in general may be freely chosen by the public administration but in some cases are linked to a specific kind of contract. The procurement systems regulated by the Public Sector Contracts Act are:

— open procedure;
— restricted procedure;
— negotiated procedure (with or without publicity); and
— competitive dialogue.

Three steps must be followed in preparation of the public works concession contract: the approval of a viability study, the draft and approval of the concession project, and the

draft and approval of the schedule of administrative clauses and technical prescriptions which will be included in the tender documentation. The open procedure is commonly used for the award of this type of contract.

It is compulsory to use the competitive dialogue procedure (as defined in the EU Directives) regarding a Collaboration Contract.

During the first evaluation phase, performed by the Special Committee for Competitive Dialogue, a decision is made on whether to refuse or permit the PPP project. The Special Committee then selects the candidates and invites them to participate in the competitive dialogue. Following a dialogue deadline declaration, the admissible bids are classified and the most economically advantageous proposal is awarded. Throughout the process, information must be provided to the rejected candidates.

Most of the new concepts and regulations introduced by the Public Sector Contracts Act come from the EU Directives 2004/17/EC and 2004/18/EC, such as competitive dialogue, the terms of receipt of the applications and offers, the duty to inform the candidates, the criteria for the award of contracts, the establishment of some clear definitions, the introduction of an electronic (online) granting process, increased transparency and confidentiality rules.

Similarly, the main principles of the above Directives are set out in the Public Sector Contracts Act: transparency, equal treatment, non-discrimination, mutual recognition and proportionality. These procurement regulations aim for better economy, effectiveness and efficiency in the use of public resources and guarantee competition.

It is quite common in Spain for unsuccessful bidders to attempt to challenge the decisions of public procurement bodies, especially on the basis of the application of subjective requirements on exclusions and other discretional criteria, and also as a consequence of bids allegedly being insufficient for the development of the project. Generally, the unsuccessful bidder may claim against the public body that awarded the contract. If the unsuccessful bidder is not satisfied with the response, it may appeal against that decision to the courts.

Local funding market

As mentioned above, the procurement of PPP projects in Spain under a concession scheme are awarded through the open procedure. Interested parties submit binding proposals that comply with the project requirements and conditions. However, financial close is not required before the award of the contract.

As also mentioned above, a new law will be enacted in the near future dealing with how concessionaires, mixed economy companies and Collaboration Contracts contractors will obtain financing in the markets. According to its current draft, the aim of this Act will be to reinforce the commitment of the private sector in order to enhance the prospects of financing projects. In this regard, at least 10% of the investment must be financed by means of its own resources (provided by the shareholders as equity). In addition, the maximum amount which may be secured by a mortgage over the concession or could be financed through issuing bonds, will be 90% of such investment.

Furthermore, the government is able to guarantee the obligations arising from the financing agreements. Although according to the first drafts of the new law, such guarantee would not have been compatible with a mortgage over the concession or with the securitisation of credit rights, such restriction has now been removed in the current draft.

Security issues

In general terms, PPPs in Spain are financed through project finance schemes. There are no legal constraints on the granting of pledges over the credit rights and receivables of the concessionaire or even on their assignment or securitisation. In addition, the concession itself may be mortgaged in favour of the lenders which grant financing to develop the concession project, although authorisation by the public administration is required. In the event of enforcement of such a mortgage, the transferee of the concession must comply with the obligations of the former concessionaire.

In relation to a pledge over the shares in the concessionaire, which is also available, there are no limitations foreseen in the Public Sector Contracts Act. However, in some cases, certain changes in the concessionaire shareholders are subject to the prior consent of the public administration (in accordance with the specific tender documentation of each project), which may affect the enforcement of these pledges.

Government response to the financial crisis

As explained above, a new law is being drafted which should assist the concessionaires and other PPP private participants in general to obtain financing in the markets (currently extremely restricted in Spain). Proposed measures include securing their obligations *vis-à-vis* the lenders by means of public guarantees issued by the government and establishing requirements for their own resources (in accordance with the criteria explained above).

In addition, the 2010 General State Budget Act included a new solution for the renewal of the first generation highways, developed in the 1980s and 1990s under a shadow toll scheme, which are being greatly affected by the economic downturn. These projects were awarded but stopped due to lack of financing. According to this Act, the highways concessionaires may compensate for the current traffic downturn by setting it off against an excess of future demand (i.e. usage over the prescribed maximum traffic level). This means that the fee paid by the government would not be increased once the upper level was exceeded, but the excess could be "added" to low traffic levels experienced during a downturn. Moreover, the government may grant public participative loans in order to restore the financial equilibrium of highway concessions adversely affected by expropriation costs (according to the aforementioned principles which apply to public works concession contracts in Spain). In accordance with the 2010 General State Budget Act, such loans may be granted for the remaining term of the concession (with a maximum of 50 years), with participative interest which must be higher than a fixed interest rate of 175 basis points.

Similar public participative loans may also be granted to other projects which are not profitable during the first years due to low traffic or high construction costs (including expropriation costs which must be born by the concessionaires and which in general have increased in relation to those estimated by the public administration leading concessionaires to a technical insolvency situation) in order to assist them to reach completion.

Summary

Comparison of PPPs with the Public Sector Contracts Act might initially suggest that the Collaboration Contract purports to represent the same legal framework in which the PPP concept will grow and become a key instrument in developing complex infrastructure projects. However, this is not entirely the case, as it co-exists with the current concession regulations which have been widely used to develop infrastructure in Spain, and as mentioned above, the Collaboration Contract is still greatly underused in comparison with the concession contract.

Regulations relating to the Collaboration Contract could be amended in order to encourage its utilisation but nonetheless the public works concession contract regulations would be retained as it has been demonstrated that they are agile and flexible enough to continue being the preferred choice for the majority of PPP projects in Spain.

The new Act regarding the financing of this type of contract will attempt to facilitate financing for PPP projects by increasing the commitment of the private sector and permitting public guarantees to be granted by the government as security. It is hoped that this will help Spain to cope with the effects of the crisis on the development of infrastructure.

CMS experience includes:

Public Courts in Catalonia, Spain: A 2005 PPP project for the Barcelona Judicial Courts with a project value of approximately EUR 325 million. This project is considered a pioneer of non-road project financing in Spain.

Switzerland



Kaspar E. Landolt, kaspar.landolt@cms-veh.com

Country overview

Switzerland has a strong economy, but like the rest of Europe is currently experiencing an economic downturn as a result of the global economic crisis.

Switzerland does not have a tradition of PPP projects. Traditionally, public infrastructure projects have been funded by the state. The healthy State finances and the reluctance of authorities and the general population to see fundamental State tasks delegated to private parties mean that only a few PPP projects have been completed in Switzerland so far. However, concessions are used in certain specific areas.

The main PPP projects that have been or are currently being realised in Switzerland are sports stadiums, particularly football grounds. The football stadium "La Maladière" in Neuchâtel was completed in 2007 and is considered to be a pioneer project in Switzerland. It had an investment volume of approximately 220 million Swiss Francs ("CHF") (including commercial and retail units in the stadium). Other football stadia are currently being constructed, such as Lucerne with an investment volume of approximately CHF 290 million (including commercial and retail units in the stadium), or are planned, such as Aarau with a total investment volume of approximately CHF 150 million.

One current pioneer project is the construction and subsequent operation of an administration building, operation centre, courthouse and prison in Burgdorf. This project is considered to be one of the first major PPP projects in Switzerland that also covers the traditional domains of the state. The contractor for this project was selected in autumn 2009 and the works should start soon. The value of the investment is approximately CHF 120 million. The realisation of this project will be closely monitored by the public and the government. Successful completion could lead to a considerable increase in the use of PPP projects, even in sectors which are traditionally activities of the State.

There is a non-profit making association that promotes PPP projects in Switzerland. It is hoped that the recent election of a member of its executive board to the Swiss government will help to support further implementation of PPP projects in Switzerland.

In the 2010 Economic Freedom index published by the Heritage Foundation and the Wall Street Journal, Switzerland was placed 6th overall and 2nd in the European region[1]. Its score has improved since 2009 and it is one of the world's most investment-friendly destinations.

Overview of legal system

Switzerland is a civil law jurisdiction. There is a strong federal tradition with three levels of legislation and administration (federal, cantonal and municipal).

Switzerland has a very stable legislative system. If 50,000 Swiss citizens sign a referendum against a new law, the Swiss people have to vote on such law. As a result, Swiss legislation tends to be slow, and new laws are usually already a compromise between the major political parties.

Although Switzerland is not a Member State of the EU, changes to legislation are often driven by legislative changes of the EU.

[1] http://www.heritage.org/Index/Country/Switzerland

Specific PPP/Concession law

There is no specific legislation with regard to PPPs and no general concession law in Switzerland. Concessions are regulated in the legislation governing specific fields of law (e.g. in the Federal Railway Act). Concessions may be regulated by law on all three State levels in Switzerland (federal, cantonal and municipal).

In Switzerland concessions are a widely-used tool of public law, used to grant certain rights, which are the sole preserve of the government, to private individuals or companies. Concessions are often used to delegate the performance of tasks to private firms where the activity involves danger or where resources are limited (e.g. use of VHF frequencies for radio channels). The process of granting a concession for which several interested parties apply is in some cases governed by procedures similar to procurement law so as to secure fair selection of the concessionaire.

Concessions are protected by the principle of free ownership of property. Therefore if the concessionaire is not in breach of the terms and conditions of the concession, the revocation of a concession is only possible in exchange for full compensation, and is regarded as an expropriation.

Procurement laws

Procurement law is applicable if the public sector procures material or services from the private sector. As the Swiss Federation is only competent to regulate procurement on the federal (but not on the cantonal or municipal) level, there are different layers of procurement legislation in Switzerland. As a general rule, these laws set out the terms of public procurement according to the WTO/GATT Government Procurement Agreement for all three State levels in Switzerland.

Prequalification of bidders and procedures with a restricted number of bidders is in general possible, as long as an effective competition is assured, for example, by a selective procedure. In the case of a selective procedure, the public sector has to select the bidders that can submit a bid from all bidders that have applied to tender, in accordance with the pre-qualification requirements. The winning bid is identified by the administration according to the conditions set out in the invitation to tender.

The contract with the winning bidder has to be approved by the government or the parliament, depending on the value of the contract. The competent authority depends on the State level that is awarding the contract (e.g. federal, cantonal or municipal).

If certain threshold amounts are not reached and the WTO/GATT Government Procurement Agreement is not applicable, the public sector may limit the bidding procedure to some specifically invited bidders. This is known as the invitation procedure and there must be at least three bidders.

Local funding market

In Switzerland, traditionally public infrastructure projects are funded by the public sector. So far this situation has not been altered by the current economic crisis.

As mentioned above, the main PPP projects that have been or are currently being realised in Switzerland are sports stadia. Often, these projects are funded by the investment fund of a bank or an investment foundation. The economic downturn and the credit crunch have, as a general rule, had neither a stimulating nor a restricting effect on the occurrence of PPP projects.

Security Issues

Swiss law provides for various types of security interests for movable or immovable property, such as pledges or charges. Security interests are commonly taken as real securities.

Since there is no specific legislation with regard to PPP, lenders of PPP projects have to revert to the general methods of taking security interests.

The provisions of the procurement laws do not expressly allow the transfer of the project agreement or concession agreement to lenders, a nominee or a replacement contractor. This means that the typical direct agreement protections of step-in and replacement of the project agreement are, as a general rule, not available. Hence, in light of the lack of typical PPP projects and of related case law, there remains legal uncertainty with regard to such step-in rights.

Government response to the financial crisis

There have not been any specific government measures related to PPP projects as a response to the financial crisis.

Summary

Switzerland does not have a tradition of PPP projects. Historically, public infrastructure projects are funded by the state. The healthy State finances and the reluctance of the public with regard to delegating what are traditionally "State" tasks to private parties mean that only a few PPP projects have been realised in Switzerland.

As a result, so far there has been no need for a specific legislation with regard to PPP.

CMS experience includes:

PPP privatisation of four rehabilitation centres (Baden, Badgastein, Bad Hall, Bad Schallerbach):
A healthcare project in Switzerland completed in 2009. This project has a total deal value of approximately EUR 32 million.
PPP Motorway A5 North: Advising on the public procurement proceedings of a EUR 1 billion road project.



Ukraine



Daniel Bilak, daniel.bilak@cms-cmck.com

Country overview

Ukraine has been hit hard by the current financial downturn. After a number of years of rapid growth, in 2009 Ukraine's gross domestic product (GDP) decreased 15.1% (according to the figures published by the State Statistics Committee). However the Ukrainian government forecasts GDP growth of 3.7% in 2010. The State Statistics Committee also reported that inflation in Ukraine in 2009 was equal to 12.3% and the forecast for 2010 is 13.1%[1]. In November 2008, the IMF approved a loan for Ukraine of USD 16.4 billion.

To date few PPP deals have closed in Ukraine. However, in view of the forthcoming European Football Championships, EURO 2012, which Ukraine is co-hosting with Poland, there is a movement to begin to use PPP as a procurement tool. Significant modernisation of the country's infrastructure is required to bring it up to the standards imposed by UEFA and it is generally understood that this development can only be achieved in partnership with private investors.

The following projects are being (or are expected to be) procured as PPPs:

— the construction of a new large outer ring road around Kyiv. The planned project involves, in total, 213,175km of road, three bridges, 78 overpasses and 28 two-level junctions and is to be built in three phases under concession. The current projected cost is approximately EUR 1.06 billion of which approximately EUR 60 million is intended to come from the State budget and EUR 1 billion from private investors; and
— construction of a new terminal at Lviv Airport, which is expected to be procured as a concession and is estimated to cost approximately EUR 90 million.

There is broad political support for PPP in Ukraine and an increasing understanding of its potential benefits. As an indication of the level of interest in PPP, the Cabinet of Ministers recently set up a working group to oversee work on the concession agreement for the construction and operation of the Lviv-Krakovets highway. It is intended to bring the existing concession agreement more in line with international standards in order to be able to attract financing for the project.

With EURO 2012 fast approaching, and with a lack of funds in the State budget, we expect to see support for PPP growing and the required legislative changes moving up the Government's agenda. The Coordination Bureau for Preparation for EURO 2012 was established in 2008 under a special resolution of the Cabinet of Ministers of Ukraine. The main purpose of the Coordination Bureau is to prepare the main infrastructure projects that will be used for the football championship in order to meet the requirements of UEFA.

There is currently no government PPP body in Ukraine, but there are private PPP forums and working groups supported by the American Chamber of Commerce and the European Business Association, which aim to promote understanding of PPP and lobby government officials on behalf of private international investors.

In the 2010 Economic Freedom index[2] published by the Heritage Foundation and the Wall Street Journal, Ukraine was placed 162nd overall and 43rd out of 43 countries in Europe. Ukraine's score is 2.4 points lower than last year, reflecting reduced scores in six of the ten economic freedoms.

[1] http://www.ukrstat.gov.ua
[2] http://www.heritage.org/Index/Country/Ukraine

Overview of the legal system

Ukraine is a civil law jurisdiction with a civil code. The country is in transition from a planned economy to a market economy. An important step in this process was achieved in May 2008 when it became a member of the World Trade Organisation. Legislation is rapidly changing and being updated to reflect this transition. At the moment, legislation affecting PPP is changing particularly rapidly.

Specific PPP/Concession law

Ukraine has a law on concessions, which controls the granting of concessions and sets out the basic terms that must be contained in concession agreements. Ukrainian law is developing to include further concession laws specific to each industry sector. The law to regulate concessions in relation to motorways has recently been amended and draft laws on amending the general concession law and on concessions for water supply, heat supply and waste water are being considered by the Parliament of Ukraine.

The law on concessions states that the main purpose of a concession agreement is to 'satisfy public needs', including by providing a public service. It governs the granting of concessions and sets out the basic terms that must be included in the concession agreement, including:

— the basis for changing prices or tariffs for the services provided;
— the type of State and community assets that are capable of being granted on a concession basis; and
— the compensation available and the procedure for the return of assets if the concession agreement is unilaterally terminated.

In particular, if the object of the concession is improved or renewed by the concessionaire, and the expense is not covered under the concession agreement, the authority shall reimburse the concessionaire. As a general rule, the concessionaire is entitled to any profit from managing and operating the concession object. The recently amended concession law on motorways provides specific supplementary provisions for concessions for the construction and/or operation of roads in Ukraine. The key provisions are:

— the concessionaire may receive revenues from (a) tolls, (b) availability payments, (c) payments for the use of service areas, (d) subsidies or compensation from the procuring authority or (e) any other source specified in the tender documents;
— specific provisions for holding tenders for road concessions are to be established by the Cabinet of Ministers in due course. The terms of each tender will be set by the State road authority, Ukravtodor;
— there must be a toll-free route available to use as an alternative to the concession road; and the procuring authority is obliged to assist the concessionaire in obtaining the necessary licences and permits and ensure that the designated use of the land on which the road is or will be located is not altered during the term of the concession.

Some projects have been implemented using the law on concessions and the concession law on motorways, but, as yet, few international investors have participated in such projects. In their current form, the concession laws are workable, but would benefit from some amendments, particularly in relation to financing. One of the biggest hurdles for international investors is guaranteeing minimum cash flows from the project and/or obtaining adequate revenue support from the State. As such, banks tend to be hesitant to lend to investors to undertake Ukrainian concessions.

The new road concession law addresses some of these issues in relation to road projects and the draft PPP law

currently provides for the granting of State guarantees. However, further legislation is required to provide the detail of the proposed changes. In particular, the concerns of international investors in relation to revenue support and guaranteeing cash flows need to be addressed, especially if Ukraine hopes to attract their much-needed funds into the country.

The draft law regarding the principles of public-private partnership in Ukraine that was passed by the Parliament of Ukraine was recently annulled by a resolution of the Parliament of Ukraine on 9 October 2009. It had been intended that the law would guide public-private partnership in Ukraine and, amongst other things, allow state guarantees to be granted to private partners. However, this law did not regulate specifics of such partnership and contradicted some norms and provisions of the Land Code.

Soon afterwards, however, the initially registered and subsequently annulled draft law regarding the principles of cooperation between the State and private partners was considerably amended, tabled and registered as a new draft law with the Parliament of Ukraine (on 20 October 2009). This new draft law purports to regulate relations between the state and private partners. It identifies the main principles of contractually based public-private partnership along with a more effective use of State and municipal property. It also sets out mechanisms for attracting investments to contribute to the modernisation of industrial and social infrastructure.

Procurement laws

Until recently, the procurement of goods, works and services using public funds was regulated by a specific law on public procurement, which was revoked on 2 April 2008. A new draft law on procurement passed its first reading in the Parliament of Ukraine in early February 2008. Until a new law on public procurement is adopted by the Parliament of Ukraine, public procurement is regulated by the procurement regulation adopted by the Cabinet of Ministers on 17 October 2008 as amended.

The law on concessions provides for a separate procurement procedure to that set out in the procurement regulations. For concessions, these procedures prevail over the procurement regulation procedures and the temporary anti-crisis measures. However, both the procurement regulation and the temporary anti-crisis measures may potentially apply to other forms of PPP.

The procurement regulation provides for:

— open tenders (the main procurement procedure);
— restricted-participation tenders;
— two-stage tenders, whereby, bidders initially submit non-priced preliminary proposals and the authority negotiates with selected bidders and then a short list of bidders submit their final, priced proposals from which the winner is selected;
— a descending-price auction procedure; and
— single bidder procurement (in restricted circumstances).

The law on concessions sets out a general procedure and timeline for the procurement of concessions by open tender. The specific procedure to be used in each case is determined by a resolution of the Cabinet of Ministers and will depend on the type of concession to be granted.

It is intended that the new PPP law will set out a framework for the procurement of PPPs with the detailed procedure being determined by the Cabinet of Ministers (or the local authorities, if the property involved is municipally owned). The current draft PPP law provides for a competitive process, which should be open unless the project involves State secrets.

The concession laws do not restrict the ability of the concessionaire to assign the concession. In fact, the general

concession law provides that a concession agreement must set out the terms and conditions under which the concession can be assigned. In general, under Ukrainian law, any assignment will be subject to the consent of the concession granting authority. However, if the express terms and conditions under which an assignment can be made are set out in the concession agreement, this should negate the need for further consent to be obtained.

The procurement regulations do not prohibit the assignment of contracts awarded via tenders. On the other hand, they do not specifically allow such assignments and, therefore, there is some doubt as to whether this is legally possible.

Although Ukrainian law does allow unsuccessful bidders to challenge the procedure used and the decisions taken in tenders and other methods of procurement, until recently such challenges were rare. However, it now appears that more challenges are being made. It should be noted, however, that challenges to the procurement procedure have to be made in the Ukrainian courts and, if the challenger is a foreign entity, it must establish a representative office in Ukraine in order to file such a challenge.

Local funding market

The total volume of local lending, including inter-bank loans, loans to legal entities and individuals and securities in local and foreign currencies as of 1 April 2010 was UAH 624,392 million (approximately EUR 58,452 million[3]).

In the past, for some types of transactions (mainly mortgages), local banks would lend for terms up to 30 years. However, as a result of the current economic downturn, the terms of new loans are around half the length available before the downturn and interest rates have increased.

For example, before the crisis, interest rates for the longest term loans in US dollars were approximately 11–13%, whereas they are now approximately 13–20%.

Due to the severity of the economic crisis in Ukraine, the flow of international funds coming into Ukraine has reduced, whilst the outflow of deposits from local banks has increased. This, combined with limited financing from the National Bank of Ukraine, has led to a significant fall in funds available to local banks. Ukrainian banks have started to cut down on their loan programmes; reducing the number of loans, increasing their interest rates and restructuring existing loans. Under such circumstances, local financing available for PPP projects is, at best, limited.

Having said that, international financial institutions, such as the World Bank, the International Financial Corporation, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, KfW Bankengruppe and the European Investment Bank have stated their intention to continue to invest in Ukraine and are likely to become key players in the financing of PPP projects.

Security issues

As a general rule, legislation in Ukraine allows funders to take advantage of a limited recourse finance structure. Funders are able to take security over sub-contracts and cash flows. Shares or participatory interests in the contractor may also be pledged in favour of funders. However, depending on the corporate form of the company, there may be difficulties enforcing such a pledge.

On enforcement of security, the sale of collateral should generally be carried out through public auction, but this

[3] As of 01.04.2010 the official UAH/EUR exchange rate set by the National Bank of Ukraine was EUR 1/UAH 10.6821.

requirement can be avoided if an alternative procedure is specified in the original pledge/mortgage agreement or in a court judgment on enforcement. Under the concession law, a concessionaire may transfer its proprietary rights arising from the concession agreement or the property granted under the concession to third parties, in whole or in part, provided it has prior approval from the authority concerned and unless otherwise stated in specific legislation regulating concessions in that industry sector. Therefore, a funder can exercise step-in rights if it has prior approval from the authority concerned.

However, title to assets granted under concession and property created as a result of the fulfilment of the concession agreement remain with the authority and so cannot be pledged or mortgaged by the concessionaire. On the liquidation of the concessionaire, the object of the concession must be returned to the authority. A concessionaire can mortgage the lease of any land granted under a concession only with the prior approval of the authority, and in practice the value of such a mortgage is not significant as it is difficult to enforce.

Government response to the financial crisis

Recently the Parliament of Ukraine adopted new legislation that was aimed to reduce the negative impact of the financial crisis, such as the Law of Ukraine "On prevention of the impact of the world financial crisis to the development of the construction sector and the residential construction", the Law of Ukraine "On amendment of some laws of Ukraine regarding the decrease of the financial crisis to the employment sector" and the Resolution of the Cabinet of Ministers of Ukraine "On the approval of the plan of emergency measures for prevention of the negative consequences for agricultural sector caused by the world financial crisis".

Other than these acts recently adopted by the Parliament of Ukraine and the Cabinet of Ministers of Ukraine, there is lack of governmental level support for PPP projects to reach completion. The economic trends and the consequences of the world financial crisis indicate the necessity of financial-budgetary policy improvement as well as the need to develop the mechanisms of effective state financial support to the private sector.

Summary

Ukrainian law in this area is developing and a number of PPPs have successfully closed. Although awareness and understanding of PPP as a procurement tool is increasing, potential investors should be aware that this is still a relatively new idea in Ukraine.

That said, the legal environment in Ukraine is reasonably favourable for the implementation of PPPs and is improving as the legislation is developed. The key issues to note are:

— at present, there is no workable mechanism for obtaining state guarantees. This is of particular concern in Ukraine where the public partners engaged in PPP, such as the state road authority, Ukravtodor, have weak finances and rely on annual grants from the state budget. There is a move to address this concern in the draft PPP law; and
— both state and local budgets are approved annually and therefore, although the state and local authorities can enter into longer-term commitments, there is a risk that annual budgets will not allocate adequate funds to meet those commitments. Similar budgetary issues have arisen in a number of jurisdictions and measures can be adopted to mitigate these risks and address the concerns of investors.

CMS experience includes:

Toll Motorways (Lviv-Krakovets and Lviv-Brody), Ukraine:
Construction and operation of two toll motorways in the Ukraine.



United Kingdom



Frank Dufficy, frank.dufficy@cms-cmck.com

Country overview

The PPP market in the UK is mature and there are no specific legal issues that arise in current projects. PPPs have been an important procurement tool in the UK across all sectors, although the future for PPPs under the new government is currently unclear. Government figures published in February 2010 identify over 580 operational projects completed since 1992 (i.e. where construction has been completed). The Private Finance Initiative (PFI) model has been particularly successful in the UK during this period. The UK has also pioneered a number of hybrid PPP models in relation to the procurement of local health facilities and portfolios of schools.

Although the recession in the UK officially ended in January 2010 the global financial crisis has had a significant impact on the economy. This recession has been characterised by the "credit crunch" which has resulted in a lack of liquidity in the financial markets, and high prices and stringent financial conditions demanded by those banks that are continuing to lend.

Inevitably the financial crisis has also had an effect on the PPP market in the UK. The collapse of the monoline insurers has left the market largely dependent on bank debt, although multilateral institutions have increased their lending to PPP projects in the UK as elsewhere. The cost of bank debt has increased dramatically and "mini-perm" loans have been promoted by banks because of concerns over long-term liquidity and banks' inability to underwrite and syndicate deals.

In 2009 the government took steps to ease the lack of liquidity in the financial markets, including creating its own infrastructure finance unit ("TIFU") to lend to PFI projects that were experiencing difficulties in obtaining finance from other sources. TIFU was later replaced with Infrastructure UK ("IUK") to provide a new strategic focus in government across the range of infrastructure sectors on issues such as planning, prioritisation, financing and delivery.

Use of PPPs in the UK

PPPs are used across a wide-range of sectors in the UK, including health, education, transport, defence, leisure, waste, culture and housing sectors:

- Health sector – where there are 85 operational projects;
- Education sector – where there are 121 schools projects;
- Transport sector – where there are 50 operational projects; and
- other sectors – where there are over 300 other projects covering the defence, leisure, waste, culture and housing sectors.

A list of signed projects in the UK[1] is available from the HM Treasury website at www.hm-treasury.gov.uk/ppp_pfi_stats.htm.

In February 2009 the current pipeline of PPP projects in the UK included education, emergency services, waste, transport and defence:

- Education – around 50 "Building Schools for the Future" (BSF) projects;
- Emergency services – five police and fire station projects;
- Waste – 20 projects;
- Transport – six street lighting projects and three highways maintenance projects; and

[1] http://www.hm-treasury.gov.uk/d/pfi_projects_in_procurement.xls

— Defence – three projects including the procurement of Search and Air Rescue helicopters.

PPP projects in the UK are developed and promoted by individual public sector bodies or government departments. There is no general public sector PPP promotion body; however there are a number of central government departments and agencies that provide PPP policy and advice, both generally and for specific sectors. A number of public sector bodies publish guidance and standard form contracts that need to be followed in order for a PPP project to be approved by the relevant government agency or department. In the event that standard guidance is not followed, specific dispensation or derogations are required on a project by project basis.

Partnerships UK was created in 2000 as a partnership between the private and public sectors. It was initiated by HM Treasury, and has a role to work solely with the public sector to support individual projects before, during and after procurement, help develop policy and support the delivery of investment.

One of the key roles played by Partnerships UK is to monitor compliance with the mandatory contract provisions set out in the Standardisation of PFI Contracts, Version 4 (SoPC4) (see below). Partnerships UK also offers various support services to public sector parties during the procurement of projects.

Whilst not responsible for any specific sector of PPP projects, HM Treasury publishes policy and guidance that covers PPP projects across all sectors. This role includes:

— publication of over-arching policy initiatives;
— publication of standard wording and guidance and additional guidance (all public sector bodies are required to use the mandatory wording included in SoPC4 in obtaining sign-off for funding of a PPP project);
— publication of standard wording and guidance in relation to practical issues or the management of PPP projects;
— Operational Taskforce – this body provides guidance to public authorities in relation to operational PPP projects; and
— Project Review Group – responsible for approving government funding and support to local government PPP projects.

Local Partnerships is an organisation set up by Partnerships UK and local government bodies in the UK to provide guidance and advice to local government in relation to the procurement of PPP projects. Local Partnerships publishes a number of standard "procurement packs" for use by local government in the procurement of PPP projects in specific sectors. As with the general HM Treasury guidance, compliance with the relevant standard form documentation is a pre-requisite for central government approval of a project.

In addition to the general government PPP bodies described above, there are also a number of individual departments or agencies that have been set up to support the public sector in the procurement and implementation of PPP projects. As with HM Treasury and Local Partnerships, these bodies publish standard contracts and guidance based on mandatory HM Treasury wording.

The PPP Forum is an industry body representing member companies in the UK PPP industry, including construction and services contractors, financial institutions and professional advisers. Its objectives are to:

— raise awareness and understanding of PPPs; and
— engage with government departments and related organisations involved in procurement.

The PPP Forum collates and provides information about PPP projects and also engages in policy discussions with the relevant government and public sector bodies on behalf of its members.

In the 2010 Economic Freedom Index published by the Heritage Foundation and the Wall Street Journal, the UK was placed 11th overall and 4th in the European region. The UK's overall score is much higher than the world average and it scores below the world average only in fiscal freedom and government size.

Scotland

In Scotland PFI has not been used for procurement of new assets since March 2007. Instead the Scottish Futures Trust (SFT) was set up by the Scottish National Party government in September 2008 as a government-owned company to improve public infrastructure investment. The role of the SFT is to reduce the cost of funding and deliver more effective investment in planning, procurement and delivery. The aim is to develop a non-profit-distributing model of finance and remove the equity gains that have led to profits in the private sector that are seen as excessive. Ministers are responsible for setting out the objectives and direction of the SFT, but operational decisions are a matter for the board and the SFT's executive management.

Although the SFT is an alternative to PFI there is a perceived lack of evidence on how the trust is different from PPP in terms of cost to the public and there has been a lack of progress in implementing SFT.

New accounting rules for the UK Government

On 1 April 2009 UK government financial accounting changed from Generally Accepted Accounting Principles (GAAP) to International Financial Reporting Standards (IFRS). The implication of this change is that PFI projects closed after this date are generally on the balance sheet of the public sector client rather than off-balance sheet, previously one of the main attractions of PFI for the government.

Overview of legal system

The UK operates an Anglo-Saxon legal system, which operates in a different manner to the civil law systems in force in much of Europe. This system is permissive and generally allows the parties to an agreement to govern their own relationship.

Specific PPP/Concession law

There is no specific PPP law or concession law in the UK. However, as stated above, guidance published by HM Treasury and other public sector bodies is mandatory for projects in certain sectors or in respect of specific risks.

There are no legal restrictions in the UK on ownership of capital in project companies. Each project agreement sets out certain restrictions on the transfer of shares and ultimate ownership of the project company. By way of example, projects in the health and education sector usually prohibit ownership of the project company by companies involved in tobacco production or pornography.

There are a number of hybrid-PPP schemes currently operational in the UK, including Local Improvement Finance Trusts (LIFT) in the local healthcare sector and BSF in the education sector, which have holding companies for multiple projects that may be part owned by public sector entities.

Generally, PPP contracts are entered into with special purpose project companies (Special Purpose Vehicles or SPVs) that then sub-contract most or all of the significant performance obligations to sub-contractors. Standard international practice is for the sub-contractors' rights of recovery against the project company to be limited to sums or remedies that the project company can recover from or enforce against the public sector partner through equivalent project relief provisions. The standard

mechanism used to do this in the UK is to include "pay when certified" or "pay what certified" provisions in PPP sub-contracts. These provisions limit the ability of a sub-contractor to recover sums from the project company until equivalent amounts have been paid or determined to be payable under the PPP contract.

Recent legislation will (unless disapplied to PFI/PPP contracts) impose certain constraints on construction contracts. These constraints will prevent project companies from limiting their exposure to sub-contractors in accordance with standard international practice. Therefore, the standard "pay when certified" and "pay what certified" mechanisms will no longer be effective. The PPP industry has made clear that, if not disapplied, this will present difficulties for the future operation of PPP projects, as the project company risks having different liabilities or exposure to its sub-contractors and to the public authority.

Procurement laws

The paragraphs above identify a number of requirements for public sector bodies in relation to the procurement of PPP projects in the UK. In relation to the specific procurement process used, the UK has implemented the EU procurement directives by the Public Contracts Regulations 2006 (SI 2006/5) and the Utilities Contracts Regulations 2006 (SI 2006/6).

PPP projects in the UK were historically procured using the negotiated procedure. However, the EU Commission disagreed with the UK's interpretation of the procurement directives and more recent PPP projects in the UK are generally procured using the competitive dialogue procedure.

There are no additional laws or regulations dealing specifically with the procurement of PPP projects, although there are a number of guidance documents published by the bodies mentioned above. These guidance documents set out sector specific approaches to the implementation of the competitive dialogue procedure.

Local funding market

Prior to the global financial crisis, PPP projects in the UK were primarily financed either by bank debt or by an issue of bonds in the capital markets. A minority share of the financing was provided by equity (from the SPV's shareholders), junior debt (lent by the SPV's shareholders) and sometimes also multilateral organisations such as the European Investment Bank ("EIB"). Following the financial crisis the bond market no longer exists and banks have become more risk-averse in their lending. Multilaterals are playing a larger role in financing deals and the government also introduced IUK to assist projects that are finding it difficult to finance projects from the market. More about IUK is set out below.

Generally the lenders in a UK PPP project will focus on particular aspects of the deal as part of their credit analysis. The lenders will be particularly interested in the early termination provisions of a project agreement and how the compensation provisions work. Under the UK model, where SoPC4 applies, there is a high level of standardisation in transactions, which leads to little negotiation and high confidence (note that the refinancing clauses of SoPC4 were amended in October 2008 and April 2009 in response to the financial crisis). Any deviation from the standard wording contained in SoPC4 must be justified and then negotiated. The scope for deviation is extremely limited.

The level of compensation payable depends on whether a party is at "fault" in a given scenario or whether it is a "no fault" termination. A summary of the provisions (subject to some additional detail) is set out below.

Where termination results from project company default, compensation is based on "Market Value". Calculation of Market Value is dependent on whether there is a "Liquid Market". A Liquid Market consists of a situation where there are sufficient willing parties (two or more) who meet the objective criteria that qualify them as being suitable substitute contractors in the market for PFI contracts (or similar contracts for the provision of services) for the price that is likely to be achieved. If there is a Liquid Market, then the compensation will be calculated as the proceeds of sale after deducting the authority's costs. If there is no Liquid Market, then compensation is paid on basis of an estimated fair value calculated by taking:

— the unitary charge payable from the date of termination to the date of expiry of contract; less
— the estimated cost of delivering the service (running costs, lifecycle cost and rectification costs).

Where termination results from a default of the public sector body or voluntary termination by the public sector body, compensation is made to senior lenders, equity holders (including junior lenders) and sub-contractors. Senior debt is fully compensated so that the lenders are no worse off than if the contract had proceeded as originally planned. The equity (including any junior debt) is compensated on basis of:

— the base case equity IRR for the duration of the PPP project (less what has been received to date); or
— the market value of both equity and junior debt for the remaining duration of the PPP project on a going concern basis immediately before termination and on the basis that there is a willing buyer and that there was no termination of the contract.

Sub-contractor losses that have been reasonably and properly incurred as a direct result of the termination of the contract are compensated.

The financial crisis

The UK officially went into recession in September 2008. The recession and liquidity constraints affected the PPP market by causing lenders to increase risk margins, retreat from underwriting exposure and reduce tenor. The problems can be summarised as follows:

— Funding has often been offered on a "club" basis. The amount that banks are prepared to lend on a long-term basis declined dramatically. Fairly large clubs of banks may be needed to provide sufficient finance for large projects (for example in early 2009, Manchester Waste PFI used a club of four commercial lenders augmented by funding from the EIB, TIFU and Greater Manchester Waste Disposal Authority; in June 2009 the M25 widening contract was financed by a club of 16 commercial lenders, the EIB, the Department for Transport, and shareholder equity; the Birmingham Highways PFI which closed in May 2010 used a club of six commercial lenders, the Bank of Ireland, Dexia Group, Nationwide, Natixis, NIBC Bank and Lloyds TSB).
— During the existing competitive dialogue process all bidders need a fully committed bid at the end of the dialogue. However, the market has struggled to find sufficient banks willing to fill all of the clubs required. It has proved difficult to carry out procurement that needs committed funding from a club, which in turn is underwritten by a selected bidder.
— Margins have widened. The average margin charged increased from 95bps (2008 average) to 215bps (2009 average), with some being even higher. Widening margins could, depending on the development of the base rate, lead to higher funding costs.
— The tenor of the loans may not be sufficient to cover the life of the project. Lenders have become less willing to sign up to the 25-year terms for PPP projects that were available affected before the credit crisis. The UK market has seen a trend for at structures of ten-years maturity. One solution could be early refinancing, but

this leads to risks for the lenders, with resultant risk and increased cost to the procuring public sector body.

The new coalition government in the UK (formed in May 2010) has introduced policies that include a proposed GBP 6 billion budget cut and the prioritisation of front line services above construction programmes. These developments will undoubtedly have an impact on the use of PFI in the years to come.

Security issues

A lender to a PPP or PFI project will want a full package of security over all the assets of the project company borrower (and counterparty to the project agreement) and its holding company. The legal jurisdiction in England and Wales affords strong protection to creditors and has robust and versatile forms of security and the courts' treatment of properly registered security is highly predictable. Therefore, the UK is an attractive legal environment for lenders.

Best practice for the structuring of PPPs is now well established. Both the project company and its holding company will be SPVs set up solely for the purpose of financing and operating the project. The project company will usually give fixed security over the project agreement, any real estate it owns or leases, the sub-contracts, insurance contracts and some bank accounts. All of the project company's other assets will be covered by a floating charge, which ranks behind a fixed charge. A floating charge will be taken over all property that is not or cannot be the subject of fixed security (for example because it cannot be adequately separately identified or because a sufficient level of control cannot be taken over it to satisfy the requirements of fixed security).

The holding company will usually give fixed security over:

— the shares of the project company;
— any inter-company subordinated debt relating to the project company; and
— certain bank accounts.

As for the project company, the assets of the holding company not secured by fixed security will be subject to a floating charge. This is not solely in order to recover those assets, since those assets should be limited in value due to the special purpose nature of the holding company. Being the holder of a floating charge gives the lender some protection against other creditors taking certain actions against the company.

If there is more than one lender who is the beneficiary of this security it is common for the security be held by a trustee (the "Security Trustee") on behalf of the other beneficiaries. This is tried and tested legal concept under English law.

The security, in order to be perfected and ensure validity against an insolvency practitioner and other creditors of the company, must be registered at Companies House within 21 days of its creation. Any charge that is not so registered is still binding on the company that created the charge.

The lenders will usually also want the benefit of:

— direct agreements between the lenders and the sub-contractors, and between the lenders and the public sector body (see the paragraph on step in rights below);
— the right to accelerate the sponsors' equity (any equity that the sponsors are obliged to invest in the project that is not invested prior to financial close) on the occurrence of specified events (known as "events of default"); and

— credit support from the sponsors of any equity they are obliged to invest in the project that is not invested prior to financial close.

Lenders in a PPP project will usually have a right to "step in" to the key project documents to which the project company is a party if the project company defaults, prior to the public sector counterparty to such documents terminating the agreement because of such default. This is achieved by the lenders (or the Security Trustee – see above) entering into a direct agreement with the counterparties to these agreements, which gives the lenders, first of all, a required period within which to consider whether to step in and incur the costs associated with doing so; and secondly, a conditional entitlement to make arrangements for another company to become a counterparty to that agreement in place of the project company (a "Suitable Substitute"), and to require those counterparties to postpone their right to terminate. The benefit for those counterparties is that if lenders decide to step in, they will give an undertaking in respect of unfulfilled antecedent liabilities and outgoing liabilities as they fall due jointly with the project company. Instead of dealing with a potentially insolvent special purpose vehicle, the counterparties will be dealing with a hopefully solvent bank or banks (or their nominee). At the point at which lenders step out, they will cease to be liable jointly with the project company other than for liabilities already incurred.

How step in would work in practice is not as clear as the position on security as few, if any, lenders have tested their direct agreements. With the exception of a lender who has a qualifying floating charge over substantially all of the project company's assets, English law does not grant specific protection to PPP or PFI projects and accordingly, a project company would be treated in the same manner as any other limited liability company on the event of an insolvency.

Government response to the financial crisis

HM Treasury set up The Infrastructure Finance Unit (TIFU) in autumn 2009 to consider applications for loans to PFI projects, negotiate the terms of any such loans, and monitor and manage loans once made. TIFU operated at arm's length from procuring authorities and its staff included a number of project finance professionals. TIFU was intended to lend to PFI projects that could not raise sufficient debt finance on acceptable terms, lending alongside commercial lenders and the EIB and, where necessary, to provide the full amount of senior debt required by a project. HM Treasury lending was intended to be a temporary and reversible intervention, the intention being to sell the loans, prior to their maturity, when favourable market conditions returned.

Further developments occurred in December 2009, with the establishment of IUK, to provide a new strategic focus in Government across a range of infrastructure sectors. IUK sets standards on how infrastructure investment is planned, prioritised, financed and delivered.

IUK was intended to develop a UK infrastructure strategy over the next five to 50 years, identify and attract new source of private sector investment, manage the Government's investment in the 2020 European Fund for Energy, Climate Changes and Infrastructure, support HM Treasury in prioritising the government's infrastructure investment and actively support the delivery of major infrastructure projects. IUK also provided immediate support to HM Treasury and the Department for Energy and Climate Change on their report on how the electricity market framework can deliver the low-carbon investment required in the long-term.

The intention with IUK was to consolidate a number of infrastructure policies, financing and delivery bodies in to one. However, under the new coalition government the future role of IUK is not clear.

Summary

PPPs, and in particular the PFI model, have been in place in the UK as a means of procuring of infrastructure projects since 1992 and are well established. The various operators in the market are familiar with the structure and there are no specific legal issues that arise in current projects. More recently different forms of PPP have been developed to respond to the needs of particular sectors in a more tailored manner.

The global financial crisis has led to recession in the UK and has had a significant impact on infrastructure projects. The previous government responded to try to ease the lack of liquidity in the market, including introducing TIFU, which assisted projects that were experiencing difficulties in obtaining finance and IUK. Multilateral investors have become more involved in UK projects and in some cases finance has been structured differently in order to accommodate the concerns of lenders. Although the recession in the UK has now officially come to an end and the general market sentiment seems to be that the outlook is improving for infrastructure PPPs in the UK, full economic recovery is some way off and the new coalition government has yet to set out its plans for infrastructure investment in any detail.

CMS experience includes:

Allenby & Connaught: An GBP 8 billion Services and Accommodation project. This is the largest estates PFI ever let by the Ministry of Defence to date.
Building Schools for the Future (BSF) programme: The BSF programme is the biggest-ever school building investment programme, involving approximately 3,500 secondary schools in England. On average between GBP 2.5–3 billion of capital investment is being spent on the programme each year since 2004.
Portsmouth Hospital: One of the largest PFI hospital projects to be awarded, with a value of GBP 1 billion.
Channel Tunnel Rail Link: High speed rail link between St Pancras International and the Channel Tunnel. The project value is GBP 5.9 billion and it is considered one of Europe's largest privately financed infrastructure projects.
Wrexham Waste Management PFI project Phases one and two: The first PFI waste management contract to be completed in Wales. This project had a capital value of GBP 23.65 million.

Contacts PPP in Europe

Contacts PPP in Europe



Frank Dufficy
Head of Infrastructure
& Project Finance
T +44 20 7367 2904
E frank.dufficy@cms-cmck.com



Jason Davies
Deputy Head of Infrastructure
& Project Finance
T +44 20 7367 2194
E jason.davies@cms-cmck.com

AUSTRIA
CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH
Ebendorferstraße 3
1010 Vienna, Austria



Bernt Elsner
T +43 1 40443 1850
E bernt.elsner@cms-rrh.com

BOSNIA AND HERZEGOVINA
CMS Reich-Rohrwig Hainz d.o.o.
Ul. Fra Anđela Zvizdovića 1
71000 Sarajevo, Bosnia and Herzegovina



Nedžida Salihović-Whalen
T +387 33 2964 08
E nedzida.salihovic-whalen@cms-rrh.com

BELGIUM
CMS DeBacker
Chaussée de La Hulpe 178
1170 Brussels, Belgium



Eric Gillet
T +32 2 74369 88
E eric.gillet@cms-db.com

BULGARIA
Petkova & Sirleshtov Law Office
in cooperation with CMS Cameron McKenna
Landmark Centre, 14 Tzar Osvoboditel Blvd.
1000 Sofia, Bulgaria



Kostadin Sirleshtov
T +359 2 92199 42
E kostadin.sirleshtov@cms-cmck.com

Contacts PPP in Europe

CROATIA AND SERBIA

CMS Zagreb
Ilica 1
10000 Zagreb, Croatia



Radivoje Petrikić
T +381 11 3208 900
E radivoje.petrikic@cms-rrhs.com

GERMANY

CMS Hasche Sigle
Kranhaus 1
Im Zollhafen 18
50678 Cologne, Germany



Christian Scherer-Leydecker
T +49 221 7716 116
E christian.scherer-leydecker@cms-hs.com

CZECH REPUBLIC

CMS Cameron McKenna v.o.s.
Palladium, Na Poříčí 1079/3a
110 00 Prague 1, Czech Republic



Tomaš Kruták
T +420 2 21098 834
E tomas.krutak@cms-cmck.com

HUNGARY

Ormai és Társai
CMS Cameron McKenna LLP
YBL Palace, Károlyi Mihály utca 12
1053 Budapest, Hungary



Erika Papp
T +36 1 48348 13
E erika.papp@cms-cmck.com

FRANCE

CMS Bureau Francis Lefebvre
1–3, villa Emile Bergerat
92522 Neuilly-sur-Seine Cedex, France



François Tenailleau
T +33 1 4738 5500
E francois.tenailleau@cms-bfl.com

ITALY

CMS Adonnino Ascoli & Cavasola Scamoni
Via Agostino Depretis, 86
00184 Rome, Italy



Paolo Bonolis
T +39 06 4781 51
E paolo.bonolis@cms-aacs.com

Contacts PPP in Europe

THE NETHERLANDS

CMS Derks Star Busmann
Mondriaantoren – Amstelplein 8A
1096 BC Amsterdam, The Netherlands



Eduard Scheenstra
T +31 20 3016 447
E eduard.scheenstra@cms-dsb.com

RUSSIA

CMS, Russia
Gogolevsky Blvd.,11
119019 Moscow, Russia



Stephen Cozens
T +7 495 786 4050
E stephen.cozens@cmslegal.ru

POLAND

CMS Cameron McKenna
Dariusz Greszta Spółka Komandytowa
Warsaw Financial Centre, Ul. Emilii Plater 53
00-113 Warsaw, Poland



Andrew Kozlowski
T +48 22 520 5547
E andrew.kozlowski@cms-cmck.com

SCOTLAND

CMS Cameron McKenna LLP
2nd Floor, 7 Castle Street
Edinburgh EH2 3AH, Scotland



Robert Wilson
T +44 131 220 7676
E robert.wilson@cms-cmck.com

ROMANIA

CMS Cameron McKenna SCA
S-Park
11–15, Tipografilor Street, B3–B4, 4th Floor, District 1
013714 Bucharest, Romania



Gabriel Sidere
T +40 21 4073 813
E gabriel.sidere@cms-cmck.com

SLOVAKIA

Ružička Csekes s.r.o.
in association with members of CMS
Vysoká 2B
811 06 Bratislava, Slovakia



Ian Parker
T +421 2 3233 3498
E ian.parker@cms-cmck.com

Contacts PPP in Europe

SLOVENIA
CMS Reich-Rohrwig Hainz
Tomšičeva 1
1000 Ljubljana, Slovenia



Aleš Lunder
T +386 1 62052 10
E ales.lunder@cms-rrh.com

SPAIN
CMS Albiñana & Suárez de Lezo, S.L.P.
Calle Génova, 27
28004 Madrid, Spain



José Antonio Rodríguez García
T +34 91 4519 302
E joseantonio.rodriguez@cms-asl.com

SWITZERLAND
CMS von Erlach Henrici Ltd
Dreikönigstrasse 7
8022 Zurich, Switzerland



Kaspar E. Landolt
T +41 44 2851 111
E kaspar.landolt@cms-veh.com

UKRAINE
CMS Cameron McKenna LLC
6th Floor, 38 Volodymyrska Street
01034 Kyiv, Ukraine



Daniel Bilak
T +380 44 39133 77
E daniel.bilak@cms-cmck.com

UNITED KINGDOM
CMS Cameron McKenna LLP
Mitre House
160 Aldersgate Street
London EC1A 4DD, England



Frank Dufficy
T +44 20 7367 2904
E frank.dufficy@cms-cmck.com

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