

Your World First

C/M/S/

Law . Tax

New PPP Rules in Serbia

Introduction

The growing need to build new public infrastructure and update existing infrastructure, invest in projects of general interest and provide services of public interest in Serbia has required the creation of a legal and institutional framework for attracting private investment. The Law on Public-Private Partnership and Concessions (the “**PPP Law**”) was adopted in 2011 and it introduced the concept of public-private partnerships into the Serbian legal system for the very first time.

Since then, several public-private partnership (the “**PPP**”) projects have been initiated and implemented in Serbia, these being mostly on the low to medium scale. The sectors involved vary from public transportation, public lighting, energy and water to maintenance of roads and other infrastructure. The Serbian market is, however, yet to see a large-scale complex PPP project in full operation.

PPPs should be both economically efficient and socially responsible. The economic rationale of this concept is that the value obtained for the funds invested should be greater than the value that would have been obtained by using the traditional public investment model (i.e. funding from the budget). Another clear advantage of the PPP is the fact that the public sector (including municipalities throughout Serbia) typically lacks the appropriate level of expertise, knowledge and know-how to tackle and implement complex infrastructure projects themselves, so involving a private partner is usually a more practical solution than engaging external consultants on a long-term basis.

From a legal point of view, a PPP project procedure is governed by both the PPP Law and the Law on Public Procurement. By and large, the rules of the Law on Public Procurement are applicable to the procedure for the public invitation, submission and evaluation of bids and for selecting the most preferred bidder (i.e. future private partner), while the PPP Law mostly governs the material aspects of the relevant project, the PPP contract’s content and other substantive matters.

The main procedural steps for the development of a PPP project are the following:

- setting up the Project Implementation Unit;
- defining the Project Boundary and Baseline;
- preparing a PPP Project Proposal, including technical, financial and economic analyses;
- obtaining approval for the PPP project proposal - positive approval from the PPP Commission and enforcement of project’s approval by the relevant public authority (together with the positive opinion of the Ministry of Finance if the value of the project exceeds EUR 50 million);
- preparation of tender documents including PPP contract;
- tendering for and selection of the most preferred bidder; and
- signing the contract and approval by the competent public authority.

As a rule, a given PPP project may last between 5 and 50 years in Serbia.

The PPP contract may, at a public partner’s request, or a private partner or financing bank’s (or other financial institutions), be amended after signing. Such amendments, however, cannot include (i) the subject matter of the contract; nor (ii) the period for which the contract is signed.



Main Challenges

The inter-play between the PPP Law and the Law on Public Procurement did not work quite so well in practice; there were several ambiguities on deadlines and certain procedural steps involved in a PPP procedure according to both laws that remained a point of concern for a notable number of stakeholders on the market.

Also, several rules of the PPP Law itself were, to an extent, not harmonized with each other, and there were notable uncertainties about some important aspects of the PPP, including the very notion of a private partner (i.e. whether it includes an SPV formed for a specific project or not), whether an institutional PPP is allowed for concessions or not, whether an SPV must be founded for the project’s implementation or not, and so on.

In addition, practical hurdles appeared to exist regarding the correct manner in how the value of the relevant project should be determined, since the application of the rules of the Law on Public Procurement did not themselves completely fit to the desired purpose once they were applied to a PPP project. In brief, the basic logical and economic rationale governing purely public procurement projects are not fully applicable to PPP projects, since in purely public procurement matters the projects usually entail a one-off procurement of a given good or service (the value of which can be relatively easily assessed) while on the other hand a PPP project’s value implies a long-term contractual relationship whereby all the project’s inflows and outflows constitute the ‘value of procurement’. In practice, however, there were many ambiguities as to the correct calculation of the project’s value, with the public authorities often taking an overly simplified and somewhat traditional approach and therefore not properly reflecting the actual value of the project in the tender documentation.

Finally, but most importantly, the existing rules of the PPP Law were considered by many market participants to not properly address the need for the PPP contract to be adapted at a later stage in the process, at the request of prospective financiers; in complex large-scale infrastructure projects the international funders are not usually very eager to thoroughly examine a given project (from both a legal and financial point of view) before they know exactly who the private partner will be, since such an exercise might entail the investment of significant resources for a bidder who may not

eventually qualify or is not awarded the contract at the end of the process, or if for any reason the project is abandoned. Consequently, there appears to be a need for a greater level of flexibility regarding subsequent adaptation of a PPP contract (i.e. after the award and/or signing) in order to meet the funders’ reasonable requirements, whilst at all times maintaining a level playing field and ensuring that real competition among the market participants remains intact.





New PPP Rules

To tackle the above challenges and foster the further development of PPP projects on the Serbian market, the PPP Law has recently been subject to amendments, which came into effect in December 2016.

These amendments are, amongst others:

- to provide for somewhat greater clarity as to SPV involvement in a PPP project;
- to put forward clearer boundaries between the applicability of the rules of the PPP Law itself on a given project and the rules governed by the Law on Public Procurement, stating that the rules of the latter shall not apply to:
 - the method for calculating the estimated value of the public contract;
 - the joint bid;
 - sub-contractors;
 - deadlines for submitting bids and applications;
 - deadlines in connection with the adoption of the decision on the selection of the most preferred bid;
 - deadlines for the conclusion of the contract; and
 - amendments of the public contract;
- to make explicit certain matters that have caused ambiguities in the previous method of practice (notion of private partner, notion of bidder, possibility of charging end-users directly, possibility for institutional PPP without elements of concession, etc.);
- to improve to an extent the rules on sub-contracting;
- to improve to an extent the rules relevant for calculating the value of the project;
- to further develop the procedural rules that are specific for concessions;
- to fine-tune the mandatory contents of a public (PPP) contract;
- to improve the rules on approving the PPP contract following its award to a private partner;
- to further specify the scope of prospective subsequent amendments to a PPP contract at the funders’ request;
- to provide for greater clarity as to a PPP contract’s termination and a corresponding return of assets; and
- to further elucidate the prospects for stipulating foreign arbitration.

Looking Ahead

The recent amendments to PPP Law indeed seem to be a constructive step forward towards full exploitation of the PPP market potentials. With several large-scale projects currently in the preparation phase in Serbia, such improvement to the legal basis is surely much needed and welcome.

While there still appears to be room for further improvement of the rules directly applicable to this sector, it is nevertheless of even greater importance that a correct and efficient practical implementation of the existing rules be enabled, as recently amended.

In particular:

- the capacities of the PPP Commission have to be further improved;
- the sharing of knowledge and existing know-how among various public entities needs to be strengthened and supported (this is particularly the case with minor Serbian municipalities);
- the domestic financial and banking sector needs to become acquainted in greater detail with the specifics of the PPP arrangements (this need appears to be even more relevant for some emerging sub-sectors, such as ESCO and others);

- practical implementation of the rules relevant for determining the project value that are PPP-specific needs to be improved and the capacities of public sector strengthened to fully delineate such projects from purely public procurement projects; and
- new rules on subsequently adapting PPP contracts at the request of funders are yet to be fully tested in practice and, in this respect, knowledge-sharing and capacity-building on the basis of best international practices would be highly welcome.

In conclusion to the above, it appears that the rules now in place for the successful realization of PPP projects are adequate, but still far from perfect. This also applies to large scale and complex PPP projects. Nevertheless, the practical implementation of these rules should be done diligently and at the same time efficiently; it is therefore yet to be seen whether the Serbian market is actually ready to fully use this potential.

Contact details



Radivoje Petrikić, Ph.D.
Managing Partner Belgrade

T +381 11 3208 900
E radivoje.petrikic@cms-rrh.com

Radivoje Petrikić is a partner at CMS Reich-Rohrwig Hainz in Vienna and heads the CMS offices in Belgrade and Sarajevo. As an expert in the field of mergers and acquisitions, corporate and commercial law as well as energy law and project finance, he has distinguished working experience in major commercial transactions and development projects throughout the CEE region. Radivoje Petrikić obtained his university Masters and PhD degrees at the University of Vienna and the University of Belgrade.

He has developed a strong team in Serbia with excellent track record of large energy and infrastructure projects carried out across different jurisdictions. His main focus lies on renewable energy, infrastructure projects, oil and gas, and finance-related matters.

Radivoje Petrikić is a qualified lawyer in Austria and Serbia. He has been recommended as an expert in both countries by Legal 500 and has been ranked in band 1 as a leading individual in Serbia by Chambers Global for the past three years. Radivoje Petrikić is fluent in Serbian, German and English.

////////////////////////////////////

PETRIKIĆ & PARTNERI AOD
in cooperation with
CMS Reich-Rohrwig Hainz
Cincar Jankova 3
11000 Belgrade, Serbia

The brochure was issued with the support of ADVANTAGE AUSTRIA Belgrade.



Djordje Popović
Partner

T +381 11 3208 900
E djordje.popovic@cms-rrh.com

Đorđe Popović is a Partner at CMS Belgrade with over a decade of relevant experience. He leads the Firm’s energy practice. His primary focus are renewable energy projects and energy efficiency projects, where he successfully represented both equity and lenders as well as manufacturers and EPC contractors in some of the most prominent transactions on the market. Equally, Đorđe Popović has significantly contributed to the development of Serbian legislation governing the sector, by means of his involvement in the projects mandated by EU and EBRD to harmonize the country’s legislation with the EU acquis. Also, he has extensive experience in providing legal support to major international clients in relation to Serbian, Montenegrin and Bosnian real estate, and corporate and finance matters. Additional areas of his specialisation include telecoms and PPPs.

////////////////////////////////////



Maja Stepanović
Partner

T +381 11 3208 900
E maja.stepanovic@cms-rrh.com

Maja Stepanović is a partner in CMS Belgrade and leads teams on a large variety of corporate and other projects. As an expert in the field of corporate, M&A, privatisations and commercial law matters, she has gained outstanding work experience advising international clients on different legal matters in Serbia. Through her involvement in large PPP and public procurement projects, she has also acquired vast experience in these areas. Also, she advised and assisted EBRD and the Government of Serbia in relation to the drafting of Serbia’s concession and PPP legislation.

In addition to providing legal support to a great number of international companies in M&A transactions in Serbia, Maja Stepanović has also advised the Privatization Agency of the Republic of Serbia in different privatisation transactions, as well as international buyers in the course of acquisition of Serbian companies in the privatisation process.

////////////////////////////////////



Law . Tax

Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.

cms-lawnow.com



Law . Tax

Your expert legal publications online.

In-depth international legal research and insights that can be personalised.

eguides.cmslegal.com

CMS Reich-Rohrwig Hainz, a limited liability company, is a member of CMS Legal Services EEIG (CMS EEIG), a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices. Further information can be found at cms.law.

CMS locations:

Aberdeen, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Duesseldorf, Edinburgh, Frankfurt, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Kyiv, Leipzig, Lima, Lisbon, Ljubljana, London, Luxembourg, Lyon, Madrid, Medellín, Mexico City, Milan, Moscow, Munich, Muscat, Paris, Podgorica, Prague, Rio de Janeiro, Rome, Santiago de Chile, Sarajevo, Seville, Shanghai, Sofia, Strasbourg, Stuttgart, Tehran, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

cms.law