THEMED PAPER

The new Macedonian Concessions and Public-Private Partnerships Act: A Need for Further Improvement?

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ABSTRACT Public-private partnership was not unknown in Macedonia prior to the adoption of the latest legislation on concessions and PPP in 2007. Many infrastructure and other public interest projects have been developed or tried in the form of concessions mainly at the state level over the past few years. The Concession and Other Forms of Public-Private Partnerships Act marks an important step towards stimulating more intensive use of public-private partnerships, particularly in developing infrastructure and public services at the local self-government level. One has to welcome the introduction of this very concept of the Public-Private Partnerships Act into the Macedonian legal system because it brings this form of financing local development closer to both public and private partners, and it makes the whole process of structuring and awarding PPP projects more transparent and clear.

KEY WORDS: • public service delivery • public-private partnership • concession • Macedonia

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1 Introduction

In the last few decades, public-private partnerships ('PPP') have gained much importance as additional tools for financing public interest projects to more traditional means of public financing. Experience in many countries, like the UK, has demonstrated great advantages in utilizing PPP for advancing infrastructure and public services at both central and local government levels, even in sectors traditionally reserved for the exclusive public domain, like public education, state penitentiaries or health. At the local self-government level, PPPs have offered a great potential for promoting local development, especially in the underdeveloped municipalities with scarce budgetary resources.

In order to provide stimulus and proper regulation of public-private partnerships, many countries proceeded with the adoption of specific legislation and/or guidelines or other supporting documents on PPP. On its part, the European Commission launched a large initiative to clarify the EC rules and principles applicable to the matter, simultaneously examining the possibility of enacting separate legislation on concessions and PPP. Driven by the need to secure the proper functioning of the internal market, the Commission has so far utilized soft instruments for advancing the latter, e.g., the issue of the Interpretative Communication on Concessions under Community Law in 2000, the PPP Green Paper and Community Law in 2004 and several other interpretative communications on the Community law applicable to concessions and PPP. The Commission activity went in parallel with the adoption of the consolidated Public Procurement Directive by the Council and EP in 2004.

The Republic of Macedonia has recently introduced the public-private partnership concept into its legal system by adopting the Concession and Other Forms of Public-Private Partnerships Act of 2007 (the PPP Law). Prior to that, only concessions were covered by specific legislation, and they were also regulated by various sector-specific laws, while some other PPP models could be derived from generally applicable laws, including the Public Procurement Act. The new Concession and Other Forms of Public-Private Partnerships Act of 2007 is intended to set out a comprehensive legal framework for all the concessions and PPPs, whereas on the other hand, particular aspects are still regulated by sector-specific legislation, which, in case of a conflict, largely takes precedence over the Concession and Other Forms of Public-Private Partnerships Act.

In the text below, we shall focus primarily on examining the provisions of the new Concession and Other Forms of Public-Private Partnerships Act of 2007, taking into account, of course, other relevant Macedonian legislation applicable to PPP. The way PPPs are regulated in that Act is rather important for the local self-government in the R.M. Most Macedonian municipalities are given limited ability to finance and manage infrastructure and public services through traditional
financing, bearing in mind though that PPPs are neither a 'magic stick' nor an instrument *a priori* more favourable for local development than traditional means. We shall see that while the Concession and Other Forms of Public-Private Partnerships Act has to be welcomed for introducing the public-private partnership concept into the legal system of the R.M. Thus getting it closer to both public and private partners, it also creates some legal confusion and leaves a number of important aspects of PPP still unclear or unresolved.

2 General notes on the definition and forms of PPP

Public-private partnership is a broad multi-dimensional concept and as such may not be easily grasped in a well functioning legal system. In fact, the term is so broad that it might mean different things to different people. The legal definition of this term, however, can be rather significant because it may determine the scope of the specific legislation applicable particularly to PPP related to the choice of the proper PPP contract award procedure.

In its broadest meaning, PPP simply denotes any form of cooperation between the public and the private bodies. It can be deployed in various sectors in pursuit of different policy goals. Sometimes, a PPP is established for the purpose of promoting local development with the involvement of private promotion agencies, universities and/or non-profit private establishments along with the public partner who can participate with certain funding in the overall PPP scheme. In other cases, a PPP may assume a construction of a public facility by the private partner entirely or partly financed by him, who then operates the facility and remunerates himself through payments received from the public partner for the contracting period (a kind of a long-term lease). It may also take the form under which the private partner who has constructed the public works at his own expense wholly or partly remunerates himself from the charges received by users during the exploitation of such works, for instance, in the case of a public works concession. The concession involving (entirely or predominately) the performance of a public service by the private party (the concessionaire) who, when remunerating himself from the fees collected for the services offered directly to the public, in many jurisdictions, would be governed by a specific set of rules applicable to public service concessions.

In EC Law, there is no legal definition of the term 'public-private partnership' because PPPs are not yet regulated as such at the Community level. Most of the PPPs fall under the normal application of the EC public procurement secondary rules, namely, under Directive 2004/18/EC of 2004 (and Directive 2004/17/EC) which also contains a handful of rules applicable to 'public works concessions'. These forms of PPP, as well as PPP contracts falling outside the scope of this Directive or of other Community secondary legislation, including public service
concessions, are governed by the relevant Treaty articles and the general principles developed by the ECJ.\textsuperscript{15}
Following its specific interest in safeguarding the proper functioning of the internal market and in pursuit of specific Community policies, the European Commission has confined PPP to infrastructure and public services. According to the Commission "[i]n general, the term refers to forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service."\textsuperscript{16} For the purpose of determining the proper application of the applicable EC secondary and/or primary rules, the European Commission has also drawn an important distinction between the 'contractual' and 'institutionalized' PPPs, with the latter also including the joint company established by the partners for the purpose of performing a public contract or a concession. That distinction is important because it is made precisely with the aim to widen the scope of the afore-mentioned Community rules on public procurement and concessions also to the 'institutionalized' form of PPP.\textsuperscript{17}

3 The definition of concessions and 'other forms of PPP' in the Macedonian PPP Law

In defining public-private partnerships, the 2007 Macedonian Concession and Other Forms of Public-Private Partnership Act generally follows the logic of the European Commission, although, as we have already mentioned, the definition developed by the Commission has no positive law status because PPPs are not yet regulated as such by the relevant Community rules. In the Macedonian Concession and Other Forms of Public-Private Partnership Act, concessions and other forms of PPP are also confined to infrastructure and public services (including granting the use rights over public goods via a concession). It generally follows the division between 'contractual' and 'institutionalized' forms of PPP. The relevant articles of this Act, however, have not entirely succeeded in making a clear distinction between the different forms of PPP, which has made the identification of particular types of public-private partnerships and the applicable rules on these somewhat uncertain.

3.1 Concessions

Most articles of the new Macedonian Concession and Other Forms of Public-Private Partnership Act relate to concessions considered as a particular form of PPP. In Article 3(1) of the Act, a concession is defined as a "(..) grant of right to use general interest goods for the Republic of Macedonia, to do public interest work or to perform public services with the concessionaire’s obligation to construct and/or manage, use and maintain the object of the concession with or without receiving payment from the conceding authority."
The 'conceding authority' could be the Republic of Macedonia, any municipality or the City of Skopje, whereas a 'concessionaire' may become any Macedonian or foreign legal or natural person or consortia to which the concession has been granted. 'Objects of the concession' are general interest goods for the Republic of Macedonia, including all the movable and immovable property owned by the respective conceding authority. The 'concession contract', in turn, is defined as a lucrative contract between partners. It has, as its subject-mater, the use of 'general interest goods for the Republic of Macedonia', doing 'public interest work' or performing public service.¹⁸

According to the above definitions, it could be assumed that the Concession and Other Forms of Public-Private Partnership Act envisages at least three different types of concessions, that is: (a) concessions where the conceding authority merely grants the concessionaire the right to use particular public goods ('general interest goods' for the R.M. or the municipality. They may be mineral resources, water, goods in public use (e.g., a highway or a lakeshore beach) etc., including (sometimes) urban land owned by the R.M.); (b) public works concession, and (c) public service concession. The PPP Law provides rules that determine all these three types of concessions in the same way with respect to the contract content, contract execution and contract award.

In many cases, the above types of concessions may merge into one, for example, where a concession has been granted for water supply and distribution in a municipality with the concessionaire constructing (or renovating) and operating the necessary facilities and installations at his/her own risk and collecting revenues from the services rendered to the public. The latter may justify the uniform handling of concessions. In other cases, however, each of the three types of concessions would stand alone, e.g., mineral resources concession or public service concession in an already existing facility. The difficulty, arising from the efforts to handle all these three types of concessions together, lies in the fact that all these concessions differ among themselves to the extent that it is almost impossible to cover them with the same set of rules.¹⁹

The Macedonian PPP Law, however, opted to regulate all types of concessions under uniform legal provisions, including contract content and award. In that, it follows the approach taken in the previous Concession Act of 2002, simultaneously inheriting the difficulties arising therefrom. Uncomfortable with the difficult task of providing the same handling of all the concessions in view of the differences in the nature of each of them, the new PPP Law, like its predecessor, provides for supremacy of the sector-specific laws over its own rules regarding one important aspect of concessions – concession award.²⁰ As past experience has shown, it may open the door for ignoring the rules provided in the Concession and Other Forms of Public-Private Partnership Act by the sector specific laws, or sometimes in the case of merging concessions governed by two
or more such laws, and for the confusion over the choice of the proper procedure to be followed in the light of the differences existing between the provisions of the relevant sector-specific laws.\textsuperscript{21}

In our view, a better solution for the PPP Law can be clearly identified. It refers specifically to each of the different types of concessions with possible exclusion of some concessions from the ambit of its application (i.e., mineral resource concessions).\textsuperscript{22} Failure to do that entails in itself the danger that many provisions of that Law may remain merely residual with respect to sector-specific laws, or they may even become obsolete. The need to provide for a well nuanced and integrated legal regulation of different types of concessions in the Macedonian legal system requires that all these laws be handled as a package which, as it appears, was not done at the time of the preparation of the PPP Law, and it had not been previously done with the enactment of the 2002 Concession Act.

\subsection*{2.2 'Other forms of PPP'}

The difficulties with the definition of concessions in the Macedonian PPP Law and the legal and practical consequences arising therefrom are even more apparent with the definition of 'other' public-private partnerships in this Law. The later forms are not clearly separated from concessions, the regulation of which appears to have been of the primary interest of the drafters of the PPP Law. In fact, it is somewhat surprising to find out that only a handful of articles of the PPP Law are devoted to 'other public-private partnerships' as compared with the number of articles applicable to concessions.

The 'other forms of public-private partnerships' are defined by the PPP Law as "all cooperation ventures, different than concessions and public procurement, in the framework of which the public and private partners put together their resources and expert knowledge with the aim of securing the execution of certain public services through adequate directing the resources, risks and revenues." (Article 3(7))

A 'venture' is "a form of cooperation between public and private partners realized through performance of activities related to design, construction, provision of services and other activities for the benefit of the public partner." (Article 3(8))

Whereas, on the other hand, 'a public-private partnership contract' is "a lucrative contract concluded between public and private partners; the contract subject-mater includes design, financing, construction and maintenance of infrastructure facilities, equipment and/or
provision of services by the private partner with the aim of public service execution." (Article 3(9))

In the first place, the above definitions create some uneasiness with regard to understanding what separates 'the other forms of PPP' from certain concessions. With respect to the performance of public services, to which 'other PPPs' are attached, both the latter forms of PPP and most concessions are 'cooperation ventures' as defined in Article 3 (7 and 8). Whereas under the definition of Article 3(7), the 'other PPP' would be more easily distinguished from concessions granting the private partner the use rights over public goods, that distinction is very difficult to make when it comes to 'public works concessions'. 'Other forms of PPP', as defined above, relate to design, construction, provision of services and other activities (including financing, maintenance of constructed facilities, etc.) by the private partner for the benefit of the public partner by remunerating himself in a form of a revenue generated from the operation of the object of the PPP and/or payments received from the public partner. The same, however, is also true for 'public works concessions'. On the other hand, the distinction between 'other forms of PPP' and 'public services concessions' appears to be more clear because Article 92 (2) of the Law excludes the private partner in 'other PPP' from the exercise of a public service as such, the opposite being, obviously, dependent upon the grant of a public service concession.

Another complication under the above and other provisions of the 2007 Law relates to the definition of the 'other forms of PPP' themselves. Whereas under Article 3(7-8) of that Law, as we have seen, PPPs are defined as 'cooperation ventures' strictly aimed at securing the exercise of a public service; in another article of the Law, in Article 88, the forms of those 'ventures' are outlined in a way that allows them to go beyond that particular aim. The latter article provides for a list of 'forms of ventures' that may be subject to a PPP which, inter alia, includes PPP projects directed at economic and social development of municipalities, promotional, educational, scientific or cultural projects, etc. Apart from being vague in itself by including these and other broad 'forms of ventures' within the scope of a PPP, Article 88 clearly challenges the rather restrictive limitation in the definition of public-private partnerships of Article 3 (7-8). It is difficult to see how a PPP, aimed at promoting 'economic and social development' or including 'promotional, educational, scientific or cultural ventures' (otherwise recognized forms of PPP), would necessarily fit in within the requirement that a PPP relates exclusively to the exercise of a public service as envisaged by Article 3(7-8).

The above provisions, in particular, Article 88, also raise difficult questions as to the difference between a public-private partnership, to which the PPP Law would apply, and other forms of private participation in the public sector which may fall under other legislation, i.e., under general public procurement rules. The PPP Law is silent on that as it is also silent on the various PPP models which, in our view,
should have been indicated and elaborated in its provisions, at least in order to increase the practical operability of the Law. The latter seems rather important, given, on the one hand, the complexity of such PPP contractual models that deserve particular attention and, on the other hand, the inexperience of the public bodies in these especially at the local self-government level. Related to that, there is also a need for the issue of a comprehensive guide and other supporting documents elaborating on the provisions of the PPP Law (and of other applicable legislation), including model contract arrangements. In that respect, of particular help could be the Commission's Guidelines on Successful Public-Private Partnerships of 2003, in which the Commission identifies several major models of private participation in the public sector according to their functional and legal characteristics, based on experience with infrastructure projects. The Guidelines first distinguish between two major groups of private participation models in infrastructure (that may be easily applicable to other sectors as well), that is, participation through (a) traditional public procurement projects and through (b) projects realized by an integrated approach to the development and operation of the infrastructure facilities. The first group encompasses i) service contracts, ii) operation and management contracts and iii) lease contracts, whereas the more complex integrated models of the second group include iv) Build-Operate-Transfer (BOT) and v) Design-Build-Finance-Operate (DBFO) schemes. Apart from greater complexity, the latter two PPP types differ from the traditional public procurement types of 'public-private relationship' in that they assume much larger risk transfer to the private partner (including, operational, financial and other risks), especially when compared with the classical public procurement, i.e., services and/or O&M contracts. Bearing that in mind, the Guidelines seem to suggest stricter competitive contract award procedures for the latter than for BOT or DBFO contracts, which, because of their complexity, may be awarded in more flexible tendering (i.e., negotiated and/or in the competitive dialogue) procedures.  

3.3 Institutionalized PPP

As mentioned above, the 2007 Macedonian Concession and Other Forms of Public-Private Partnership Act does provide for a distinction between 'contractual' and 'institutionalized' concessions and/or other PPPs (IPPP). Whereas 'contractual concessions/PPP are understood as "partnerships between public and private partners established by a contract", IPPPs in turn are defined as such partnerships "established in a form of a joint legal entity set up under law." Apart from these provisions, however, IPPPs are scarcely ever mentioned elsewhere in that Act, which makes it difficult to understand both the concept and the logic behind distinguishing between the 'institutionalized' and the 'contractual' PPP. To answer that question, one has to turn to the reasoning of the European Commission that presumably served as an inspiration to the drafters of the
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Macedonian PPP Law, especially as expressed in its latest interpretative Communication on IPPP of 5 February 2008. The main reason behind the distinction made by the European Commission between 'contractual' and 'institutionalized' PPP lies in the necessity to submit a 'joint entity,' established by the public and private partners in an IPPP whenever it is about acquiring a concession or other public contract by the public partner under the Community rules on contract award. Relying on several important decisions of the ECJ on the matter, the Commission in its Communication made clear the imperative of preventing "in-house" award of concessions and of other public contracts from a public body to a mixed public and private company, which would normally exclude the application of the public procurement and related Community rules. According to the Commission, "it is important to note that public authorities are not permitted 'to resort to devices designed to conceal the award of public contracts or concessions to semi-public companies'." The latter applies to the case when an IPPP is established through setting up a new joint entity by the public and private partners for the purpose of acquiring a concession or other public contract ab nuovo, and to the case when such an IPPP is established through acquiring a share by the private partner in an existing publicly owned company that has obtained public contracts or in-house concessions in the past. In both cases, the selection of the private partner by the public authority and the award of the respective concession and/or public contract (including inherited in-house contracts) has to be made in accordance with the applicable EC secondary and/or Treaty rules, preferably as suggested by the Commission for practical reasons, in one tendering procedure.

In line with the above reasoning, the 'institutionalized' PPPs are defined by the European Commission as including both the establishment of the joint company by the PP partners and the purpose of performing a public contract or a concession:

"IPPPs are understood by the Commission as cooperation between public and private parties involving the establishment of a mixed capital entity which performs public contracts or concessions. The private input to the IPPP consists – apart from the contribution of capital or other assets – in the active participation in the operation of the contracts awarded to the public-private entity and/or the management of the public-private entity. Conversely, simple capital injections made by private investors into publicly owned companies do not constitute IPPP (..)." (emphasis added)

Opposite to that, the provision of Article 3(13) of the Macedonian PPP Law on the definition of 'institutionalized' public-private partnerships omits one important aspect signifying the content of an IPPP - the purpose of the joint entity of performing a concession or another PPP contract. By excluding the latter, that
definition creates a danger of wrongly conceiving the IPPP as referring only to the establishment by the public and private partners of the "joint legal entity" irrespective of its special purpose, which might mislead the whole process of IPPP award. IPPPs are scarcely mentioned in the remaining provisions of the Law, in particular in those provisions governing the contract award, which leaves many questions unanswered, including the one on the possibility of exercising "in-house" contract awards by the public partner to the benefit of a semi-public entity with private participation in it.  

4 Concession and other PPP award

The new Macedonian PPP Law provides for the same set of rules governing the award of concessions and other PPPs. In that, it largely transposes the previous Law provisions to concessions of 2002, offering a choice between an (a) open and (b) restricted tendering procedures with the exclusion of the negotiated procedure. Compared with the previous Law, however, the 2007 PPP Law adds to the list the (c) competitive dialogue procedure so that this new way of awarding public contracts, introduced by Directive 2004/18/EC, may now be used in "particularly complex cases" of concessions and PPP award. The latter award procedures and the rules governing them, however, may be superseded by any other rules on concession or PPP award contained in applicable sector-specific laws so that, with respect to some of those laws, it may easily become possible that they serve merely the residual and guiding roles.

The above procedures for concession/PPP award are regulated in detail at various stages in a fairly correct manner. The procedure is prepared and conducted by a Commission, set up by the competent minister in the Government of the R.M. or by one of the major municipalities, or by the City of Skopje. The Commission is composed of the President, his deputy and at least three other members (and their alternates), appointed from among the personnel of the competent ministries and the Ministry of Finance, and outside experts. During the tendering procedure, the Commission is in charge of all the activities referring to preparation of tender documents, short-listing of pre-qualified bidders in a restricted procedure or conducting the dialogue with the candidates in a competitive dialogue procedure, etc., except for the adoption of the final decision on award. The latter decision is merely proposed by the Commission in its evaluation report submitted to the conceding authority (the public partner), based on the previous evaluation of bids according to the criteria of a financially or economically most advantageous offer. Then the conceding authority issues the final award decision that is notified to all bidders and published in the Official Journal of the of R.M., after which the public partner and the awarded bidder proceed with the finalization of the concession/PPP contract within the framework of its bid and the draft-contract included in the tender documents to be concluded within three months.
It is important to note that Articles 2 and 4 of the PPP Law introduce four important principles governing the concession/PPP award, i.e., the principle of equal treatment ('non-discrimination') of all interested parties, the transparency principle, proportionality and effectiveness of the tendering procedure. In addition, the PPP Law ensures the aggrieved candidates or bidders the right to use legal remedies against the Tender Commission’s decision and/or the public authority's decision on contract award. In the first case, the non-qualified candidates that expressed an interest in participating in the first stage of the restricted procedure (or a competitive dialogue) or the bidders that submitted a bid may make a complaint to the Commission about the list of pre-qualified candidates and/or about the ranking list of bidders proposed by the Commission following evaluation of bids. If the Commission deciding on a complaint has not changed its position, the aggrieved candidates or bidders may initiate an 'administrative dispute' at the competent administrative court, following the receipt of the award decision. In any case, all aggrieved bidders may challenge the award decision through an 'administrative dispute' procedure, which, however, does not suspend the execution of the decision and/or the conclusion of the respective contract. The aggrieved bidders succeeding in challenging the contract award decision at the administrative court are provided with the right to indemnification.

The PPP Law also regulates the preparatory activities preceding the decision on an open tender procedure. The decision to proceed with the tendering process is issued by the Government of the Republic of Macedonia (when the conceding authority/the public partner is the Republic), or by the municipal council when the authority is a municipality or the City of Skopje. It has to be adopted upon the proposal of the competent minister and/or the Mayor on the basis of the prior assessment of the advantages offered by the proposed concession or other PPPs compared to other models of financing, and on the basis of the study on the respective project.

In addition, for the purpose of the effective creation of a concession and PPP policy, including the preparation of a Strategy for realisation of projects in that field to be adopted by the Parliament of the R.M., the Law provides for the creation of a Council for Concession/Public-Private Partnerships, composed of the representatives of six relevant ministries and the Legislation Secretariat, two representatives from the Association of Local Self-Government Units (ZELS) and two outside experts - an economist and a lawyer. The Law, however, sets out no particular institutional structure for monitoring compliance with the PPP contract and project implementation of the awarded contracts, except for making reference to other applicable laws and the contract itself.
5 Conclusion

In the Republic of Macedonia, public-private partnership was not unknown prior to the adoption of the latest legislation on concessions and PPP in 2007. Many infrastructure and other public interest projects have been developed or tried in the form of concessions mainly at the central, i.e., state level over the past few years. In the energy sector, for example, the ROT (Rehabilitate-Operate-Transfer) concession project for 7 small hydropower plants was granted to Hydropol, the Czech private investor, in 2001. The Government is currently conducting tender processes for a number of other small hydropower plants and for two large hydropower plants based on the BOT concession. Similarly, in transportation, a concession for the existing airports in Skopje and Ohrid, and for construction of an additional airport in the Stip area has been recently awarded to a Turkish investor. In addition, the Government has announced its intention to proceed with several highway concession projects. Concessions have also been applied in other sectors, e.g., in the fields of telecommunications, health, etc.

The Concession and Other Forms of Public-Private Partnerships Act, adopted in 2007, marks an important step towards stimulating more intensive use of public-private partnerships, particularly in developing infrastructure and public services at the local self-government level. As such, one has to welcome the introduction of this very concept of the Public-Private Partnerships Act into the Macedonian legal system with the intention to bring this form of financing the local development closer to both public and private partners, and to make the whole process of structuring and awarding PPP projects more transparent and clear.

However, in many respects, the 2007 Law on PPP is of modest practical significance because it frequently offers ambiguous solutions to different aspects of the PPPs. It does not deal selectively with different forms of concessions despite their distinct nature, most notably as regards public services concessions. Related to that, it does not help to avoid the conflict between its provisions and the applicable sector-specific laws, which might devaluate its own relevance when compared to them. At the same time, the PPP Law does not provide for a clear definition of 'other forms of PPP' and makes no effort to identify particular PPP models, which would have been of great help for public authorities to structure the future PPPs. The relationship between other types of PPP and certain concessions also remains blurred, whereas the institutionalized PPPs are largely left unregulated and possibly even wrongly conceived.

In the light of the above, the new Concession and Public-Private Partnerships Act of 2007 should be seen as a mere beginning of the development of a comprehensive legal framework for the PPPs in the R.M. Due to the ambiguity of many of its provisions, much effort should be placed on preparing the public-private partnership project by identifying and structuring the proper contractual
PPP package. In order to make the new PPP Act more usable and coherent, some urgent amendments to that Act and to sector-specific legislation would be needed, all of which should be dealt with as a whole. There is also a need for comprehensive guiding and other supporting materials elaborating on the PPP Act provisions (and other applicable legislation), including the need for the PPP contract models, for which there is much comparative experience to consult. In the meantime, more intensive training on PPP for public authorities would be of great help, especially at the level of municipalities where despite the recognized potential of PPP, there is a lack of experience and knowledge of them.

Notes

1 UK is probably the best example of using PPP in developing infrastructure and public service projects. From the start of the so-called Private Finance Initiative (PFI), launched by the conservative government in the beginning of the 90s and further embraced by the Labour government, PFI and other forms of PPP have become well established in many sectors, including in road construction, prisons, hospitals, schools, etc. Since 2003, PFI has been used for over 600 facilities, including 34 hospitals and 200 schools (See HM Treasury, PFI (2003) Meeting the Investment Challenge, www.hm-treasury.gov.uk.). Experience, however, has shown that PFI are not suitable for smaller capital projects or IT projects. Useful documents on PFI and PPP in the UK could be obtained at www.hm-treasury.gov.uk.

2 For the US experience with local economic development policies and programs, including PPP programs (see Bartik, 2003).


6 Commission's Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions of 15.11.2005 (COM (2005) 569); Interpretative Communication on the Community Law Applicable to Contract Awards not or not fully Subject to the Public Procurement Directives of 01.08.2006 (OJ C 179; subject to CFI annulment proceedings); Interpretative Communication on the Application of Community Law on Public Procurement and Concessions to Institutionalized Public Private Partnerships of 05.02.2008 (C(2007) 6661).

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8 Zakon za koncesii i drugi vidovi na javno privatno partnerstvo (Sluţben vesnik na R.M. br. 7/08; 139/08).

9 The Concessions Act (Official).

10 Zakon za javni nabavki (Sluţben vesnik na R.M. br. 136/07).

11 Article 5 of the new PPP Law provides that the procedure for concession award is governed by that Law unless otherwise provided by a "specific" law (See below under 2.1. and 3). There are numerous sector-specific laws applicable to concessions and/or other PPP, for instance, the Water Act (Zakon za vodite, Sluţben vesnik na R.M. br.4/98; 19/00; 42/05; 46/06), the Municipal Utility Activities Act (Zakon za komunalni dejnosti, Sluţben vesnik na R.M. br. 45/97; 23/99; 45/02; 16/04), the Waste Management Act (Zakon za upravuvawe so otpad (Zakon za upravuvawe so otpad, Sluţben vesnik na R.M. br.68/04; 107/07; 104/08), the Civil Aviation Act (Zakon za vozduhoplovstvo, Sluţben vesnik na R.M. br. 14/06; 107/07; 102/08; 143/08), the Mineral Resources Act (Zakon za mineralni surovini, Sluţben vesnik na R.M. br. 24/07) etc.

12 See Timothy E. Bartik supra note 2.


14 In the EU Member States, the main legal rules governing PPP contract's award are those of EC Law. Under these rules, public service concessions are outside of the scope of EC secondary public procurement legislation (See below). On various procurement issues concerning PPP, See Arrowsmith, id. p.31-.

15 See the Commission's Interpretative Communication on Concessions under Community Law of 2000 and other communications, supra note 3

16 Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, supra note 5, paras.1-2. According to the Commission, a PPP is characterized by the following elements, namely, a) the relatively long duration of the relationship, involving cooperation between the public partner and the private partner on different aspects of a planned project, b) the method of funding of the project, in part from the private sector, sometimes by means of complex arrangements between the various players (nonetheless, public funds - in some cases rather substantial - may be added to the private funds), and c) the important role of the economic operator who participates in the project at different stages (design, completion, implementation, funding). The public partner concentrates primarily on defining the objectives to be attained in terms of public interest, quality of services provided and pricing policy, and it takes responsibility for monitoring compliance with these objectives.

17 See below in the text under 3.3.

18 Article 3 (2-5) of the PPP Law.

19 The above is most notable with respect to differences existing between mining concessions and public services concessions, but also between public works and public services concessions. Just to remember, the EC Law provides for a different treatment between public works and public services concessions, with the former concessions being subject to detailed (although not numerous) secondary rules of Directive 2004/18/EC of 2004 whereas public service concessions are governed only by primary Treaty rules. In the case of combined public works and public services concessions, the predominant element in the contract would determine whether the rules on public works or a public service concession would apply.

20 Article 5 of the PPP Law.

21 Differences between the provisions of the PPP Law and of the sector-specific legislation are not rare. For example, article 154a of the Water Act (inserted by amendments of 2005, Sluţben vesnik na Republika Makedonija br.42/05) stipulates that a water concession related to a hydro-electric power facility may be granted by the Government in a negotiated procedure,
whereas the PPP Law does not provide for that. The former Law also envisages much longer concession periods than the 35-year period set out in Article 22 of the PPP Law, the latter article giving precedence to the sector-specific laws. Again, in contrast with the PPP Law, the Mineral Resources Act (supra note 11) provides for the direct grant of a mining concession following application by qualified entities, allowing for a renewal of the concession after the initial concession period (articles 26-27), etc.

22 Failure to understand properly the distinctive character of public services concessions and to deal with them separately, has made the PPP Law abandon one important instrument of the 2002 Concessions Act (borrowed from the French administrative law), the sequester, in case of a continuing material non-performance by the concessionaire of the conceded public service (Article 42 of the 2002 Concessions Act). Unlike the new PPP Law, the 2002 Concessions Act devoted a whole section specifically applicable to public services concessions (Section 4, Articles 37-43). Developing the concept on the later concessions according to the well established principles of the French Administrative Law, the Law of 2002, in the first place, provided for the principle of "protection of the economic and financial equilibrium of the contract," as an overriding principle governing the whole contract's execution regime (Article 38 of the 2002 Law), including the possibility of unilateral modification of the concession by the conceding authority when necessary for the regular, continuing, effective and secure performance of the respective public service (not normally permitted under the Law of Obligations; Article 41 of the 2002 Law; compare this article with Article 82 of the PPP Law); the obligation of the concessionaire to provide continuing service in case of a material change of circumstances under which the concession was initially concluded (corresponding mutatis mutandis to the French legal doctrine of improvidence: Article 43 of the 2002 Law; compare this article with Article 78 of the PPP Law); and the sequester.

23 Article 86(2) of the PPP Law.

24 Article 11 of the PPP Law. The original idea of the drafters of the Law as to the difference between the 'other forms of public-private partnerships' and 'public works concessions' may have relied on the presumption that the latter should apply whenever the 'object of the concession' remains in the ownership of the conceding authority for the entire period of the concession (See the definition of 'objects of concession' in Article 3(4) of the PPP Law, cited above), with the private party exercising only the use rights over them. Opposite to that, in a similar 'other PPP,' the private partner would own the objects constructed and operated by him through the entire PPP term (i.e., like in a Build-Own-Operate-Transfer (BOOT) or a Build-Own-Operate (BOO) scheme, etc.). The latter, however, is not entirely clear, especially in the light of Article 94 of the PPP Law, which implies that a private partner in an 'other public-private partnership' might not always be the owner of the object of the PPP.

25 The 'forms of ventures' of a PPP enlisted in Article 88 are: "i) the design, equipment and implementation of an investment project for the execution of a public interest; ii) supply of services for a certain period if covering operation or maintenance of a property component essential for that aim; iii) activities that have as an aim economic and social development including the revitalization or development of the municipalities and the City of Skopje under a project of the public or the private partner; iv) development of pilot projects, promotional, educational, scientific or a cultural venture supporting the execution of a public interest; v) other forms of cooperation in accordance with the law."
services and 'other covered activities': Chapter IX of the Public Procurement Act, Articles 176-199; for commentary on these articles, see M.B. Micovska, M. Jovanovska, A.Argirovski, R.Gligorievska, Primena na Zakonot za javni nabavki vo praksa, Zduženje na finansiski rabotnici na lokalnite samoupravi i javnite pretprijatija, 2008, p.45 and 336-).


28 It should be noted, however, that the models of private participation in the public sector indicated by the Commission and the nomenclature used in the Guidelines are by no means exhaustive or definitively accurate to describe the complex financial, legal and contractual aspects of different PPP schemes in comparative use (See the Guidelines supra note, p. 17). Apart from BOT and DBFO models indicated by the Commission, there are also other designations for specific contractual schemes, such as DBOT or BOOT or BOO, etc., and a different meaning is sometimes attached to the same designation. In addition, the models indicated in the Guidelines do not necessarily stand alone, so that apart from a DFBO, exclusively designated as 'concession', in different legislations, a BOT (or similar), contractual scheme may also assume a grant of a concession (for instance, if a public good is involved), etc.

29 See id., p.42-. 30 Article 4 of the PPP Law.
31 Article 3(12) and (13) of the PPP Law.
33 Case C-410/04, ANAV, ECR 2006, I-3303, paragraphs 30 et seq; Case C-26/03, Stadt Halle, ECR 2005, I-1, paragraph 49; etc.
34 Supra note 32, p. 3. Also Case C-29/04, Commission v. Austria, ECR 2005, I-9705, paragraph 42.
35 Id., p.3-4.
36 In the Commission's view, a possible way of setting up an IPPP, suitable for complying with the principles of Community law while at the same time avoiding a double tendering procedure (though not required), is the following: "(t)he private partner of the IPPP is selected by means of a procedure, the subject of which is both the public contract or the concession which is to be awarded to the future public-private entity, and the private partner's operational contribution to perform the task and/or his contribution to the management of the public-private entity. The selection of the private partner is accompanied by the founding of the IPPP and the award of the contract or concession to the public-private entity."
37 Id. p.2.
38 In particular, Article 9(1) of the PPP Law raises doubts in this respect. As regards concessions, that article excludes (from the concession provisions) award public companies, public establishments and companies in which the R.M. or a municipality exercises direct or indirect control through a total or majority share (or control over management) in them. Is it possible for a private participant who acquired a (minority) share in such a company (or a public enterprise) to acquire a concession 'in house' later on through it? In its Interpretative Communication on IPPP, the Commission does not allow that (id., p.4).
39 See Article 92 of the PPP Law.
40 A "particularly complex case" occurs when the conceding authority/the public partner "(...) would not be able to objectively a) define the technical specifications for the performance and
functional requirements or b) set out precisely the legal and financial framework for the implementation of the respective concession" or other PPP (Article 35 of the PPP Law).

41 Article 5 of the PPP Law. See supra note 21.
42 Article 37 of the PPP Law.
43 Articles 71-73, 75(2) and 66 of the PPP Law.
44 On the applicability of these and other principles applicable to concessions/ PPP award in the Community law, See the Commission's Interpretative Communication on Concessions under Community Law (OJ C 121 of 29/04/2000) and its other communications cited supra note. See also Sue Arrowsmith, supra note 13, Chapter 4. It will be interesting to see how Macedonian courts will apply the above principles in practice, for which they may find it useful to refer to the rich practice of the two Luxembourg courts.
45 Articles 99-100 of the PPP Law.
46 Articles 101-102 of the PPP Law.
47 Article 104 of the PPP Law.
48 The decision to initiate a tendering procedure has to be published in the Official Journal of the Republic of Macedonia and in a domestic (and, if appropriate, in a foreign) public media (Articles 27-30 of the PPP Law). Under Article 87, the initiative to proceed with a public-private partnership requires the prior assessment of the better 'value for money' offered by the particular PPP as compared to traditional means of financing of the project.
49 Article 8 of the PPP Law.
50 Article 98 of the PPP Law.
51 The two larger HPP projects are 'Cebren' and 'Boskov most'. The tendering for the first project, amounting to more than 300 million euros, was recently stopped by the Government due to reported deficiencies in the tender documents.
52 At the local self-government level, for example, an IPPP project for a recreation centre in the city park of Skopje had been in preparation by the Public Enterprise 'Parkovi i zelenilo' without, to our knowledge, being successfully completed. According to the initial idea, the prospective private partner should have designed, constructed, equipped and operated the recreation park on a granted area through a joint company established with the public partner. Some other initiatives for PPP projects have also been reported, including the (unsuccessful) negotiations two years ago between an interested foreign investor and the Mayor of Skopje on the public bus-transportation PPP (source: Press Release of the Centre for Economic Analysis (CEA) at www.cea.org.mk).

References