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INTRODUCTION TO HYBRID PUBLIC PRIVATE-PARTNERSHIPS IN POLAND

*Rafał Cieślak**

*Beata Marczevska***

Abstract

Public-private partnership (PPP) is an alternative form of delivering public services by the private sector. The concept of hybrid PPPs developed by the European Commission puts emphasis on integration of the EU funding with the commercial financing supported by private investors. The Commission has introduced a number of advantages of so-called “blended” projects, and among them are: the opportunity to implement undertakings which otherwise would not be exclusively financed by commercial sources or reducing financial risk of projects. Hybrid PPPs demand respect for basic EU principles such as open market access, state aid regulations, protection of public interest and defining the optimal

* Centre for Studies in Local Government and Development Warsaw University, e-mail: rcieslak@uw.edu.pl

** Centre for Studies in Local Government and Development Warsaw University, e-mail: b.marczevska@uw.edu.pl

level of subsidization. In Poland PPP has been developing since 2009 when the legislation on PPP and concessions entered into force. The Polish legal framework allows the formation of hybrid PPPs according to the EU concept. Hybrid projects may be realized in a different variants, defining private partner's role as a beneficiary or operator of the co-financed infrastructure, or mixed types of his engagement in projects.

Keywords:

Public-private partnership, EU funds, hybrid PPP

Introduction

Fulfilling the principle of sustainable development, which also constitutes the basis of the European Union's cohesion policy, is possible thanks to the application of diverse cooperation mechanisms to public administration, entrepreneurs, non-governmental organizations and other participants in the social-economic sphere. This regards all levels of local government; however, this principle is being implemented to the fullest and in the most effective way at the local level. The tendency to cooperate on the basis of partnership principles and not only on the basis of administrative submissiveness, as well as commissioning the accomplishment of specific assignments to external entities, has been observed for a long time also in Central and Eastern Europe. This is due to the ongoing democratization process and the free market economy model, as well as – above all – to the fact that the majority of countries in this area accessed the EU. The need to join the resources of market participants of different legal status and purposes is also dictated by natural limitations of these resources and the need to seek joint solutions for substantial problems, including infrastructure problems¹. Relevant literature stresses the significant character of partnerships in various sectors of social, economic and political life, and to the key role of partnerships in creating social awareness².

Public-private partnerships (PPP) are a particular form of cooperation, within which partners accomplish joint tasks, although their interests may seem difficult to reconcile. The statutory objectives of public entities concentrate on fulfilling

¹ *Partnerstwo publiczno-prywatne*, collective work, Warszawa 2007, p. 2.

² See T. Borys, *Partnerstwo publiczno-prywatne w koncepcji zrównoważonego rozwoju*, "Finanse Komunalne" 2003, Vol. 4, p. 6.

social needs, whereas the existence of private investors relies on generating revenue and accumulating capital. However, solutions to undertakings serving the public good based on the principles of PPP, especially in the case of infrastructural projects, are being introduced at the central, regional and local level. Capital, knowledge, organization and a business approach to rendering services traditionally associated with the public sector translate both to the feasibility of undertakings, as well as effective asset management. For this reason, the public sector is increasingly more willing to practice the PPP method, seeking the possibility of fast infrastructure development without exaggerated budget burdening and leaving the assets in the hands of the public partner. A well constructed cooperation allows the public administration to delegate a part of its duties to private companies. In return for his financial commitment, investment process and public services, a businessman may expect a stable income provided either by customers or the public budget³. At the same time, the public administration remains responsible for the realization of public tasks (providing services). PPPs should be seen as a method of providing public services, and not a straightforward replacement of the public sector's function by private investors⁴.

One of the main aims of EU policies, including the cohesion policy, is the improvement of the quality and effectiveness of public services. PPPs, being an alternative form of realizing public tasks (providing services), fulfills these assumptions. However, the realization of a project using the PPP method depends on the identification of "added value", which is measured with the VfM (value for money) indicator. The VfM indicator constitutes the relation of the total advantages obtained using the PPP method and the costs incurred by the public sector and society⁵. In this sense it is necessary to prove the project's "profitability" in order to acknowledge the possibility of implementing the PPP project⁶. This regards both the comparison of prices and quality offered by the private partner, as well as a comparative analysis of implementing the project through the traditional versus PPP method, or other methods. Greater effectiveness is expected from the PPP method (e.g. with regard to limiting costs, increasing availability, ensuring a specific qual-

³ B. Korbus, M. Strawiński, *Partnerstwo publiczno-prywatne. Nowa forma realizacji zadań publicznych*, Warszawa 2009, p. 15.

⁴ R. Cieślak (ed.), *Partnerstwo publiczno-prywatne: 100 pytań, wyjaśnień, interpretacji*, Warszawa 2014, p. 15.

⁵ *Partnerstwo publiczno-prywatne jako metoda rozwoju infrastruktury w Polsce*, Raport Amerykańskiej Izby Handlowej w Polsce, Warszawa 2002, p. 19.

⁶ A. Glapa, *Partnerstwo publiczno-prywatne jako metoda realizacji zadań publicznych*, Warszawa 2005, p. 5.

ity level, introducing innovation, improved management etc.). Assessing value for money is possible with the use of so-called comparators, including the public sector comparator, which relates to the implementation of a project by a public entity where external and internal factors are taken into account⁷.

The most frequently indicated advantages of the PPP model in comparison with the traditional method of realizing projects are⁸: securing (additional) capital for the construction/extension/modernization of infrastructure, without which the project would not be carried out within the desired time limit, technology or expected quality, and therefore – would not be made available to the public; lower total costs by around 15% – during the PPP agreement validity (including preparation costs, capital expenditures, and infrastructure exploitation)⁹; less time needed for infrastructure construction works – due to the fact that delays in rendering services are disadvantageous for the private investor who finances the construction works, whereas profit is made from the moment when the structure begins to operate¹⁰; implementing innovations, better quality of rendered services, more effective management – which makes private entities superior to the public sector; limiting project risks as they are shared between parties to the PPP agreement on the basis of their experience and competence; the possibility of developing and improving the infrastructure quality with a limited financial engagement on part of the public entity; better definition of needs and optimal utilization of resources.

On the other hand, the following impairments are considered part of PPP projects: more expensive and complicated preparation and project implementation process, higher capital costs for the private sector, which must be compensated through a higher efficiency, limiting the financial flexibility of the public sector as a result of long-standing financial liabilities resulting from the PPP agreement, limited possibilities of changing the PPP agreement during its duration, and – the existing risk (“myth”) of corruption, which accompanies all larger contracts engaging considerable private capital. There are several dozen kinds of project risks connected with possible benefits and threats emerging from PPP projects. Their correct

⁷ *Ibidem*, p. 9.

⁸ Cf. *Partnerstwo publiczno-prywatne...*, pp. 20–21; A. Glapa, *Ibid.*, p. 6; *Wytyczne dotyczące udanego partnerstwa publiczno-prywatnego*, Komisja Europejska, Dyrektoriat Regionalny, Polityka Regionalna, Bruksela 2003, p. 2; *Partnerstwo publiczno-prywatne...*, p. 20; *7 mitów i 3 prawdy o partnerstwie publiczno-prywatnym*, 2005, p. 11.

⁹ *Value for Money Drivers in the Private Finance Initiative*, Andersen Arthur and Enterprise LSE, Commissioned by the Treasury Taskforce (UK), 2000.

¹⁰ Cf. *PFI: meeting the investment challenge*, 2003, p. 31.

identification and appropriate timing determines, to a large extent, the success of each project¹¹.

PPP regulations in Poland

PPP in Poland has a relatively short tradition. Following the example of a few other member states of the EU, the legislature created separate regulations regarding the establishment and functioning of public-private partnerships. Presently this issue is regulated by the Act of 19 December 2008 on Public-Private Partnership (APPP)¹². Furthermore, a separate act¹³ regulates concessions for construction works or services, which are considered to be a form of public-private partnerships. This act came into force along with the regulations of APPP¹⁴. Although the number of projects of this type being currently implemented in Poland is relatively small, research on PPPs shows that public-private partnerships may become quite common with local governments¹⁵. This is due to the fact that solutions taking advantage of the PPP principles may be implemented at all levels of public administration. It is worth noting that the Polish PPP market is dominated by local government entities, especially at the community level.

Although there is no legal definition of a PPP, the APPP regulations define the constitutive features of partnerships. According to Art. 1 para. 2 of APPP, the subject of public-private partnerships is the joint realization of a project based on the division of tasks and shared risks between the public entity and private partner. The legislature gave a wide definition of the term “undertaking”, indicating that it may involve construction or renovation works, providing services or other activities – combined with the maintenance or management of an asset which is being

¹¹ A. Panasiuk, *Koncesja na roboty budowlane lub usługi. Partnerstwo publiczno- prywatne. Komentarz*, Warszawa 2009, pp. 293–294.

¹² Dziennik Ustaw of 2009, No. 19, item 100, as amended.

¹³ Act of 9 January 2009 on Concession for Works or Services (ACWS) (Dziennik Ustaw of 2009, No. 19, item 101, as amended).

¹⁴ Projects implemented on the basis of APPP (and ACWS) regulations are frequently defined as PPP *sensu stricto*. Whereas a wider understanding of PPP includes various forms of cross-sector cooperation implemented on the basis of regulations pertaining to, among others, public procurement, property management, municipal management, the civil code, public benefit activities and voluntary service (so-called PPP *sensu largo*).

¹⁵ E. Kornberger-Sokołowska (ed.), *Partnerstwo publiczno- prywatne w samorządzie polskim na przykładzie regionów mazowieckiego i śląskiego*, Warszawa 2008, p. 73.

used for the completion of the project or is associated with the project (Art. 2 point 4 APPP). Henceforth, if an undertaking is limited to specific activities associated with creating assets (e.g. construction works, transport or other services), and does not include the performance of a task by the private partner at the exploitation stage, then the undertaking cannot be considered a public-private partnership.

The cooperation defined by APPP also determines the need for making specific contributions by both partners; the lack of such a contribution means that the cooperation may not be regarded as a PPP arrangement¹⁶. The contribution made by the public entity or private partner particularly involves incurring project expenses, including financing additional payments for services provided by the private partner, or contributing assets (Art. 2 point 5 APPP); European funds procured by the public entity for the implementation of the project may also constitute such a contribution. According to Art. 9 para. 1 of APPP, a financial contribution in the form of an asset may be made particularly by way of a sale agreement, agreement of lending for use, usufruct, rental or lease. In practice, a typical contribution made by a public entity takes the form of a real estate. On the other hand, the private partner's role involves incurring, partially or in whole, expenditures related to the undertaking or having them incurred by a third party; the PPP agreement is a payment agreement, as specified in Art. 7 para. 1 of APPP.

The reward of the private partner should be equivalent to the expenses he incurred and the assumed risks. According to Art. 7 para. 2 of APPP, this reward is dependent above all on the actual use or factual availability of the facility constituting the subject of the public-private partnership. There are in practice various methods of rewarding the private partner. The first method allows the private partner to receive benefits by providing services to external users of an infrastructure, which usually means that the private partner bears the risk of demand. This is plausible only in the case of profitable investments, such as municipal parking lots, motorways, shopping malls. The second model of rewarding the private partner involves a payment from the public party. This construction implies that the investor bears exclusively the availability risk, which is ensuring a proper standard of services in the technical-technological sense, but also in adequate quantity and quality. The availability payment is exercised in the case of social infrastructure projects characterized by financial unprofitability (for example: public administration facilities, schools, facilities for the use of the general public). The third mo-

¹⁶ See verdict of WSA in Opole of 11 January 2013 I SA/Op/445/12, <http://orzeczenia.nsa.gov.pl/doc/1E332FD042> [last visited: 12.06.2014].

del of rewarding the private partner consists of a combination of forms, which assume the partial financial participation of the public entity. The financial burden of financing the private partner's activities is in this case spread out adequately to his input, degree of involvement at the exploitation stage and the project's rate of return. It must be added that although the "concession" model prevails in Poland, the partnership based on payments made by the public entity slowly gains in popularity¹⁷. This results from the fact that projects, which assume the transfer of all (or the majority of) the risk to the side of the private partner, with no guarantee from the public entity of at least a partial financial participation, are in most cases unattractive to the private sector. It must be added that the remuneration principles determine the legal basis for choosing the right partner. Depending on the established remuneration mechanism, the choice is made in accordance with the regulations specified in the Act on Concession for Works or Services (ACWS¹⁸) or the Public Procurement Law¹⁹ of 29th January 2004.

The hybrid project concept

In principle, traditional financing from public funds is realized in relation to the public sector, which implements non-commercial undertakings of great social importance, which due to their low profitability remain within the competence of that sector²⁰. Nevertheless, the tendency to privatize and commercialize public services, as well as to finance these services by the private sector, is growing. As the availability of public financing is diminishing, much stress is put on the integration of Union funds with more commercially-orientated financing; this also includes the structures of PPP²¹. "Hybrid" projects may be defined as undertakings, which assume a financial assembly that takes into consideration the financ-

¹⁷ I. Herbst, A. Jadach-Sepiolo, E. Marczevska, *Analiza potencjału podmiotów publicznych i przedsiębiorstw do realizacji projektów partnerstwa publiczno-prywatnego*, Warszawa 2012, pp. 23–24.

¹⁸ According to Art. 4 paras. 1 and 2 of APPP, if the private partner's remuneration is the right to receive benefits from the subject of the public-private partnership, or foremost that right along with the payment of a sum of money, then the regulations of ACWS (in the scope undefined in the APPP) are applied for the act of selecting a public-private partner and drawing up a public-private partnership agreement; otherwise public procurement regulations are applied in the private partner selection and PPP agreement process.

¹⁹ Consolidated text, Dziennik Ustaw of 2013, item 907, as amended.

²⁰ See B. Korbus, M. Strawiński, *Partnerstwo publiczno-prywatne...*, p. 215.

²¹ Cf. *Wytyczne dotyczące udanego partnerstwa publiczno-prywatnego...*, pp. 78–79.

ing of a project from non-refundable sources, particularly with regard to European Union's structural funds or the Cohesion Fund²².

The European Commission indicates that the basic advantage of hybrid projects is the possibility of implementing undertakings, which otherwise may not be exclusively financed by commercial sources (mainly projects regarding the so-called social infrastructure); furthermore, UE subsidies may serve the greater financial "vitality" of the project – to a level that enables commercial financing (the so called leverage mechanism); moreover, providing the undertaking with European funds reduces the financial risk, which in effect limits the project's cost²³. Subsidies in PPP projects increase therefore the financing value and may constitute its guarantee – especially at the infrastructure construction stage. Relevant literature emphasizes, that even the willingness of public authorities to grant a subsidy may constitute a specific warranty for the PPP undertaking's importance²⁴. It is worth noting that the European Commission indicates PPP as a long term instrument supporting the public sector in times of an economic downturn²⁵.

The European Commission considers the lack of encouragement for a more effective use of commercial funds as one of the weaknesses of PPP subsidizing. This may suppress seeking alternative financing methods and make beneficiaries dependent on contributions made from public funds; also, another discouraging factor is the long and bureaucratic procedures for securing and implementing EU funds in PPP projects²⁶. Hence it seems that the most important element whilst creating a "hybrid" is the planning phase, in which the need for financing and the optimal utilization of European funds must be determined, making it acceptable by the donor (appropriate Management Institute or European Commission). Alternatives to grant usage – as stated in the EC's *Guidelines for successful public-private partnerships* include: provision of regular subsidy payments for operational costs, coverage of financial costs, subsidizing revenue flows, financing the public sector's contribution in-kind and assisting the financing of the public sector's financial incentives to the private sector. In the case of public funds distributed through

²² R. Cieślak (ed.), *Partnerstwo publiczno-prywatne: 100 pytań...*, p. 77.

²³ *Wytyczne dotyczące udanego partnerstwa publiczno-prywatnego...*, p. 79.

²⁴ *Partnerstwo publiczno-prywatne. Poradnik*, collective work, Warszawa 2010, p. 145.

²⁵ *Wspieranie inwestycji publiczno-prywatnych krokiem w kierunku naprawy gospodarki i długoterminowej zmiany strukturalnej: zwiększanie znaczenia partnerstw publiczno-prywatnych*, Communication from the Commission to the European Parliament, Council, European Economic and Social Committee and Committee of the Regions, COM(2009) 615 final version, Brussels, 19.11.2009.

²⁶ *Wytyczne dotyczące udanego partnerstwa publiczno-prywatnego...* p. 80.

OPs, coverage of the project's financial costs at the investment stage is of particular significance.

The financing of a PPP project depends on the observance of the general principles obliging in the EU. These include:

- 1) Ensuring open market access – encompassing equality of treatment of parties, application of transparent public procurement procedures and EU principles;
- 2) Adherence to the principles governing state aid – this includes ensuring there is no overcompensation for services rendered by the private investor and matching grants to real needs;
- 3) Protection of the public's interest – this includes ensuring the “hybrid” project delivers quality of service, ensuring public participation in the oversight function, eliminating extraordinary profits to contractors, ensuring responsibility for social consequences including employment and socio-economic development;
- 4) Defining the optimal level of grant financing – grants to be matched to real needs, maximization of the use of limited funds, maximization of the leverage potential of grants, avoiding the distortion of market operation and not treating PPP as an opportunity to artificially lower the level of public debt.

The problems, which may arise while integrating the above mentioned principles may be encountered at all stages of a PPP financed from EU funds. The EC analyzed the problem of selecting the private partner, the influence of EU funding on the balance of both sectors, the investment's “vitality” and sustainability guarantee, meeting European standards, assets ownership and public interest²⁷ at all stages of a PPP project.

In this respect the partner selection process is of utmost importance; the EC published the “Green Paper”²⁸ and Communication²⁹ on this matter. It should be noted that the above mentioned criteria and EU funding conditions may excessively burden the PPP performance. Parties to the project should therefore carefully ana-

²⁷ *Ibidem*, pp. 84–86.

²⁸ *Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions*, Commission of the European Communities, Brussels 2004.

²⁹ Communication from the Commission clarifying the application of Community law regarding public procurement and concessions in respect to institutionalized public-private partnerships (IPPP) of 5 February 2008, C(2007)6661.

lyze risks and the financial assembly pertaining to the inclusion of the stream of European funds to the project³⁰ at the early planning phase.

The hybrid PPP's variants

On the basis of the afore mentioned EU and state regulations, as well as available studies³¹ and foreign and domestic experiences, three practical basic hybrid project implementation variants may be proposed.

In Variant 1 (“comprehensive”) the private partner is responsible for the project design, the construction works, acquiring funds³² (including securing European subsidies) and infrastructure operation. The investor prepares the application documents, submits a financing application form and – upon receiving funds – is responsible for the correct performance of the project, monitoring, reporting, settlement and the observance of the sustainability principle. Thus the investor assumes the risk of having to return all (or part) of the European funds in case of disbursing them contrary to the project funding agreement. On the other hand the public entity takes the risk that the private investor may fail in obtaining EU funds. This risk is manifested through higher expenditures in favor of the investor on account of infrastructure availability or tolls and other user fees. The public entity may therefore increase its own share in the undertaking or reserve the right to annul the proceedings in case the application procedure proves unsuccessful. Because of this, applying for a grant only after selecting a partner – although admissible – may prove risky in terms of the project’s feasibility. Hence one of the main strengths of the “comprehensive hybrid” is securing co-financing from EU funds for a substantial part of capital expenditures and project preparation costs (analyses, expert opinions, technical and project documentation etc.). In this case, the participation of public resources during the project implementation stage is

³⁰ See *Hybrid PPPs: Levering EU funds and private capital*, 2006, p. 14.

³¹ See M. Koźmińska [in:] *Partnerstwo publiczno-prywatne*, A. Gajewska-Jedwabny (ed.), Warszawa 2007, pp. 150-154; *Hybrid PPPs: Levering EU funds and private capital...*, pp. 17-18; M. Koźmińska, A. Kiwiol, J. Patarska [in:] *Partnerstwo publiczno-prywatne w praktyce. Przemysł, przygotuj, przeprowadź*, collective work, Warszawa 2009, pp. 109-110.

³² The public party may also be responsible for acquiring funds. In that case the private investor may be indicated in the application form as the beneficiary of funds under an operational programme.

minimized. This may have a positive impact on the level of fees paid by the final users.

Variant 2, which may be termed as “mixed”, assumes the division of the investment into parts (or stages), which are realized either as a PPP or by obtaining EU funding. In this case the beneficiary of EU funds is mainly the public entity. The public party, in cooperation with the private investor, achieves certain elements of the undertaking and simultaneously obtains a grant with the purpose of financing the remaining part of the infrastructure, necessary to achieve the complex character of the project. Similarly to the full model, the private partner remains the operator of rendered services. The main advantage of this model is easier access to financing (due to better access of the public sector to EU funding used for infrastructural undertakings and the absence of additional complications connected with financing a PPP), which benefits the public entity. On the other hand, the capital input of this sector into the entire undertaking increases substantially, as it must cover in full its own contribution to the part of the project co-financed from the grant, as well as (optionally) participate financially in the part covered by a PPP.

Variant 3 is an “operator” variant. It is characterized by having the public entity obtain European funds for the infrastructure construction and then selecting a private partner, which will be its operator (in terms of management or maintenance). This method may prove successful for example in case of service concessions or varied management agreements, which constitute a PPP model *sensu largo*. This is however the least effective PPP-EU model as it does not ensure a comprehensive approach to the project on the part of the private partner. Moreover, issues related to the presence of a financial gap or public resources, similarly as in the variants described above, require a thorough project evaluation at the early planning stage. This is necessary in order to obtain an optimal level of financing from European funds. The strength of the model is taking advantage of the private partner’s experience during the exploitation phase and transferring to him the related risks.

Besides the three above mentioned “hybrid” projects’ implementation variants there are also other forms of engaging EU funds in public-private co-operations *sensu largo*. For example, it is possible for a private entity to rent the public entities’ assets and to develop the infrastructure or services with the use of EU funds; to develop various forms of cooperation with socio-economic partners and to apply other models engaging EU funds – at least to indirectly support various variants of cooperation amongst participants of the economic market.

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