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Not quite PPP-perfect

While the concept of Public Private Partnerships (PPP) has achieved popularity around the world, in Latvia the topic has only recently become newsworthy, driven by local municipalities seeking to cope with ever-increasing demands for a modern infrastructure in extremely tense budget conditions.

Recently, both government and the private sector have shown interest in the concept, with private business showing interest in various PPP-oriented seminars and events, and the government passing PPP development guidelines. However, the practical side of the process appears to be somewhat stalled, as there are almost no genuine and successful examples of PPP in Latvia. Consequently, the purpose of this article is to examine the existing PPP framework from the private sector's perspective and reveal certain major hindrances in the PPP process.

While the general PPP concept appears to have been grasped by the public and private sectors, the government's framework for PPP is unlikely to make the concept viable. Several serious drawbacks need to be addressed to make the the rules attractive enough for private-sector partners to join in.

Who will police the politicians?

Firstly, the legal and political framework is rather underdeveloped, creating uncertainty. Latvia has not yet passed specific legislation to facilitate PPP. Instead, the government has largely preferred to operate with political documents. Their wording and legal form are evidence of political will, but in a country where governments change frequently and even key legislation is regularly amended, this is far too little for the private sector. A basis of well-drafted PPP laws and regulations providing for clear and judicially-enforceable rights and long-term guarantees would be preferable.

Furthermore, the Concessions Act is too simplistic to handle the complex projects that PPP agreements tend to cover. Firstly, it targets only concessions, not mentioning other PPP models. Secondly, it ultimately requires the concession resources to be returned to the public sector, thereby excluding PPP models that entail the private partner's title to public resources. Of course, alienation of public resources is already possible, but the governing law was largely enacted to prevent a repeat of the privatisation experience. As a result, such operations normally require lengthy and complex procedures, usually involving a separate auction, and there is a risk that competitors may disrupt the partnership between the public sector and the chosen investor by bidding at the auction.

The provisions governing public procurement also appear flawed. While the negotiated-procedure method seems the most popular in the UK because of its flexibility (crucial in construction projects), it seems not to have entered Latvian law in the manner prescribed by the EU. Although, according to EU law, the negotiated-procedure method can also be employed in exceptional cases, when the nature of the works or the risks attaching thereto do not permit prior overall pricing, this option has not been made available to the Latvian authorities. Instead, the negotiated procedure would apparently be available if a previously-announced competition had failed to attract interest. Luckily there appears to be awareness that the current state of affairs is not in line with the relevant provisions of EU law. It is hoped that this deficiency will be eliminated in due course.

A contest of wills

What is more disturbing is the current practice of contesting the results of the public procurement process, as even a single poorly-reasoned complaint has the potential to stop a multi-million-lats project pending proceedings, with no serious pecuniary risk for the plaintiff; the so-called "northern bridge" project is only one example. Rather surprisingly, a number of complaints are later recalled for no apparent reason, and it is suspected that agreements of questionable legality between the competitors might be one of the reasons for this: it is certainly more cost-effective to enter such arrangements than watch the entire process stall while hoping for much-delayed justice in court.

The Latvian court system's overall reputation does not appear helpful. The problems with legal certainty and judgment drafting that have been on the agenda for the last 15 years are still an issue. The Civil Procedure Rules call for more development, the civil procedure as such for more efficiency, and the cost recovery regime can hardly be described as satisfactory. Moreover, the presence and influence of certain privileged groups can still be sensed, although the programme for ousting this post-Soviet phenomenon is looking promising. Understandably, while the private sector has both the resources and the ability to address these flaws, this approach involves increased project costs that would in fact be more appropriate to the public sector.

Beyond legal and political issues, various psychological, technical and simply local business-environment reasons may prevent the PPP concept from succeeding. For instance, the remarkable dishonesty of privatisation will be long remembered, and a good deal of explanation will be necessary before PPP is trusted. Furthermore, the public sector itself does not appear ready for PPP, because the project documentation has either not been developed at all or has not been standardised. Again, this is homework for the public sector. Finally, the local business environment as such may appear project-unfriendly.

The public sector seems unprepared for PPP, and it must first remedy these drawbacks. There can also be a disturbing tendency to present PPP as a cure-all for the public sector's financial difficulties. Therefore, the private sector needs reassurance that works and services will be paid for one way or another, creating genuinely reciprocal partnerships. While the presence of these elements appears questionable, so would the prospects for effective PPP. ◇◇