

Towards a better regulation of public-private partnership and concessions in Montenegro

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Establishment of a separate legal framework for public-private partnership has been an emerging trend in the past ten years in most countries in transition. Although these countries – almost by default – already had concession laws in place, these laws appeared insufficient for the regulation of PPP, while the use of other legal provisions pointed to the need for enhancing and unifying the laws in the framework of one single legal act. Bearing in mind that Montenegro lacks a defined legal framework in the field of PPP, and that its current legislation in the area of concessions is not aligned with the relevant EU provisions, the goal of this analysis is to demonstrate how this matter is regulated in transition countries.

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Public-private partnerships (PPP)¹ represent an optimal, yet complex model (contractual relation) of overcoming the gaps between the need for enhancing public services and infrastructure on the one hand, and the lack of financial resources for these investments on the other. The lack of funds for enhancing the quality of services is especially evident in countries in transition which have limited budgets for capital investments and a much greater need for infrastructure investment compared to developed countries (5% of GDP). Compared to traditional forms of establishing and securing services, PPP stimulates savings in terms of innovation costs and improvement in terms of risk management (risk share). However, **this is exclusively the case if the public sector has an adequate legal framework and the necessary competences to manage such projects.** Well-defined and harmonised legal, economic and political framework is a precondition for foreign investment and hence for successful implementation of PPP.

PPP and concessions framework in Montenegro

As most neighbouring countries, Montenegro also has a high budget deficit, which additionally limits the possibilities for infrastructure investments. In 2012, this deficit amounted to 5.6% of GDP, which was significantly higher than the predicted 2.4%

Why does Montenegro need a Law on public-private partnerships?

- ⇒ There is an increased need for infrastructure investment and for enhancing the quality of services.
- ⇒ Budget deficit and public debt are high.
- ⇒ To secure transparent procedures for the implementation of PPP as exceptionally complex projects and instruments to compensate for budget deficit.
- ⇒ To allow for infrastructure investments or provision of services to be cost-effective.
- ⇒ To have the possibility of risk sharing between the public and private partners.

1 "PPP is the cooperation between the public and the private sector with the aim to procure the financing, development, refurbishment, and management of infrastructural objects and the service sector. That is, PPP entails the financing of those projects and services that are traditionally procured by the public sector.", *Public-private partnerships in Montenegro – accountability, transparency and efficiency*, Institute Alternative, 2010, p. 6

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deficit, while the public debt rose to 54% of GDP.² Hence, PPP has been identified as an efficient model to compensate for the budget deficit. However, despite numerous announcements from the government that the PPP would be more frequently implemented,³ the adoption of the Law on public-private partnership is still pending and is not even planned in the government's Work Programme for 2014.⁴ Currently, over 40 sector laws regulate cooperation between the public and private sectors in the provision of public services.⁵ Bearing in mind that there is no legal act which regulates the area of public-private partnership, the institutional framework for the implementation of PPP has not been established and there is no authority which would approve and secure assistance in the preparation of projects and which would monitor the enforcement of contracts. At the national level, the Council for privatisation and capital projects determines which facilities and business entities are to be privatised via public tender, through stock market sale or via PPP.⁶ However, the hitherto implementation of PPP has not been subject to systematic planning, while the national plan for the development of this area is yet to be adopted.

With regard to concessions in Montenegro, this area is regulated by the Law on concessions, adopted in 2009.⁷ The law defines concession as granting of the right to exploit a natural resource, a public good, or to conduct a business of public interest, i.e. to 'finance, research, design, construct or reconstruct, use, maintain, re-vitalise and transfer facilities, devices or plants, within the prescribed deadline, into the property of the grantor, including other similar forms'⁸ which is a wider definition compared to the Directive 2014/18/EC.⁹ Although the definition includes conducting a business of public interest, an additional problem lies in the fact that the concessionaire does not use the public good in order to provide services for citizens; instead it is used for personal interest. 'That is why the concession contract is more about granting a licence by the competent body rather than obliging the contracting party to provide services for citizens.'¹⁰ The law does not define concessions for works, or the procedures for allocating concessions, in line with EU regulations.¹¹ Although the European Commission has been pointing out to the problem of non-alignment of this Law with the *acquis*¹² for several years now, there is still no law which would enhance the regulation of this area, while the working group tasked with drafting amendments to improve the existing law has been formed back in 2011.

2 Montenegro 2013 Progress Report, p. 17

3 See: Vujica Lazović, Deputy PM for Economic Policy and Financial System: 'Montenegro is entering the phase of public-private partnership', Portal analitika, 16 May 2012, available at: <https://portal-analitika.me/ekonomija/vijesti/61063-lazovi-crna-gora-ulazi-u-fazu-privatno-javnih-partnerstava.html>

4 The programme foresees adoption of the Strategy and Action Plan for the development of public-private partnership in healthcare, which should be adopted in the second quarter of 2014. See: 2014 Work Programme of the Government of Montenegro, January 2014.

5 2013 Annual Report of the Commission for concessions, p. 86

6 See: 2014 Privatisation Plan, available at: <http://www.gov.me/vijesti/134885/Savjet-za-privatizaciju-i-kapitalne-projekte-usvojio-Predlog-odluke-o-planu-privatizacije-za-2014-godinu.html>

7 Law on concessions, "O.G. of Montenegro", No. 08/09 of 4 February 2009, applicable to the areas of mining, forestry, water industry, education, transportation and maritime affairs. Besides this Law, the area of concessions is regulated by other laws and regulations, such as the Law on mining, Law on waters, Law on forests, etc.

8 Article 4 of the Law on concessions of Montenegro

9 This directive is no longer in force following the adoption of the Directive 2014/24/EU on public procurement on 26 February 2014

10 Montenegro 2011 SIGMA Assessment, 2011, p. 27

11 Limited procedure and competition dialogue

12 Montenegro 2013 Progress Report, p. 21

13 Report on the fulfillment of obligations from concession contracts, January 2013

Knowledge about concessions at national and local levels is very poor. A small number of employees in these institutions are knowledgeable about the area of concessions and modalities for its implementation.¹³

In Montenegro, there is no institution regulating the area of concessions. The Commission for concessions is a second-instance body, i.e. it acts upon complaints submitted by those who participate in the procedure of allocation of concessions, with regard to evaluation and ranking on the allocation of concessions; it creates and keeps records of concession contracts; approves extension of deadlines for allocating concessions or expanding the space for performing concessionary activities.¹⁴ Since its establishment in 2009, the Concessions Commission has acted upon a total of 13 complaints in procedures for concession allocation. This number includes deliberation on complaints submitted to the Administrative Court against the decisions of this Commission.

Number of complaints addressed by the Concessions Commission

2010.	2011.	2012.	2013.
7	3	2	1

Despite the limited number of activities that fall under its competence, the Concessions Commission receives significant funding for its work. It is interesting to note that until 2014, funding has been allocated from the state budget to the Concessions and BOT Arrangements Commission, established in 2003¹⁵, although the 2009 Law does not identify this body as competent for the procedure of concessions allocation. Furthermore, the Law foresees that this body would perform the duties of the Concessions Commission until the establishment of the new commission (2009). Annual performance reports of this body are not available.

Budget funding allocated for the work of the Concessions Commission

2010.	2011.	2012.	2013.	2014.
Concessions Commission				
77 415,20	95 815,20	88 634,73	96 500,00	95 500,00
Concessions and BOT Arrangements Commission				
26 100,00	29 100,00	35 590,47	22 500,00	/

Apart from the inadequate institutional framework in the field of concessions, the coordination among institutions at national and local levels is poor, which is reflected in the fact that the municipalities do not adopt concessions plans, although it is their legal obligation to do so.¹⁶ In addition, municipalities do not have any information on the type of concessions which is the basis for payments made at the national level, i.e. revenues from the State Treasury. Hence, municipalities are unable to realistically assess their revenues annually or in the long-run.

Total revenues on the basis of concessions indemnities

2011.	2012.	2013.
25 699 255,23 €	12 706 115,31 €	13 233 490,18 €

¹⁴ Article 11 of the Law on Concessions

¹⁵ Compare: Decision on the establishment of the Commission for concessions and BOT arrangements 'Official Gazette of RoM, No.48/03

¹⁶ Article 7 of the Law on Concessions

Concessions payments are managed through the Ministry of Finance, in cooperation with the Tax Administration. The competent state authorities submit the decisions on concessions indemnities to the Tax Administration, while the Tax Administration is in charge of concessionaires' debts and payments of concessions indemnities on that basis, i.e. it monitors the realisation of payments. In case obligations are not met, the Tax Administration can apply measures of forced payments.¹⁷ However, this system of payments of concessions indemnities has shown a number of problems in practice.

Debts based on the obligations the concessionaires failed to meet are rising every year. As of December 2012, these debts amounted to EUR 12 249 306.44 compared to April 2011 when this debt amounted to EUR 8 154 721.94.

Another limitation in the system of control of the implementation of contracts on allocated concessions, as well as the control of payments of concessions indemnities, lies in the inspection control. This problem is not only due to the lack of administrative capacity of the Administration for inspection affairs in this area, but also due to incomplete inspection controls.

Inspection controls in 2013¹⁸

Inspection control subject	Department in the Administration for inspection affairs	Number of controls
Concessionaires exploiting forests	Department for the inspection of forestry, hunting and plant protection	234
Concessionaires who concluded contracts with the government of Montenegro on right to research and exploitation of mineral materials	Geological inspection	29

Insufficient transparency

It is necessary to enhance transparency, especially when it comes to updating records on concessions and publishing concessions agreements and payments.¹⁹

Lack of transparency in the area of concessions is largely a result of an incomplete central registry of concessions, bearing in mind that the registry kept and updated by the Concessions Commission does not contain plans for concessions payments, nor complete contracts on allocated concessions.

Contents of the concessions registry in Montenegro

Date of registration	Name of concessionaire	Name of the contracting party	Subject of concession	Date and number of the contract on concession	Duration of the contract on concession	Remarks
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The concessions registry in Montenegro contains the subject and duration of the

¹⁷ Law on Tax Administration, 'O.G. RoM', No. 29/05

¹⁸ 2013 Annual Performance Report of the Administration for Inspection Affairs, March 2014

¹⁹ Montenegro 2013 Progress Report, p. 28

allocated concession, as well as the names of concessionaires and the contracting party. A single database of contracts concluded within the framework of public-private partnership has not been established. In contrast, examples from the region show all types of information to be contained in such registries.

So for instance, besides the data available in the registry in Montenegro, the public-private partnership registry in Croatia also contains a detailed account of the purpose and contents of the concluded contract, including the obligations of the public and of the private partner. The registry further includes indemnities which the private partner is bound to pay to the public partner, as well as the total capital expenses of the PPP project.

Table: Example of good practice – contents of the public-private partnership registry in Croatia²⁰

On the basis of the existing Law, a total of 183 concessions have been allocated, of which 23 have been terminated. Only three concessions were allocated in the area of 'services'.²¹ In 2013, only two concessions contracts have been signed, which demonstrates the difficulties in the implementation of this Law.

The absence of a PPP framework, non-alignment of the existing Law on Concessions with the acquis, as well as the problems in the implementation of this Law, indicate that there is an urgent need to define legal provisions which would regulate these areas in line with the relevant EU regulations and good practice of the countries which have more experience in the implementation of this type of projects.

Registration number	
Public partner	
Private partner	
Date of signature	
Start of implementation	
Public-private partnership model	
Purpose of the contract	
Subject of the contract	
Area of implementation	
Key activities	
DPN	
Public partner's obligations	
Indemnities paid by the private partner to the public partner	
Private partner's obligations	
Objects	
Location of objects	
Capital expenses of the PPP project	

PPP regulations in countries in transition

In the past ten years, most countries of the region and those still considered in transition, have enhanced their legal and institutional framework in the area of PPP.

Until 2004-2005 a significant number of countries had a legal framework exclusively for concessions, while PPP used to be regulated by the existing laws, mostly those regulating public procurement. Having in mind that there is a set of legal rules at the EU level which may serve as guidelines for regulating this area²², more and more countries introduced a separate law on PPP in addition to a law on concessions, or they recognise concessions as a form of PPP within a single law. The need for additional law is based on the possibility of recognising and regulat-

20 Available at the website of the Public-Private Partnership Agency: <http://www.ajpp.hr/naslovnica/registar.aspx>

21 2013 Annual Report of the Concessions Commission, p.23

22 Works Directive (93/27/EEC), Supplies Directive (93/36/EEC), Services Directive (92/50/EEC), Utilities Directive (93/38/EEC), Guidelines for Successful Public-Private Partnerships, 2003, Green Paper on Public Private Partnerships and Community law on Public Contracts and Concessions, 2004.

ing other PPP mechanisms vis-à-vis concessions,²³ i.e. on the possibilities of enhancing the legal solutions which recognise concessions as the only operational model of public-private partnership.

	Legal framework for PPP and concessions	
	Single	Separate
Albania	!!	
Bulgaria		!!
Croatia		!!
Macedonia	!!	
Serbia	!!	

In Bulgaria, although the Law on concessions was adopted in 2006, the legal framework for PPP was incoherent and fragmented with a large number of laws regulating this area.²⁴ The Law on public-private partnership was adopted in 2012 in Bulgaria and entered into force in 2013. In Croatia, the Law on concessions was adopted in 2008, as well as the Law on PPP which was subsequently

amended in 2011, while additional amendments are currently subject to a public discussion. In Serbia, the Law on public-private partnership and concessions was adopted in 2011.

Laws on public-private partnership were adopted by Bosnia and Herzegovina (2009), Latvia (2009),²⁵ Kosovo (2011), Poland (2009), Romania (2010)²⁶ and Slovenia (2006), while Albania (2013) and Macedonia (2012) have a single law regulating PPP and concessions. Countries that are yet to adopt separate legislation for PPP are, inter alia, Estonia, Lithuania,²⁷ Hungary,²⁸ Slovakia,²⁹ etc.

Institutional setup for PPP

Since most countries regulate their procedures for the selection of private partners on the basis of models defined in accordance with relevant directives in the area of concessions and public procurement, one of the key questions for regulating public-private partnership is the optimal institutional framework for the preparation, implementation and monitoring of PPP.

Qualified and motivated staff in the public administration sector dealing with PPP may help in defining the role of the public sector, as well as in institutional capacity building for project-management at all levels.³⁰ Therefore, most countries which adopted the legal framework for PPP also established a central unit in charge of providing expert assistance in preparing projects on the basis of this model. There are three most frequently used models of specialised institutions for PPP which may be established by the executive: centralised/central independent unit; unit within the ministry competent for financial affairs (or another ministry); one or more units competent for PPP in different sectors.³¹ The duty of these units is to, inter alia, provide the so-called *policy* advice and guidelines for enhancing the regulatory framework; provide expert assistance to state bodies in

23 Contracts on management of external contractors; BOT; DBFO, etc.

24 According to the 2009 research, this number amounted to over 30.

25 Law on concessions adopted in 2000

26 Adopted in 2010, but the procedure for amending this law began in 2013

27 Law on concessions was adopted in 1999, and amended in 2011

28 Hungary implements PPP on the basis of the Law on public procurement, local administration and Civic Code.

29 Law on public procurement allows for the implementation of PPP projects.

30 "Guidelines for Successful Public-Private Partnerships", European Commission, 2003

31 Dedicated Public-Private Partnership Units, A Survey of Institutional and Governance Structures, OECD, 2012, p. 33

the preparation of projects and approving them; manage records on concluded contracts, etc.

In 2012, Croatia established the Agency for public-private partnership which approves proposals for PPP projects (upon previous consent of the Ministry of Finance), manages records on contracts and monitors the implementation of projects. The Administrative Council of the Agency is appointed and dismissed by the government and is composed of a president and four members, i.e. ministers of economy, finance, construction and judiciary. The President of the Administrative Council is the Deputy Prime Minister. The Agency is managed by the director who has a deputy and four advisors for: legal, technical and financial aspects, as well as for international cooperation. Besides this Agency, in Croatia there is also the Centre for monitoring of activities in the energy and investment sector, which has a separate department for PPP in charge of providing expert assistance in the preparation of documents for the selection of private partners in public bidding.³²

In Serbia, the Commission for public-private partnership was established through the Law on public-private partnership and concessions. This Commission provides expert assistance in the implementation of PPP, i.e. it assists in the development and preparation of PPP proposals. The Commission, composed of nine members, is appointed by the government at the proposal of the Prime Minister. It is run by the representative of the ministry competent for economic affairs and regional development, while its members are from the ministries competent for financial, infrastructure, mining, communal, environmental affairs and those in charge of the autonomous provinces and the city of Belgrade.³³

Moldova has a PPP unit within the Agency for public property, under the Ministry of Economy, while Bosnia and Herzegovina, Latvia and Slovenia do not have separate units/institutions specialised in PPP. Instead, it is the ministries competent for economic and financial affairs that are in charge of coordinating this area in these countries. Slovakia used to have a PPP unit within its Ministry of Finance, but it was abolished in 2010. Placing the PPP unit within the ministry competent for financial affairs may be good because of the direct connection with other expenditures, investments, capital investments, but also bad due to the possibility of political preferences influencing the evaluation of PPP projects.³⁴

The Laws on PPP in these countries also regulate conditions for appointment of persons working in these bodies. So, for example, a member of such a Commission in Serbia is appointed for a period of five years, with the possibility of one additional term, and (s)he has to possess expert knowledge of the PPP area, public procurement and concessions or the EU law. In Croatia, director is appointed for a term of four years, renewable once, and must possess knowledge of legal, economic or technical science, and have ten years of relevant working experience.³⁵

32 More about this Centre at: <http://www.cei.hr/>

33 Article 65 of the Serbian Law on public-private partnership and concessions, 'O.G. RS', No. 88/2011

34 Dedicated Public-Private Partnership Units, A Survey of Institutional and Governance Structures, p. 32

35 Article 27 of the Croatian Law on public-private partnership, NN 78/12

Enhanced regulatory framework for PPP – precondition for progress in practice?

In Croatia, between 2011 and today, a total of 14 PPP contracts have been signed,³⁶ while in Serbia, during the first year of the implementation of the Law, only one project was prepared and approved. A well-defined legal and institutional framework for PPP does not necessarily mean expansion of these projects. However, clearly defined procedures reduce corruption risks, they create a fertile soil for foreign investment, and they motivate the public sector to invest in strengthening its capacity. 'PPP model is never an imperative on its own'³⁷ but it is precisely the goal of comprehensive analyses preceding investments, to examine whether greater added value and savings for tax payers are to be obtained through traditional projects, via PPP model or through an entirely privatised object. However, an additional argument for the public sector to consider implementing projects according to the PPP model lies in the fact that an aligned regulatory framework allows for funding with loans provided under favourable conditions by the international investment banks, which again leads to creating competitive conditions.

Conclusions and recommendations

Montenegro does not have significant experience in the implementation of public-private partnerships. The legal framework for PPP is incoherent and encompasses over 40 sector laws, while the legal framework for concessions is not aligned with the EU *acquis* and is not operational in practice. With no adequate legal framework, there can be no plan for the development of this area. Montenegro does not even have an expert nucleus for PPP, i.e. a central institution which would enhance the process of preparation of such complex projects. Planning, concluding and monitoring of PPP contracts require special know-how and skills in comparison to the preparation of traditional projects and public procurement. Hence, the lack of knowledge on the 'logics' behind the implementation of these projects is yet another limiting factor affecting their more intensive use.

An additional problem is reflected in the lack of the necessary expert knowledge in these areas, both at national and at local levels. There is no institution which is competent for regulating concessions, while the Concessions Commission acts as a second-instance body when it comes to deciding on complaints, and since 2009 – when this body was established – it acted upon a total of 13 complaints. Nevertheless, this Commission receives significant funding from the budget every year.

Access to PPP contracts is hampered by the absence of an electronic database. In terms of concessions, the registry updated by the Concessions Commission only contains information on the subject of concession, duration of concession and names of contracting authority and concessionaire. Poor coordination between the competent national and local administration bodies is reflected in the fact that municipalities do not have annual concessions plans although they are legally bound to adopt them. An additional limitation is posed by the inefficient system of concessions payments, managed by the Ministry of Finance and Tax Administration, so the concessionaires' debts are rising every year. In January 2013,

³⁶ See: PPP contracts registry in Croatia, available at: <http://www.ajpp.hr/naslovnica/registar.aspx>

³⁷ Taken from the internet presentation of the Croatian Centre for monitoring of energy and investment sector activities: <http://cei.hr/javno-privatno-partnerstvo/>

this debt amounted EUR 12 249 306.44. Poor control of the implementation of concessions contracts is contingent upon the lack of capacity for all areas, i.e. in all departments of the Administration for Inspection Affairs.

Comparative experience shows that aligned legal and institutional frameworks, along with transparency, clearly defined strategic development goals and careful preparation of projects, are crucial for successful implementation of public-private partnership. However, an improved legal and institutional framework does not guarantee quick success in the implementation of PPP. They are, nevertheless, a starting point for creating favourable conditions for foreign investment and obtaining loans from international investment banks. In order to establish such an 'environment' in Montenegro, it is necessary to:

- ✓ Prepare mid-term strategic framework for the development of PPP, which would allow for further planning of projects per sectors.

Adopt a legal framework for public-private partnership which shall:

- ✓ Establish clear and transparent procedures for PPP and concessions in line with the EU acquis;
- ✓ Establish precise division of tasks and competences between the central level and local self-governments, which will allow local administrations to monitor the receipt of concessions indemnities and to realistically assess their revenues annually and in the long-run;
- ✓ Create the basis for establishing an electronic database of PPP contracts with complete contracts and plans for financial payments, which would be updated upon the signing of the contract.

Establish an independent unit for PPP which shall:

- ✓ Provide expert assistance in the preparation of PPP projects;
- ✓ Approve PPP project proposals;
- ✓ Manage the registry of contracts on PPP and concessions;
- ✓ Perform monitoring of the implementation of PPP contracts;
- ✓ Provide training for state and local administration employees involved in PPP;
- ✓ promote PPP concept in the country and abroad;
- ✓ Perform evaluation of PPP projects.

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About the Institute Alternative

Institute Alternative (IA) is a non-governmental organization, established in September 2007 by a group of citizens with experience in civil society, public administration and business sector.

Our mission is to contribute to strengthening of democracy and good governance through research and policy analysis as well as monitoring of public institutions performance.

Our objectives are to increase the quality of work, accountability and transparency, efficiency of public institutions and public officials; to encourage open, public, constructive and well-argument discussions on important policy issues; raising public awareness about important policy issues, strengthening the capacity of all sectors in the state and society for the development of public policies.

The values we follow in our work are dedication to our mission, independence, constant learning, networking, cooperation and teamwork.

We function as a think tank or a research centre, focusing on the overarching areas of good governance, transparency and accountability. Our research and advocacy activities are structured within five main programme strands: i) public administration, ii) accountable public finance, iii) security and defense, iv) parliamentary programme and v) social policy.

On the basis of our five programmes, we monitor the process of accession negotiations with the EU, actively participating in working groups for certain chapters. Our flagship project is the Public Policy School, which is organized since 2012. Ministry of Science has issued a formal decision, granting Institute Alternative the official certificate to conduct research activities in the field of social sciences, on 17 October 2013, based on the Law on Conducting Scientific and Research Activities.

In our hitherto work, we had joint projects with Center for monitoring and research (CEMI), Centre for Civic Education (CGO) and European Movement in Montenegro. When it comes to international partners, we have cooperated with Centre for Control of Armed Forces (DCAF) from Geneva, Support for Improvement in Governance and Management (SIGMA), a joint initiative of the OECD and the European Union, European Policy Center from Brussels, Center for International Studies (CESPI) from Rome, Center for Study of Democracy – Sofia, etc.

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