Public-Private Partnerships in Albania: From the Legislative Provisions to Risk Management

Julinda Keçi

Department of Civil Engineering, EPOKA University, Albania,

ABSTRACT

Public Private Partnerships (PPPs) are frequently used in Albania, mainly in the form of concession, as the main "engine" to make work the public sector in the field of investments. It is estimated that recently, there are more than 170 PPP-s only in the infrastructure sectors in Albania.

The focus in this policy was given by the European Union, and the application of this model initially was based on the EU directive 2004/18/EC of the European Parliament and that of Council of Europe on 31 March 2004 so far, as part the process of Acquis Communautaire. The renewed and increased interest on PPPs, where private sector finance public investments in return for realizing profits, is especially present in a fragile state like Albania.

The process is based in a legal framework, which in few years has been amended frequently, with the aim to make increase the investments fields, stakeholders, and benefits. It is to be emphasized that Albania has not only adopted new laws, but it has set up an ad hoc public institution, called the "Agency on the Treatment of Concessions". The examples of PPP-s contracted and implemented in Albania, are a lot, mainly considered as success story and pathfinders for strategical sectors of Albanian economy.

This paper will review the PPPs legal framework, performing a comparative study on legislative provisions in Western Balkans Countries.

***Keywords**: PPP-s, Legal framework, Risk management, Albania*

INTRODUCTION

In a time of economic uncertainty and increased demand for infrastructure, governments are seeking alternative ways of funding projects. This situation has led to researching for new approaches such as Public Private Partnerships (PPPs). "PPPs are arrangements where the public and private sectors both bring their complementary skills to a project, with varying levels of involvement and responsibility, for the purpose of providing public services or projects" [1]. These alternative delivery methods may employ three or more functions such as: Finance (F), Design (D), Build (B), Operate (O), Lease (L), Own (O), Maintain (M), and Transfer (T), mostly adopted in the form of BOT (Build- Operate- Transfer) or the so-called concession.

Researchers agreed that public financing in developing countries has become very unstable due to the lack of effectiveness in three main directions, such as time, cost, and quality. Most infrastructure and services are assessed to be in short supply when compared to the country's increasing demand. A McKinsey study in June 2016 [2], estimated a yearly investment need of US$3.3 trillion each year to 2030, to support current growth rates (equal to 3.8% of the global GDP). An analysis performed in Western Balkan Region [3], estimated a need of EUR110 billion in infrastructure investment for a ten-year period 2015-2024. Even the available infrastructure is not performing to the required standards due to low maintenance and public perceive as "no man's property".

In these conditions, the transition to the PPP approaches is recognized by many studies as a win-win solution due to the perceived benefits in government debt reduction, increase of private sector participation and prevention of tax escalation [4].

In analogy with world-wide experience, driven in part by the growing infrastructure investments with postponed payments, PPPs have proliferated in Western Balkan Region; Albania makes no exception. While governments seem eager to create such partnerships, not everyone is convinced of their value- criticizing the system's ability to deliver the promised benefits due to the inherent risks, long-term nature, their high value, and complex organizational structures.

Following the established legal framework in 2006, Albania has seen an increased number of PPP projects, mainly in the field of energy and transport. Studies have revealed a high mortality rate of PPPs in Western Balkans, especially during preparation phases [5]. Nevertheless, their applications remain still high, ranging from two projects in Serbia to eleven projects in Albania reaching financial closure. Most contracts are based on unsolicited proposals, hindering the planned public policy development, as private investors are choosing the projects they want to invest in.

It is though important to highlight that over the past years Albania has made efforts to learn best practices from its past and apply them to new procurements. Practice also showed that circumstance change in a country and what seemed to be good terms and conditions for PPP contracts in the 2000's was not that great for more recent projects. This study focuses on PPP legal framework, its compliance and effectiveness, as well as implementation and risk management, highlighting lessons learned from Albanian approach.

PPP DEVELOPMENT TRENDS IN WESTERN BALKANS (WB)

Infrastructure development is a crucial support to the regional economic recovery and growth, especially after the global crisis. The first development of PPPs in Western Balkans dates to 1998; Time by time the number of PPP projects is quickly increasing, influenced as well by recent trends and successful PPP deliveries and the ability to use the private sector know-how in building - operation- maintenance. It is important to highlight the high mortality rate of PPPs [5]. A study conducted for the Region [6], revealed that most successful projects were delivered in transportation sector (65%), followed by social and community services (20%), telecommunications (10%), and environmental (8%), mostly in Albania. Considering the frequent application mode, WB countries have developed their dedicated legal and institutional framework to support public authority in the PPP developments, conforms the EU directives 2004/18/EC1: transparency, equal treatment, fair and open competition, and solid procedures.

Large investments in WB delivered through PPP, instead of traditional public procurement, seem to match more with a national strategic attention rather than with a better Value for Money (VfM) delivery. Most of large projects in WB did not carry out a VfM analysis of the procurement method, as it was strategically very early decided not to adopt a traditional procurement. Considering the high need for large infrastructure investments in the Region, the developed projects are considered of strategic importance for the country. So, their development phases are generally supported by continuous studies and research of European Commission, international expertise and advisory, as well as financial support from USAID, IFC, EBRD.

Despite this, it was not uncommon for PPP project to go off-rail, mainly due to poor initial preparation of the project- with a predisposition for public authorities to launch the procurement before being sufficiently ready, and poor preparation and management of the procurement process. The first major PPP successful applications in WB countries are treated as 'pathfinder' projects, especially for the legal and institutional frameworks, to enable compliance with the respective procurement processes [5].

PPP as a mechanism for DEVELOPMEN IN ALBANIA

Although PPPs are only lately being extensively used, historical facts reveal their early history in Albania. According to Albanian National Archives documents, the public sector partnership with private sector dates to the early 1920, progressing through three main development phases: 1) 1920- 1944; 2) 1944-1992; 3)1992–ongoing.

Since 1922, the Albanian National Council used to discuss various requests from foreign companies to invest in various sectors in the form of concessions [7]. Due to the lack of a specific law on concessions, the government used to discuss and approve the contracts case by case.

The second development period (1944-1992) is considered as a dark phase of PPPs, as they were legally prohibited. Economic and political changes of 1992 in Albania increased the need for public private partnerships, requiring the realization of three basic conditions: Reconsidering the PPPs definition; Developing an adequate legal framework; Establishing an institutional framework.

Due to a large public funding gap, the potential of PPPs as a source of alternative finance was recognized quite early by the Albanian Government, making numerous efforts to create an enabling PPP environment. The legal reforms were introduced later on, with the PPP Law of 2013 (no. 125/2013), amended in 2015 (no. 77/2015). The current Albanian PPP law and its amendments establishes the legal framework for PPPs and describes institutional responsibilities. It is to be emphasized that Albania has not only adopted new laws, but it has set up an ad hoc public institution, called the "Agency on the Treatment of Concessions", serving as a PPP Unit in the Ministry of Finance.

Albania has a history of successful and less successful PPP procurements. In a recent World Bank analysis [16], Albania scores well in preparation and procurements of PPPs and with unsolicited proposals, medium score in preparation and lower score for PPP contract management.

The central budget authority's approval is needed before tendering and PPP's prioritization is consistent with public investment prioritization even though there is no detailed procedure regulated. It is missing a specific methodology for economic analysis, fiscal affordability, financial viability, risk assessment, and market assessment. During the preparation stage are used the standardized PPP model contracts and a draft contract is requested in the proposal. The Albanian government has created a system to manage the implementation of PPPs and a monitoring and evaluation system, with the private partner providing periodic information to the procuring public authority. The current regulation allows changes in the structure of public partner and modification or renegotiations of the PPP contract, limited on risk allocation only.

Currently a great focus is being placed on PPP market discussing the lack of specific comparative analyses in Value for Money with public procurement, Benefit Cost analyses, social assessment and high critical risks in "corruption" and lack of "respect of law". The changing economic circumstances have led to amendments being made in procurement laws, strategic approaches and specific PPP contract terms and conditions.

This section presents a review of two selected PPP projects developed and carried out in Albania. It analyses the practices and procedures used, as to be able to identify key issues as possible opportunities for improvement. Considering the limited data availability, the methodology used considered both documentation review and interviews.

Tirana International Airport "Mother Teresa"

In the framework of EU integration, Albanian government gave priority to improving infrastructure and services of Tirana International Airport (TIA) [8], [15]. 'Mother Teresa' Airport was built in 1957, 17 km North-West of Tirana, and had the latest upgrade of the runway on 2002. Considered as the first and last impressive image of Albania offered to air passengers as well as a connection point with the world, the government committed for the further development and improvement of its infrastructure through PPP [4]. The decision to deliver the intended investment through a PPP, instead of a traditional pubic procurement, results more a reflection of the national strategy than based on a VfM analysis.

The procurement process for the Tirana Airport pursued an international tender organized in two stages: pre-qualification stage followed by request for proposals. As reported on EPEC study [6], out of the 18 companies expressing their interest in the transaction, four entities were invited to tender. Following a competitive dialogue procedure, the contract was awarded to Tirana Airport Partners (TAP), a company established on September 20, 2004 specifically for the implementation of the concession contract. It was initially owned by Hochtief Airport GmbH 78.7% and Albanian-American Enterprise Fund 21.3%. In October 2004, Hochtief sold 31.7% of the shares of DEG - Deutsche Investments. The concession agreement provided for the investment of a share capital of 9,375,000 Euros. On October 6, 2016, the company was bought for 82.25 million euros by Real Fortress Private Limited, a company registered in Singapore, which owned 100 % of shares. On December 1st 2020, the concession was sold to Kastrati Group Sha. for 71

million euros [17]. The Concession Agreement was signed in October 2004, with the objective to construct, operate and maintain the International Airport "Mother Teresa" of Tirana, specifically including the designing, financing, installation, building, maintaining, operating, managing and developing the new terminal construction based on the old airport. BOT of "Mother Teresa" International Airport in Rinas, had exclusive rights to international flights to and from Albania for an initial period of 20 years starting from 2005. This contract was amended in 2016 and was extended with 2 years in exchange for the removal of the exclusivity clause on international flights.

The structure of the agreement allowed phased construction, with investments being made after reaching predetermined levels of passenger traffic. So, the project was delivered in three main phases, completed on schedule:

Phase 1: Construction works (2005-2007), during which were performed the following investments: New Passenger Terminal; New Car Parks (Area 1 and 2), covered and uncovered; New Air Cargo Centre; New Access Road; New Bridge on the Existing Road; New perimeter road; New circulatory road; Standardized in-house services; Additional operational facilities (waste water treatment plant).

Phase 2: New Passenger Terminal (2008-2009) and additional investments in airport facilities and operations, in the extension of apron; in improving the FFR Station.

Phase 3: Following investments in CCTV control system, Access Control system, Emergency Centre, Preparation of Standardized Operation, Maintenance, Security Manuals and others.

TIA was granted a one-off exemption from customs duties, import taxes and VAT on imports and materials supplied for construction and reconstruction work, although a part remains liable to corporate tax and VAT at the statutory rates [5]. The concessionaire fee is structured with an initial lump sum of 3million EUR and a variable fee per year representing 30% of private partner profits.

The risk allocation is mainly guided by the PPP principle “allocating the risks to the party that can best handle it”. So, the private partner retained the risks related to design, construction, operation, maintenance and market. The public part retained regulatory risks and responsibility related to specific operational aspects, such as delivery of secondary needed infrastructure (e.g. access roads), air traffic control. Other risks, such as financial and environmental are shared between parties). The environmental risk is shared, with the public part responsible for the existing site conditions, while the private partner responsible to fulfil with the legal environmental regulations. Financial risk as well is shared, with the public part responsible, in case of early termination, for any residual amount due to the lender, while the private part responsible for project finance availability [11]. It should be noted however that, studies reviewing current EU best practices ([9], [5]) highlight that public authorities are discouraged from accepting responsibility for full debt repayment in case of early termination of the concession as a result of private partner default.

The political risk, causing closure or disruption, is retained by the private authority, even though it was estimated with a low probability due to the high economic harmful impact. To ensure a fair return of the investment and to treat the potential risk of ‘over design’ (building today an infrastructure which will provide over capacity for the actual passenger traffic), the agreement allowed phased construction. To mitigate the risk of local currency devaluation aviation revenues are collected in foreign currency (EUR of Dollar) while unitary costs of non-aviation revenues- collected in Albanian Lek- are often indexed in a basket of international currency. Cost overruns, as a result of contract agreement using a preliminary non- detailed project, was addressed by an investment ceiling.

TIA is considered as a flagship project for Albania. Due to lack of experience, it was treated as a ‘pathfinder’, ratifying the concession contract by the national parliament. VfM is still under question mark. Having made an early strategic decision to adopt PPP, resulted in a lack of a formal quantitative value for money analysis, to compare PPP to the traditional procurement. A detailed comparative research on aviation charges was on performed, but a study investigating user satisfaction performed in 2017 [10], revealed the

user dissatisfaction with the high charges making TIA one of the most expensive in the Region. However, it is to be highlighted that high charges are not an indicator of poor value for money.

To conclude, the contract is considered as fair, with good partnership spirit. This was proved with the goodwill of both parts in managing the contract changes, such as the ownership change or the request for exclusivity, both not anticipated in the original contract. The contract is being currently managed by Civil Aviation Authority, under the Ministry of Transport and Infrastructure, and has an overall good operation.

ASHTA HPP

The new law on concessions affected directly the hydropower sector in Albania, which at the time had more than 80 proposals aiming at the design, construction and maintenance of hydropower plants through small concession agreements. The situation was further supported by several actions undertaken by the Albanian government, aiming to promote the participation of private sector in the provision of large infrastructure projects, such as offering guarantee for the energy market (for the first 15 years out of 35), including the right of financial institutions to 'step in' in case of possible failure, initiating the 'One Stop Shop' for licensing and permits, decreasing the taxes on infrastructure constructions into 0.1% of the investment value.

The history of PPP procurements in the hydroenergy sector has a mixed history. There was a proliferation of mini-hydroelectric concessions that were awarded by the government through unsolicited proposals, but unfortunately some of them seemed to have been opportunistic and have never met their project commitments to build operational hydroelectric plants [18].

The Ashta hydropower plant was Albania's first major hydro-power plant development in 30 years and the Government's first large public-private partnership (PPP) in the energy sector [12]. Located in Drini River, in northern Albania, it is the last of a chain of HPPs. The Ashta HPP was initially developed in the 70s-80s, with some structures of it constructed in 1973 (e.g. Spathara dam). As Summarized in IFC report [13], the project need identification dates back to 2001, with the Albania's power utility (KESH) contracting the China Water & Electricity Corporation (CWE) to build, on a turnkey basis, a hydropower plant on the lowest reach of the Drin River. Multiple socioeconomic and environmental questions forced Albanian government to suspend the contract in August 2001 for an independent feasibility assessment. Despite the study was completed in a few months, it took six years to the government to approve the new concept (Ashta) and to implement the pilot PPP under the new concession law.

The prequalification phase of the bidding process started in January 2008, including 12 possible bidders out of which only 10 were eligible and fulfilled the prequalification requirements. The IFC team and the possible bidders negotiated on the design of standard bidding and contract documents in a fair, transparent procedure. Even though the main conditions were discussed and negotiated, an important number of problematic issues were not included in the pre-negotiations, such as hydrological risks, geological risks, environmental risks, land appropriation risks, construction risks.

Furthermore, Ashta HPP, being the last HPP constructed in Drini river, is directly affected by

Vau i Dejes, Komani and Fierza HPP, which are property of KESH and as a result subject to public regulatory framework ("regulations on minimum ecological flows, water off-takes for irrigation, cascade operation rules, potential liabilities associated with existing structures" [13].

In June 2008, only two international companies Verbund and the joint venture Electrabel &Companie Nationale du Rhone, submitted their technical and financial proposals. In July 2008, Verbund was awarded as the winner and in a two months period the concessionaire agreement was signed adopting a Build Own Operate Transfer (Table 1). In 2010, EVN AG and Verbund negotiated a collaboration agreement, creating the joint venture Energji Ashta Shpk, to invest, design, construct, and operate Ashta HPP, which was later approved by the contracting authority.

Table 1. Ashta HPP project overview (UNFCCC, 2006)

ASHTA HPP, Albania	
Project Type:	BOOT
Contract duration:	35 Years
Investment amount	EUR 212.9M
Location	Shkoder, Albania
Schedule 2008 - 2043 PHASE 1 (planning/authorization phase): total duration: 18 months PHASE 2 (construction phase Ashta 1): - start of construction: March 2010 - commissioning: Autumn 2012 PHASE 3 (construction phase Ashta 2): - start of construction: April 2010 - commissioning: beginning of 2013 PHASE 4/5 (operational phase): 2012 - 2043	

The project consists of a two-stage diversion power plant which incorporates some pre-existing structures and some supporting infrastructure investments. The project construction lasted approximately 30 months, and the official inauguration was performed on September 2012. On March 2013, the project reached the final stage of testing and commissioning, competed successfully with 66 GWh produced electricity, sold to local companies GSA and CEZ. Officially, the Ashta HPP was considered as one of the worlds' largest hydro power plant using the matrix technology: 90 innovative hydro-matrix turbines, with a capacity of 52MWh, producing 278 million KWh per year electricity for Albania.

Being a pilot application under the new concession law, the project faced various problems and difficulties, directly affecting cost escalation. The financial risk, totally bared by the private partner, was treated by an additional contract clause giving the private partner the right to change the project without any additional obligation from the contractual authority (paragraph 7.2.3 of Concessionaire Agreement).

Being the last of a chain of HPPs, Ashta plant is fully reliant on water releases from the upstream state-owned plants. The risk that KESH may retain water for extended period and release it on certain peak times (e.g. peak power times), would impact negatively the project performance. Considering that Ashta has almost no storage, extreme water releases would overpass the dam with no electricity production. This risk was mitigated through an agreement assisted by IFC team between the concessionaire and KESH. The arrangement stipulates conditions for regular water releases under normal situations and directions crisis management in case of emergency events such as floods [13].

Other identified risks include (see Table 2):
- ***Hydrological risks***: temporary deficits, long-term deficits, flood damage (during construction phase), flood damage (during operation phase);
- ***Construction risks***: cost overruns, unforeseen geological conditions, time overruns;
- ***Performance risks***: equipment, project performance, transmission;
- ***Environmental risks***: permit, land ownership and occupancy; Market and credit risks;
- ***Political risks***: changes in permits, tax changes.

A formal quantitative VfM is missing. However, beside the main benefit directly related to the reduction of the countries' needs to import electricity, there are several other perceived benefits of the partnership project, such as: environmental benefits (e.g. reduced CO2 emission) [14]), an important economical impulse, job creation, benefiting from the international experience know-how, attraction of international investments, important social impacts

Table 2. Ashta HPP risk allocation overview [11]

Risks	PRIVATE	<= =>			PUBLIC
Hydrological		*	*		
Construction		*			
Financial		*			
Performance		*			
Environmental			*		
Political &Regulatory				*	
Force Major			*		

.

CONCLUSIONS

Weakness and threats:

- Sustainability assessment of PPP projects.

While reviewing the PPP developments in WBR, and especially in Albania, it was evident that decisions to use PPP deliveries was based more in a national strategy. There was no documentary evidence assessing the sustainability of a specific project delivered through PPP, neither a specific regulation.

- VfM is still under question mark.

No documentary evidence of quantitative VfM analysis or Benefit Cost analysis. A formal ex-ante VfM could have been a helpful tool, while comparing it with an ex-post analysis, to demonstrate the project deliveries.

- Unsolicited proposals are commonly used, causing some concern.

These practices allow the public part to avoid costs for project preparation. Furthermore, it hinders the centrally investment-oriented public policy, as there are private partners choosing the projects they want to invest in.

- Poor competition

Due to unsolicited proposals, encouraged by the bonus policy, the projects seem to have a readymade pathway, resulting in poor or no competition.

Strengths and Opportunities:

- Dedicated units for the PPP development.

Albania is appreciated from several EU studies for the lower PPP mortality rate in Western Balkans. Dedicated units for PPP development and clear definitions of roles and responsibilities, contributes to this success. The PPP unit should be empowered with technical and staff resources.

- Good practice in PPP procurement stage.

Case studies reviews have revealed following a good practice in procurement stage by following international tender procedures, being constantly supported by studies and research from European Commission, international expertise and advisory, and financial support. Anyway, it is to be highlighted that external support does not necessarily guarantee the project success.

- Phased construction allowed in the PPP agreement.

The phased construction agreement resulted a good practice to avoid 'over design', and as a result higher charges to end users.

REFERENCES

[1] Efficiency Unit, "An Introductory Guide to Public Private," 2008. [Online]. Available: http://www.changingroles09.nl/uploads/File/Final.Ke-Wang-Chan.pdf.

[2] PwC, "Global infrastructure investment," GIIA, PwC, 2017. [Online]. Available: https://www.pwc.com/gx/en/industries/assets/pwc-giia-global-infrastructure-investment-2017-web.pdf. [Accessed 05 January 2019].

[3] Ri, Berthomieu, Cingolani, "Priority Investments in the Western Balkans and Croatia: Analysis of medium-term needs, possible impacts and criteria for ranking in terms of efficiency and development potentia," STAREBEI Research Program, 2014.

[4] J. Keçi, "Public Private Partnership for Infrastructure Projects: Mapping the Key Risks," International Journal of Economics and Management Engineering, vol. 9, no. 9, pp. 3141- 3151, 2015.

[5] WBIF, EPEC, "PPP Projects in the Western Balkans: Good Practice, Challenges and Lessons Learnt," 2018.

[6] EPEC, EIB, "Overview of the PPP Legal and Institutional Frameworks in the Western Balkans," EPEC, Luxembourg, 2015.

[7] B. Berberi, Partneriteti Publik- Privat: Hallke e Rendesishme e Procesit Te Integrimit te Shqiperise ne Komunitetin Evropian, Dizertacion Doktoral, Tirane: UNIVERSITETI I TIRANËS, 2013.

[8] BENEFIT, "Case Studies: Tirana International Airport," 2016. [Online]. Available: http://daphne-new.aegean.gr/wiki/index.php/Case_Studies:_Tirana_International_Airport#Risk_Allocation. [Accessed 30 May 2015].

[9] Iossa E., Spagnolo G., Vellez M. , "Best Practices on Contract Design in Public-Private Partnerships," World Bank, 2007.

[10] Keci, J., MODEL PËR MENAXHIMIN E RISKUT NË PROJEKTET E MËDHA INFRASTRUKTURORE TË PARTNERITETIT PUBLIK PRIVAT, Tirana: Polytechnic University of Tirana, 2017.

[11] Keci, J, "Infrastructure Public Private Partnership Implementation and Risk," in IABSE Guimaraes 2019, Portugal, 2019.

[12] United Nations Economic Commission for Europe Team of Specialists on Public-Private Partnerships, "UNECE PPP STANDARDS FOR GRID-CONNECTED RENEWABLE ENERGY," United Nations Economic Commission for Europe, 2016.

[13] I. F. C. IFC, "Ashta Hydropower—Turning a Doubtful Concept into a Technological Trailblazer," IFC, 2009.

[14] UNFCCC, "CLEAN DEVELOPMENT MECHANISM -PROJECT DESIGN DOCUMENT FORM (CDM-PDD)," 2006.

[15] ". S. T. I. A. BENEFIT, "Case Studies: Tirana International Airport"., " 2016. [Online]. Available: http://daphne-new.aegean.gr/wiki/index.php?title=Case_Studies:_Tirana_International_Airport&oldid=844.

[16] W. Bank, "Benchmarking PPP Procurement 2017," World Bank Group, 2017-2018.

[17] ALBANIA'S PUBLIC PRIVATE PARTNERSHIPS, "http://ppp.reporter.al/," 30 January 2021. [Online].

[18] D. Baxter, "The Status Quo of PPPs in Albania," 2018.