

Public Private Partnerships and possibilities of their using in the field of Ministry of Agriculture

Veřejně soukromá partnerství a možnosti jejich využití v působnosti Ministerstva zemědělství

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Abstract: Public-Private Partnerships (PPPs) are based on co-operation between the public and private sector. The reason for using it is a lack of public financial sources. For this reason, in most PPPs the management and financing of the project is entrusted to the private sector. In the Czech Republic, the widest development area for PPPs in the scope of the Ministry of Agriculture is probably water supply. The further areas for using of PPPs in the scope of this Ministry are the following: forestry, flood protection, adjustment of water flow, security of water sources, building of the strategic foodstuff store. Important attempts have been made within the last year to increase the implementation of PPPs in water supply. These attempts are based on operation models similar to the BOT (Build Operate Transfer) and the DBFO (Design Build Finance Operate). In addition, the Czech Parliament adopted a law No. 139/2006 Coll., on concessions procedure and concession treaty which entered into force in July, 1st, 2006 and which brings the legal framework for realisation of the PPPs. There are some legal barriers which limited wide using of the PPPs. It is in the case of public-private venture companies (the limitation is in public procurement law). Public-private venture companies – which refer to the situation where both the private and the public sector holds equity, and, consequently, the company is controlled by the private as well as the public sector – should be the ideal form of PPPs in the areas which are in the scope of the Ministry of Agriculture.

Key words: PPP projects, Ministry of Agriculture, public-private joint venture

Abstrakt: Veřejně soukromá partnerství (PPP projekty) jsou založena na kooperaci mezi veřejným a soukromým sektorem. Důvod pro jejich použití je nedostatek veřejných finančních prostředků. Z tohoto důvodu ve většině PPP projektů řízení a financování je svěřeno soukromému sektoru. V České republice nejvíce rozvinutá oblast pro PPP projekty z oblastí, které jsou v působnosti Ministerstva zemědělství je pravděpodobně oblast vodovodů a kanalizací (správa vodovodního řádu). Dalšími oblastmi v působnosti tohoto ministerstva pro využití PPPs jsou lesnictví, povodňová ochrana, úprava vodních toků, zajištění strategických vodních zdrojů a vybudování strategických skladů potravin. Významné pokroky byly učiněny v posledních letech při využití PPP projektů v oblasti správy vodovodů a kanalizací. Tyto pokroky jsou založeny na využití operačních modelů podobných BOT (Postav Provozuj Převed) a DBFO (Navrhni Postav Financuj Provozuj). Nadto v České republice byl přijat zákon č. 139/2006 Sb., o koncesních smlouvách a koncesním řízení, který nabyl účinnosti 1. července 2006 a který přináší právní rámec pro realizaci PPP projektů. V našem právním řádu však přesto jsou právní bariéry (např. omezení v zákoně o veřejných zakázkách). Smíšené veřejně soukromé podniky, ve kterých má stejnou majetkovou účast veřejný i soukromý sektor, by mohly být vhodnou formou PPP projektů v působnosti Ministerstva zemědělství.

Klíčová slova: PPP projekty, Ministerstvo zemědělství, smíšené veřejně soukromé podniky

The concept of Public-Private Partnerships (PPPs) refers to all forms of co-operation between the public and private sector for the management of services intended for the public. In most PPPs, the management and financing of the project is entrusted to the private sector. The costs of the projects are refinanced

by either receiving the payment directly from the user or by charging the government itself for the service (Arrowsmith 1996).

Compared with other countries (e.g. the United Kingdom, Germany, Poland) (Jaeger 2006), PPPs are rare in the Czech Republic. The reasons vary

from organisational to institutional and legal problems. However, probably the main one is the present law in the Czech Republic. It is true that, as in the other countries, there was no specific "Public-Private Partnership Law".

Because of the approved this Act No. 139/2006 Coll., on concessions procedure and concession treaty which entered into force in July, 1st, 2006 – intensive discussions of PPPs in the Czech Republic have recently significantly increased. This is especially a result of the financial situation in the Czech Republic which does not allow for the realisation of the necessary infrastructure projects in the area of road contraction, rail sector, utilities and social infrastructure such as prisons and court of law buildings. There is an urgent need for investment and a lack of public funds. The public sector is no longer able to provide the financial means for the projects.

Consequently, there has been an increasing political support for PPPs law and areas where these projects can be realised. At the end of 2005, the Czech government created a task force with the aim of determining the applicability of the PPPs in the Czech Republic and identifying the political measures required in order to remove the institutional, organisational and legal barriers. The models of the PPPs generally include privatisation, concessions, and public-private joint venture companies.

PUBLIC-PRIVATE JOINT VENTURE AND PUBLIC PRIVATE PARTNERSHIPS IN THE FILED OF MINISTRY OF AGRICULTURE

Public-private joint venture should be a good model of PPPs in the area which is in scope of the Ministry of Agriculture. The public-private joint venture companies¹, in particular are of great practical interest in some countries (the Great Britain, Germany). Public-private venture companies refer to the situation where both the private and the public sector hold equity, and, consequently, the company is controlled by the private as well as the public sector. These joint venture companies are established by the sale of company shares, entirely owned by the public sector to the private sector or by the foundation of a new company established by the public as well as the private sector. The government, States, local authorities and public institutions look for such a co-operation in order to achieve the private sector know-how as well as the necessary financial

means while retaining a certain level of control over the joint venture. Public-private joint venture companies are especially used for public transport, waste disposal services, urban development and in public institutions such as hospitals and prisons for transferring service to a mixed economy entity. During this creation of joint venture companies, different procurement issues arise and these will be considered below.

In contrast to the transfer of equity as such, the situation is different in the case of the transfer of equity from a separate private legal entity owned by a contracting authority to the private sector and if this entity already has a contractual relationship with the contracting authority. In the case the private company obtains, while purchasing the equity, *inter alia*, a public contract, it did not have to be advertised since it was an in-house transaction. The same situation occurs, if the public and the private sector set up a joint venture company and the joint venture obtains a public contract which needs to be advertised according to the public procurement law. In both cases, attention must be paid to the possible circumvention of public procurement rules. It appears that in most of the cases, the intention of the private sector when establishing the joint venture was to obtain the public contract without carrying out a procurement process. Therefore, the question arises whether the transfer of equity from a separate private legal entity, owned by a contracting authority to the private sector involving a contractual relationship between the entity and the contracting authority is subject to the public procurement law.

It appears that the EC procurement Directives or the Czech procurement law apply to the treatment of the described transaction involving, *inter alia*, a public contract. However, the situation is currently neither explicitly covered by the EC Procurement Directives nor by the Czech procurement legislation. The Commission states only that the rules and the principles of the Treaty "have a valid application as regards the transfer of assets to private purchasers". An argument in favour of a restrictive application of public rules is the fact that public procurement rules should not restrict the public sector's ability to organise itself into private legal and distinct entities in order to carry out projects flexibly and efficiently. Choosing a private minority joint venture partner providing the international know-how cannot lead to the application of public procurement rules in any case. This idea is already laid down in the Utilities

¹ In Germany *gemischwirtschaftliche Unternehmen*.

Directives “affiliated undertakings”² According to the Directive, an exemption applies where a utility awards a service contract to an “affiliated” undertaking which it controls and where the affiliated undertaking derives at least 80 per cent of its turnover from such services by providing them to the undertaking to which it is affiliated. These seems to be no logical argument why this exemption is only laid down in the utilities sector and not also valid in the public sector. Against this background, a restrictive interpretation of public procurement law regarding the award of contract could be appropriate where the private company obtains, *inter alia*, a public contract while purchasing the equity. Therefore, it becomes necessary to consider the possible conditions where there might not be a need for the award of the contract, according to the public procurement law.

In the Czech Republic, the widest development and discussed area for using of PPP project is probably traffic and building infrastructure. The area where there is an experience in using of PPP projects is water supply. Further areas should be forestry, flood protection, adjustment of water flow, security of water sources, building of strategic foodstuff store (Chaloupka 2006). These areas for using of the PPPs projects are discussed. The practical experiences are in the area of water supply where private companies invest the financial sources into water supply infrastructure which is public property. These forms of the PPPs should appear the best ones because in the PPPs, there exist some legal barriers which limited wide using of the PPPs (public private joint venture).

LEGAL BARRIERS IN THE FIELD OF PPPS USING

It is common ground that there is no space for the application of the public procurement law in the case of transferring public sector equity to a private sector as such. According to the paras 12 Act No. 137/2006 Coll. on Public Contracts, Czech procurement law is applicable if a public authority intends to conclude a contract with a company for construction, works, supplies of goods and services or freelance services and the contract exceeds the required financial threshold which is oriented on EC Procurement Directives. Therefore, “only” in the case where the private and the public sector conclude a “public contract” within the meaning of the Czech procurement

law their award must respect the provisions set out in the public procurement law. The transfer of public sector equity as such, however, does not constitute a public contract. There is no contractual relationship in terms of cooperation between a public authority and the private sector (Dreher 2002).

The European Court of Justice (ECJ) implied a partial exclusion for following the public procurement procedure where the awarding authority exercises control over the supplier and where the latter carries out the essential part of its activities for the authority.³ The ECJ has followed this view in the case where a public authority holds 100 per cent equity of the company. It is submitted that these principles should apply to the transfer of equity from a private separate legal entity owned by the contracting authority to the private sector involving a public contract, where the established joint venture company is controlled to a high degree by the contracting authority. Consequently, these principles should be also apply to the foundation of joint venture company involving a public contract, if the joint contract, if the joint venture company is dominated by the contracting authority. In both cases, the joint venture has to provide the essential parts of its activities to the contracting authority. Thereby the level of equity held by the public sector should be more than 50 per cent in any event. The level of equity held by the private sector, however, should not be the only factor. In addition, the corporate and administrative connection between the public authority and the joint venture company and the level of the turnover provided to the affiliated joint venture company are of decisive importance for the application of public procurement rules (Arrowsmith 2000).

CONCLUSIONS

In the Czech Republic, there is a new trend how to solve the lack of public money, PPPs. There are some forms of PPPs: privatisation, concessions, and public-private joint venture companies. In the Czech Republic, there is analysed the using of PPPs. For these reasons, two subjects – the PPP centre and the PPP association created a task force with the aim of determining the applicability of PPPs in the Czech Republic and identifying the political measures required in order to remove the institutional, organisation and legal barriers. Two subjects – the PPP centres and the PPP association-proposed pilots PPP

² Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

³ See cases C-107/98 Teckal Srl v Comune di Viano, C-94/99 ARGE.

projects which were approved by the Czech government. These projects are in the scope of the Ministry of Transport and the Ministry of Justice. In the areas which are in the scope of the Ministry of Agriculture, PPPs are discussed. The area where there is some experience in using of the PPP projects is water supply. Further areas should be forestry, flood protection, adjustment of water flow, security of water sources, building of strategic foodstuff store. The practical experiences are in the area of water supply where private companies invest the financial sources into water supply infrastructure which is public property. These PPPs are based on operation models similar to the BOT (Build Operate Transfer) and the DBFO (Design Build Finance Operate). In PPPs, there exist some legal barriers which limited wide using of PPPs (form of public private joint venture) which should be appropriate in the above mentioned areas which are in the scope of the Ministry of Agriculture.

Choosing a private minority joint venture partner providing the international know-how – which is the form of PPPs appropriate e.g. in forestry – should not lead to the application of public procurement rules in any case. This idea is already laid down in the Utilities Directives “affiliated undertakings”. According to the Directive, an exemption applies where a utility awards a service contract to an “affiliated” undertaking which it controls and where the

affiliated undertaking derives at least 80 per cent of its turnover from such services by providing them to undertaking to which it is affiliated. There seems to be no logical argument why this exemption is only laid down in the utilities sector and not also valid in the public sector. This should be de lege ferenda the recommendation for changing of the Public Sector Procurement Directives⁴. It is the most significant legal barrier which prevents using the PPPs in the above mentioned areas.

REFERENCES

- Arrowsmith S. (1996): Law of public and utilities procurement. Sweet & Maxwell, London.
- Arrowsmith S. (2000): Public private partnerships and the European procurement rules: EU policies in conflict? *Common Market Law Review*, 37, 709.
- Dreher (2002): Public Private Partnership und Kartellvergaberecht. *N.Z. Bau* 245.
- Chaloupka V. (2006): Analýza užití metod PPP z pohledu Ministerstva zemědělství ČR. (Materiál z přednášky), Praha.
- Jaeger (2001): Public Private Partnership und Vergaberecht. *N.Z. Bau* 6.

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⁴ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.