



# Public-Private Partnerships in urban development projects. Polish practices and EU regulations



SPRAWNE PAŃSTWO  
PROGRAM *ERNST & YOUNG*

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2009 was the fourth year in a row for Ernst & Young to be recognized as leader in project finance transactions by the Project Finance International, in majority for its input into public-private partnerships (PPPs). During those past few years Poland has issued three acts regulating the nature of PPP, of which only the last two – pertaining directly to PPPs and concessions – may find a practical

application. This presents a great opportunity for PPP projects to be recognized as the best way to finance new investments and to outsource public functions. The unquestionable growth of competencies in the public sector in terms of preparation of infrastructure investments, seen in recent years, would be a sound basis for this. But the opportunity also lies in the concurrent maturing of certain EU-financed projects, and the declining revenues of local authorities, which will now be forced to look for alternative funding.

The following report, prepared by an academic team selected as part of the Ernst & Young Better Government grants competition, represents an attempt to describe the current issues surrounding PPPs in Poland and the general conditions for a wide implementation of this mode of cooperation between public and private entities. The authors also attempt to present several recommendations, pinpointing existing or potential problems and aimed at dissemination of best practices. We hope that this report will improve the quality of PPPs in Poland and raise the profile of such partnerships as an efficient tool, serving the interests of local governments and citizens.

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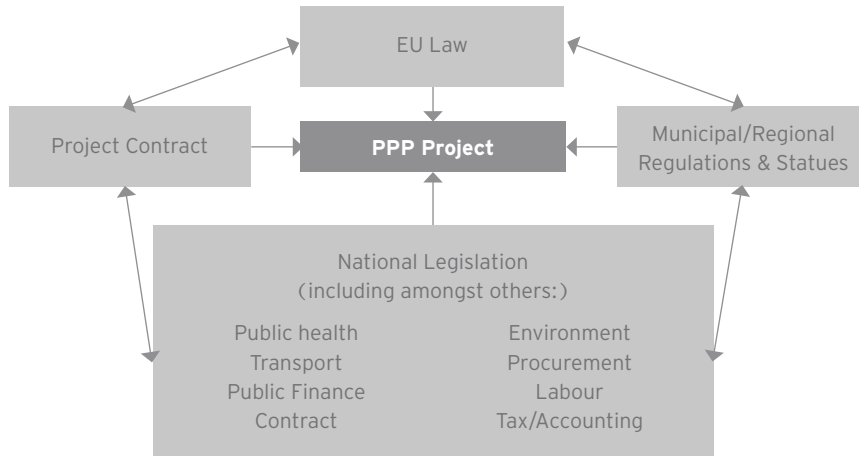


# 1. Introduction

## 1.1. Brief introduction to PPPs

PPPs (public private partnerships) in urban development can be best defined as a true partnership of public officials and private developers who “have development ambitions that they could not complete alone” (Sagalyn, 2007, p. 8). In this form of public (municipalities) and private sector (private companies such as construction and property development firms, private banks, investment companies, etc) cooperation, the aim usually is to accomplish a public task or a project by funding and/or operating on the basis of a partnership in which the financial risks of the public sector are to be reduced. PPPs are mainly driven by limitations in public funds to cover investment needs and by efforts to increase the quality and efficiency of public services (EC, 2003). PPP investments are influenced by a hierarchy of legal regimes as shown by Figure 1:

**Figure 1. Hierarchy of the legal structures relating to PPP projects**



Source: Adopted from Guidelines for Successful PPPs (EU, 2003)

For establishing PPPs an institutional structure is required, to allow the public sector to change their role from being a direct service provider to an independent regulator, manager, monitor, and project promoter (EU, 2003). The key principle is that the risk, which can be defined differently in each institutional context, should be allocated to the party that is best able to manage it. Here, risk means any factor, event or influence that threatens the successful completion of a project in terms of time, cost or quality (EU, 2003). In general, however, one of the

main expectations of the public sector concerning PPPs is the transfer to the private sector of at least part of the financial risk that may be incurred during the lifetime of a project. As some scholars have, however, already argued (Flyvbjerg et al., 2003), the public sector usually ends up bearing larger financial risks and cost overruns than anticipated. The scale and type of risks that are incurred by the private and public sector may differ from case to case. Of the variety of risks, this report specifically focuses on the implementation risks attached to large-scale public-sector urban development projects, in terms of non-compliance with European regulations, as described in the sections below.

## 1.2. Definition of the problem

PPPs are not only commonly used by local governments across Europe for financing public infrastructure and services, but are also a widespread form of financing for large-scale urban projects. Although they are mainly used for regeneration purposes, they are also used for the development of new projects or for many other types of project, such as employment and investment in deprived urban areas. Due to the unclear definition of this type of collaboration within the EU legal framework, however, some implementation problems arise concerning the use of PPPs in urban development. By definition, as PPPs concern the cooperation between public and private sector actors on the basis of contracts and legal arrangements, and as they usually require a tendering process, these projects fall under the EU regulations concerning free, fair and transparent trade. As they require a specific set of rules to deal with the complexities of urban development, these projects face implementation problems, especially due to the Single European Market rules that are aimed at regulating state aid and public procurement to ensure free and transparent trade across Europe (Taan-Kok & Korthals Altes, 2008). Because of this, the Commission repeatedly faces complaints concerning infringements of the Community Law on concessions, state aid and public procurement.

Poland, as a new member state, has been using PPPs in many different forms since the 1990s. The first projects involved municipal services and the construction/improvement of technical infrastructure facilities, and were mainly small investments implemented by local governments. During the 1990s, the PPP did not formally exist within the legal system; therefore, for many years, quasi-PPP initiatives have taken place, i.e., projects that do not fall under public-private partnership according to the legislature, but from the point of view of their organization and objectives they are of such nature. Local governments are clearly interested in using this option, but a multitude of obstacles limit the implementation of projects in the broadly-understood form

of PPPs. The existing state of infrastructure development and the possibility of using EU funds should also strongly encourage the use of PPPs in large-scale urban development and city regeneration.

In October 2005, the principles that govern public-private partnerships in Poland finally became unambiguously defined. The law settled the question of the nature and legality of the PPP (Brzozowska, 2006).

It was not, however, used in practice, so its implementation may not be considered a success (Gonet, 2008). On 6 January 2009, the President of Poland signed a new PPP Act, which promised a new direction in the use of public-private partnerships by public and private entities. It is, however, as yet unclear how this act will have an impact on the successful implementation of PPPs in urban areas. This lack of clarity is mainly due to the fact that the law is new and the municipalities have no experience relating to formal PPPs in urban areas. Moreover, the state aid and public procurement rules have constrained the use of PPPs in urban development projects, as proven by the increasing number of infringements in Europe concerning this type of project, as we demonstrate in this report.

### 1.3. Relevance of Single European Market regulations

The European Treaty laid down rules and regulations, with the aim of supporting fair trade and transparent competition, such as state aid and public procurement rules, that encroach on national development practices. The general principle is that state aid is not allowed, and that the European Commission is entitled to question such practices. In terms of public procurement, the practice is that public works that are realized by planning obligations (i.e., the developer puts in place infrastructure on the land and transfers this 'for free' to the local government) are not put out to a tendering process as required by European public procurement rules. In the implementation of public private partnership projects, however, the Commission expects an open tender process. Thus in Western Europe PPPs, as widespread local government instruments for large-scale urban projects, are increasingly affected by these regulations. The EU regulations are not always appreciated by the local governments, as they increase the land transaction costs, extend the development processes, and cause disagreements between the local governments and those private developers involved in the development process. The current implementation experience of other European countries will shed light on the regulation and practice of PPPs in urban policy in Poland.

In Poland the major experience has been in the field of large infrastructure (roads, water and wastewater projects, and ports); however, some fragmented examples of public private cooperation

emerged on the basis of individual projects in large cities to regenerate neighbourhoods or special brownfield zones, or to build entertainment and sport facilities, such as aqua parks. Of these limited urban projects, in most cases the public side (municipality) as the landowner had an agreement with a private company for the development or redevelopment of land or property in inner city areas, mainly for commercial use. In these limited instances the usual form was that the municipalities or other public authorities were usually passive partners that offered the use of the land in exchange for a specific share of the profit. Polish municipalities have developed their own instruments (planning, zoning, permits, regulations, etc) for the implementation of large-scale schemes, but these were not part of a larger plan with social dimensions, and they were not in the form a PPP.

Becoming a member state, maturing with market rules and having new regulations, the Polish municipalities have realised the opportunities that PPP schemes can offer for the redevelopment of brownfields or the upgrading of deprived neighbourhoods within the framework of larger plans. The full implementation of the EU single market regulations has brought about certain strict expectations for the municipalities. Are the municipalities aware of the constraints (and opportunities) that EU single market regulations bring about for this type of urban development, and to what extent are they ready and able to adapt to the regulatory framework of urban development in the form of PPPs within the given limitations? In order to answer these questions we will focus on a number of cities for an in-depth analysis not only to understand the awareness and readiness of the Polish municipalities for the implementation of the urban regeneration projects in PPP format, but also to provide a set of criteria for success within the framework of Single European Market regulations.

#### **1.4. Aims and scope of the research**

The main aim of this research is to understand the extent to which Polish municipalities are prepared and willing to use PPPs in urban development projects, and the extent to which they are aware of the risks of EU competition regulations, which may affect the success of implementing the project. The research is designed to pinpoint the risks and opportunities for successful implementation of PPPs in urban development. Our research findings supported the initial argument that the more prepared and aware the municipalities are regarding the use of PPPs in urban development and the implications of the single market regulations, the less trouble or risk they may face during the implementation of these projects. At the time (mid-2009) it was, however, still too early to find cases relating to real problems with EU

regulations and there has not been a PPP in urban development, as defined by Polish Law, until the summer of 2009. The scope of the research is, therefore, reformulated on the basis of the interaction between the evidence and the initial project arguments.

### 1.5. Research outline: Data, data collection and research methodology

The research is designed around three general arguments:

- 1) The implementation of large-scale urban development (and/or regeneration) projects is experienced differently in each institutional context because of the diverse local/traditional relationships between public and private sector actors, the diverse ways of deal making, informalities (oral deals and indirect relations, etc) and other local contingencies that create case-specific situations in each context.
- 2) EU competition policy directly (and sometimes indirectly) interferes with the traditional/local urban policy implementation processes.
- 3) Local governments are not completely aware of the consequences of the EU single market regulations (state aid *and* procurement) for the establishment of public private partnerships for urban development projects.

On the basis of these arguments and the feedback from the fieldwork, we defined the goals of our field survey as follows:

- 1) to define the success factors concerning the implementation of PPPs in urban development projects on the basis of European experiences;
- 2) to understand in general Polish municipalities' experience with PPPs in urban development and assess their risks and potential problem areas in the successful implementation of these projects;
- 3) to evaluate the success factors and risks attached to Polish municipalities' involvement in PPP-type cooperation in urban development, in terms of European regulations.

This research was conducted as qualitative research with in-depth interviews, with a review of international problematic cases and of the Official Journal of the European Union. A hermeneutic approach was followed, which is a constant reciprocal process of interaction between the story lines and the evidence (Smith, 1998). This kind of

methodology is very suitable for social areas in which the institutional context is constantly changing or displaying transitional characteristics.

The hermeneutic approach allowed us to make adjustments and reformulations. During the field survey, we realised that due to two reasons the assessment of the current implications of EU regulations on PPP implementations in urban development is not possible. First of all, as PPP law is very new (passed on 19 December 2008), the influence of state aid and procurement rules can only be predicted.

No problematic cases have, as yet, been noted. Secondly, the interviewed local government officials had only a general idea and understanding of these regulations, and when it came to the specific risk factors, such as the use of special agencies or compensation by service obligations, they have no understanding or experience of such situations at all. Thus, as at July 2009 there had been no evidence of any direct risks within the framework we have defined. However, on the basis of our expertise with Polish land development and planning, we could provide assessments for each risk area. Moreover, these risk criteria defined the framework for the recommendations for future implications, while for the assessment of current risks, we focused on the awareness of regulations as a general criterion for success.

The research was conducted in three phases:

- Phase 1: Definition of international criteria for success and risks
- Phase 2: Selection of Polish cities
- Phase 3: Evaluation

### ***Phase 1: Definition of success and risk factors***

We defined two sets of criteria on the basis of the analysis of the experiences of European cities with PPPs in urban development:

- 1) general success criteria for the success of PPPs in urban development;
- 2) criteria for risks and potential problem areas relating to non-compliance with European regulations.

These criteria allowed us to review various country experiences. Institutional frameworks and urban development traditions as well as risks and potential problem areas related to the Single European Market regulations differ in each country. Reviewing the existing experience of member states with PPPs in urban development and particular EU regulations that have an influence on them, we had the following aims:

- 1) to develop an international database of cases on the success and risk factors for PPP implementation in cities within the framework of EU regulations,

- 2) to establish our questionnaire with specific questions to analyse the Polish cities' potential issues within the framework of EU regulations.

### ***Phase 2: Selection of Polish cases and field work***

We aimed to understand the existing experience and future expectations of Polish municipalities, as Polish cities have limited experience with PPPs in urban projects. The selection of cases took place in three steps, in each of which we evaluated Polish cities on the basis of three types of score:

- 1) interest in and potential for PPP urban projects;
- 2) experience with (some forms of) private public cooperation;
- 3) size of city population.

At the end of the evaluation, 13 cities were selected as focus cities: Three large cities (Warsaw, Łódź and Kraków), five medium-sized cities (Wrocław, Gdańsk, Szczecin, Katowice and Toruń) and five small cities (Zabrze, Bytom, Słupsk, Opole and Tychy). In the selection of the cities, size played an important role as in theory more private sector interest is expected to concentrate on large cities. In fact, in the early years of the transition, international investments were especially concentrated on the large cities such as Warsaw and Krakow. This not only increased experience with the private sector in large cities but also triggered the interest (and competition) of the smaller cities. Interviews were conducted on a face-to face basis. The Land Development, Investment, Strategy, Planning and Financial Development departments of 11 cities were visited. Of the previously selected 13 focus cities, 10 agreed to be interviewed. In addition to the pre-selected cities, an additional small city (Sopot) showed interest and even though it was not one of the focus cities, an interview was conducted with municipal officers from this city. Another small city was chosen as a control city (Konstantynow Lodzki). The municipal officers did not, however, want to take part in the survey. This underlines the attitude of some municipalities to the use of PPPs. In three cases (Opole, Tychy and Konstantynow Lodzki) the municipal experts stated that the municipality had not been, and would not in the near future be, involved in PPP projects, although in two municipalities (Opole and Tychy) there were official statements of interest in taking part in PPPs. In the third municipality (Konstantynow Lodzki), pointing out the sufficient EU financial support, the municipal expert indicated that preparing new projects would not be possible considering the modest municipal finances (as the public debt limit would be violated). This statement indicates that in some municipalities there is a great lack of knowledge about PPPs. In Wrocław - a city with experience in quasi-

Sample

PPPs, it was not possible to meet the competent officers. For three months, the researchers tried to organise an appointment; even when the date was settled, the meeting was cancelled.

Thus, all together 11 in-depth interviews were conducted in three groups of cities:

- 1) *Group I* (large cities with high or medium interest and experience): Warsaw, Lodz and Krakow
- 2) *Group II* (medium-sized cities with medium interest and experience): Gdansk, Szczecin, Katowice, Torun
- 3) *Group III* (small cities with medium or low interest and experience): Zabrze, Bytom, Slupsk and Sopot

Once the cities were selected, semi-structured interviews were conducted with municipal officials. These interviews aimed to cover the following points:

- 1) The general framework of the EU and PPPs
  - awareness of and experience with EU single market regulations specifically on procurement and state aid rules
  - awareness of Polish PPP rules
  - experience, interest and willingness to use PPPs in general
  - willingness to use, and interest in using, PPPs in urban development
- 2) Risk or chance for success
  - potential for the risk criteria (defined from the international research)
  - current instruments that may result in risks
  - current traditions in urban development and zoning, which may provide risk
  - vision or ideas for using PPPs in future urban development

### ***Phase 3: Evaluation – the chances for success and pinpointing the risks***

Different categories of Polish city were compared in order to ascertain the following:

- 1) *The extent to which cities with interest, potential and experience face the potential problems in PPP implementation;*



- 2) *The extent to which awareness of EU regulations goes hand in hand with experience and the extent to which it matters for the implementation of PPPs;*
- 3) *The extent to which the risk of non-compliance is higher in small or big cities;*
- 4) *The potential dangers of non-compliance for Polish cities.*

## 1.6. Contents of the report

The report consists of four main chapters:

- **Chapter 1**, which explains the main problem of this research, gives introductory information on the relevance of Single European Market regulations, provides the aim and scope of the research and reveals the research methodology and data.
- **Chapter 2**, which identifies success criteria and risks for the implementation of PPPs in urban development on the basis of the current problematic cases in Europe for both state aid and *public* procurement regulations. It is a fact that state aid and procurement rules are known and experienced by Western European municipalities; however, infringements arise even in the most experienced cities.
- **Chapter 3**, which tackles the current practice and success potential of PPPs in Poland, especially in the form of urban development and regeneration, on the basis of a field-survey. Since the EU regulations and Polish PPP Law are new, this chapter focuses on the success potential for Polish municipalities by looking at the current practices and trends in using PPPs.
- **Chapter 4**, which is devoted to fulfilling three tasks: to assess the risks of non-compliance with EU regulations in Polish cities that use PPPs in urban development; to evaluate the current status of Polish PPP regulation within the framework of EU regulations and to give recommendations for Polish municipalities for developing un-problematic PPPs within the framework of EU regulations.

## 2. Impact of Single European Market regulations on the successful implementation of PPPs in urban development

### 2.1. European Treaty, competition law legislation, and prospects for PPPs in urban development

The establishment of the Single European Market (1993) and the broader European Economic Area (2002) is still taking effect in practice (Korthals Altes, 2006). It is affecting the legislation of local and regional governments. Examples include changes in planning regimes, vocational and professional training, local transport, the environment, and trading standards (John, 2000; Bishop et al., 2000). European regulations encroach on national land development practices (due to the state aid rule) and planning obligations (due to the public procurement rule) (Tasan-Kok and Korthals Altes, *forthcoming*).

Rules on state aid are established in the European Community Treaty (EC Treaty), which takes precedence over national legislation and restricts national governments' intervention in order to ensure competitive single market conditions. Article 87(1,2) of the EC Treaty states that placing an entity at a competitive disadvantage as a result of a distortion of the competing forces within the common market, such as by agreement or special position, is not allowed. Article 87(1) of the Treaty also states that an aid granted by or through a member state distorts competition and is incompatible with the common market (Elsinga, Haffner, and van der Heijden 2008). The EU's general competitiveness policy perceives the market-based economy as the best guarantee for raising the living conditions for its citizens. The EU's market principles and regulations apparently create various cases in individual countries, due to differences in land and property development practices and institutional contingencies. The transparency and fairness of general competition is guaranteed by the EC treaty, while specific regulations concerning urban development are brought about by such regulations as those that cover state aid and public procurement. The general principle is that state aid is not allowed and that unjustified state aid must be repaid (Tasan-Kok and Korthals Altes, *forthcoming*).

In terms of public procurement rules, the practice is that public works realized by planning obligations (i.e., the developer creates the

infrastructure on the land they are developing and transfers this 'for free' to the local government) are not put out to tender as required by European public procurement rules. Moreover, in realizing public private partnership projects the Commission expects an open tendering process to create fair and transparent competition. Naturally, this process is not always preferred by the local governments, as it increases land transaction costs, extends the development processes, and causes disagreements between the local government and the private developers involved in the process (Tasan-Kok and Korthals Altes, 2008b).

In light of a number of European Court of Justice rulings it is increasingly clear that these urban development projects, especially in inner city areas, are likely to be subject to the Regulations and require competitive tendering, although the issue will need to be considered on the specific facts of each development (CBRE, 2008). The direct and indirect influences of these regulations on the regulation and implementation of urban development projects (brownfield, greenfield, housing, industry or commercial) are visible in many European cases, although the consequences are not widely known by policy makers or scholars (Tasan-Kok and Korthals Altes, 2008a). The limited literature and fragmented information is an important indicator of this situation. The cases referred to in the literature range from interference with the organization of tenders for urban development projects as public-private schemes, to the regulation of land development.

With the state aid rule, the EU treaty aims to prevent private profit on the basis of public interest; and with the public procurement rule, which is included in the Public Sector Directive, the treaty aims at open and transparent competition. Article 87 of the EU Treaty states that any aid granted by a member state or through state resources by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between member states, be incompatible with the common market (CEC 1999). The definition of state resources is wide. Tax breaks for specific areas are considered to be state aid, and this instrument cannot be used without the prior consent of the European Commission. Public procurement was officially introduced in the European Union in 1971 and served as a model for procurement regimes such as World Trade Organization's (WTO) Agreement on Government Procurement (GPA) (Gordon, Rimmer, and Arrowsmith 1998). It is one of the main regulations that safeguard the Single European Market. According to public procurement rules, any project that is valued higher than the European threshold should be tendered European-wide (as of 1 January 2004, the threshold is € 5,923,624, for services it is defined as € 236,945, and for delivery it is defined as € 236.945).

EU regulations  
and PPPs

The direct result of these EU single market regulations is unclear for the policy makers, as many violations are not sanctioned (Tasan-Kok and Korthals Altes, 2008a). The European Commission does not have instruments to follow each project in each European municipality to check whether they are compatible with the single market competition policy. Although risky, if a municipality cooperates with a selected company through its own local tendering methods and nobody complains, the chances are high that it will never be noticed by the EC. However, a letter to the European Commission may be enough to start a process of question and answer between the European Commission and the national government.

The EU's approach to PPPs is rather technical (to provide support for infrastructure and service provision) and the definition of the legal framework on the basis of procurement rules, contracts and concessions, provides a limited framework for using PPPs in the provision of large-scale urban projects on which the public sector usually embarks in pursuit of economic and social restructuring via spatial intervention (Tasan-Kok and Zaleczna, 2009). These projects are generally initiated by public stakeholders and usually envision large-scale urban regeneration, which is a complex and costly form of urban redevelopment activity, especially in brownfield zones where the land is contaminated and usually built up. The public authorities (mainly municipalities) have a twofold aim: they want to upgrade, revitalize, or renew neighbourhoods, but they also want the kind of spatial restructuring that will attract private investment and help to improve the social conditions in a larger area. Thus, the public initiators usually encourage the involvement of private-sector stakeholders in order to stimulate capital accumulation (Tasan-Kok, 2009). Problems with PPP formations for urban development have been faced across Europe since 2000 (Korthals Altes, 2006), as we present in sections 2.4 and 2.5.

## 2.2. Public private partnerships in European regulations

As introduced earlier, PPPs are a funding and/or operating means for public organisations to accomplish a public task or project with private sector participation. Although there is no legal definition of a PPP at EU level, they are traditionally mentioned within the framework of cooperation between public authorities and private sector agents "to ensure funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service"<sup>1</sup> and defined as a form of long-term, high-value and often complex form of public procurement (Burnett, 2007). In general, PPPs have been used as an instrument throughout the EU to finance infrastructure for water and waste water

treatment, solid waste management, transport infrastructure, public health, education and public safety, etc., in most of the Member States (and later on in the accession or candidate states).

In summary, the involvement of the private sector is expected to reduce the risks and to provide input into different stages of project design, completion, implementation and funding. Since 2000, the Commission has been trying to provide a common framework for the PPPs that are mushrooming throughout Europe; however, there is no specific legal framework for PPPs at European level (Tasan-Kok and Zaleczna, 2009). There have been some EU initiatives concerning PPPs (see Appendix 1) but these are rather at the level of papers, interpretative communications and some directives (concessions and public contracts) that affect the PPPs. EU initiatives concerning PPPs can be collated into three groups: 1) documents that concern the awarding of public service contracts and concessions (mainly for procurement procedures and regulation for infrastructure and service projects); 2) documents that concern competition policy (mainly for state aid regulations); and 3) documents that directly concern PPPs.

The Commission seems to recognize PPPs within the framework of the 'Community law on public contracts and concessions' [COM (2004) 327] and defines the fundamental Commission-PPP interactions within the framework of open market and public procurement, respect for state aid regulations, protecting the public interest and efficient grant allocations (EC, 2003, p. 66). Thus PPPs are 'contractual arrangements' according to these Commission documents (Burnett, 2005). In its latest interpretative communication the Commission indicates that if third parties are involved by the public in economic activities with a public contract or a concession, the Community provisions for public procurement and concessions must be complied with [C (2007) 661, Brussels, 2008, p. 2]. Ensuring open market access and competition, and ensuring full compatibility between PPP arrangements and State aid rules are mentioned among the key issues for PPPs (the other key issues are protecting the public interest, defining the right level of grant contribution and defining success and constraint factors, etc) (EC, 2003, p. 9).

PPPs were originally seen as a form of public procurement and the New Procurement Directive (2004/18/EC) covered the PPP topic; however, with the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions (COM (2004) 327) the Commission agrees that transactions under the Directive are complex due to the difficulty of defining a transaction as a contract or a concession (Burnett, 2005). Thus, the Directive (2004/18/EC)

PPPs and the  
European Commission

introduced the 'Competitive Dialogue' procedure, which has been implemented in the Public Contracts Regulations (SI 2006/5) with effect from 31 January 2006. It is introduced as a special procedure for complex contracts to allow the contracting parties to discuss all the aspects of the proposed contract with the candidates (OGC, 2006). In 2005, the Communication from the Commission to the European Economic and Social Committee and the Committee of the Regions, on Public-Private Partnerships and Community Law on Public procurement and Concessions (COM(2005) 569) was published to provide a legal framework for popularly used PPPs. Following these documents, the Commission seems to have a clearer view of PPPs, by publishing the resolution of the European Parliament on public private partnerships in 2006 (2006/2043(INI)) and the Commission interpretative Communication on the Application of Community Law on Public procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP) (C (2007) 6661) in 2008. The Commission's Green Paper makes a distinction between contractual and institutionalized PPPs. Contractual PPPs are defined as partnerships based on contractual links and may fall within the scope of European Directives on public procurement. Institutionalised PPPs are undertakings jointly held by public and private parties by establishing a mixed capital entity to provide services for the public. They can also be established for a private operator to control a public entity (COM (2004) 327; IP/08/252).

### **2.3. PPPs in urban development: Criteria for successful implementation**

The Guidelines for Successful Public and Private Partnerships by the DG Regional Policy have been subject to wide consultation within the EU, which involved the EIB, EBRD, PPP units and task forces of Member and Candidate Countries. On the basis of a detailed analysis they defined a general set of criteria that play the most important role in the success of PPPs (for general infrastructure and/or service provision). Besides other criteria for a successful PPP implementation such as protecting the public interest, selecting the most suitable PPP type, timing, recognising EC grant financing objectives and the best use of grant financing, and future requirements, the four main criteria are related to state aid and public procurement namely:

- 1) ensuring open market access and competition;
- 2) ensuring full compatibility between PPP arrangements and state aid rules;
- 3) defining the right level of grant contribution;

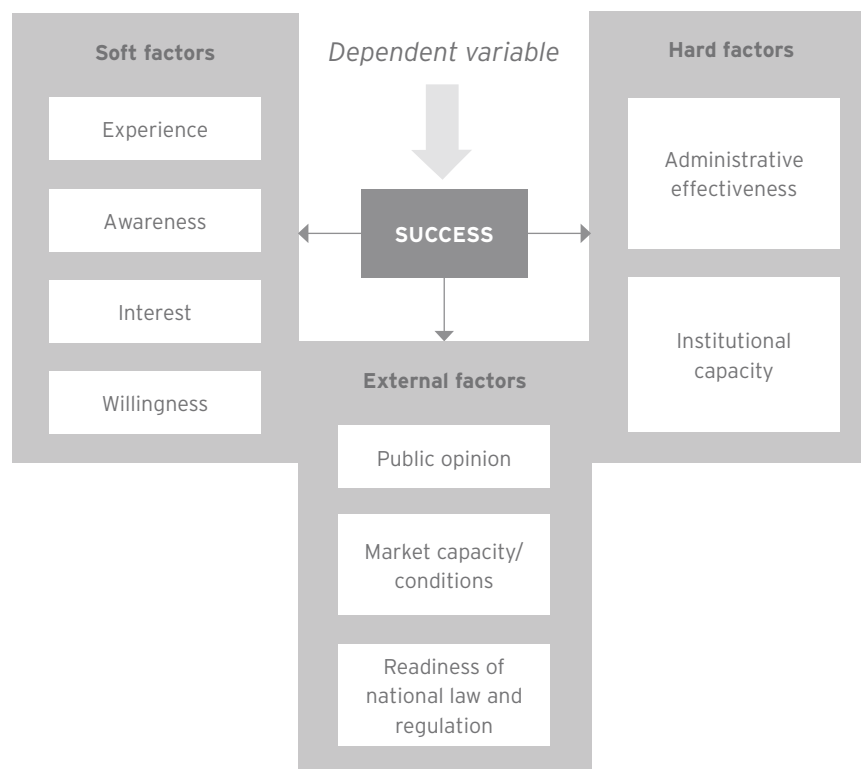
- 4) success and constraint factors concerning transparent rules on how private partners can be selected, how financing must be used and the benefits that parties can expect from the project, etc.

Although member states are all aware of these rules in principle, when it comes to the implementation of PPP projects in urban development a number of common mistakes are noticed.

PPPs have been widely used across Europe to finance large-scale urban development, regeneration, renewal and rehabilitation projects. These projects involve city-wide neighbourhood regeneration, community and social plans, conservation activities, creating and regenerating public spaces, provision and improvement of infrastructure (social and technical) for neighbourhood renewal, brownfield development activities and strategic investments for regeneration (including mobility and transport). Despite their popularity, the implications of PPPs in urban areas within the framework of the EU Treaty are not very widely discussed. While some cities established networks to have a better understanding of PPPs in urban areas, such as Partners 4 Action (Trache and Green, 2006), the reference to the EU Treaty's specific application to this area has not been discussed. The general success factors in the literature, therefore, do not involve the role of EU regulations. Our research suggests that awareness of EU regulations is one of the success factors, next to those summarised below (the success criteria are collected on the basis of our international overview) (Figure 2).

PPPs in EU  
countries

**Figure 2. Criteria for the successful implementation of PPPs in urban development**



Source: Author's own review.

The relationships and arguments relating to these criteria (and how we measured them in Poland) are given in Table 1.

**Table 1. Success indicators for PPP implementation in urban development**

	Indicator	Argument	Data sources for measuring the criteria for Poland
<b>SOFT FACTORS</b>	<b>Experience</b> <ul style="list-style-type: none"> <li>- with PPPs in general</li> <li>- with PPPs in large-scale urban projects</li> <li>- with the private sector</li> <li>- with EU funds</li> <li>- with foreign capital</li> </ul>	More experience means being aware of the bottlenecks, knowing the behaviour of market parties, and having more (formal and informal) instruments/methods to cope with the challenges	<ul style="list-style-type: none"> <li>- A number of tenders are identified from the TED database</li> <li>- Media or internet sources</li> <li>- Interviews with the mayor, planners and lawyers</li> </ul>



Impact of Single European Market regulations on the successful implementation of PPPs in urban development

SOFT FACTORS	<b>Awareness</b> - of PPP issues - of the opportunities - of the EU regulations	If the awareness is high, the chance of success is high because the local government is more prepared for bottlenecks	- Interviews with the mayor, planners and lawyers
	<b>Interest</b> - in using private investment in public services	When a local government shows interest (in preparing the tenders for PPPs in general), it means that they are more aware of the possibilities and are also willing to use the private sector investment for urban development	- Interviews with the mayor, planners and lawyers
	<b>Willingness</b> - to use PPPs	When willingness is high, the chance of success is also high because the local government is more motivated to use PPP instruments	- Interviews with the mayor, planners and lawyers
HARD FACTORS	<b>Administrative effectiveness</b> - in planning and bureaucracy - administrative structural flexibility	When a municipality is more effective in terms of administration, it means that it is able to cope with the irregularities of dealing with a private sector party	- Literature and results of other research - Interviews with the mayor, planners and lawyers
	<b>Institutional capacity</b> - in planning and bureaucracy - administrative structural capacity to deal with the private sector	When a municipality has a high institutional capacity, it means that it is able to cope with the irregularities of dealing with the private sector and the legal complexities	- Literature and results of other research - Interviews with the mayor, planners and lawyers
EXTERNAL FACTORS	<b>Public opinion</b> - on the image of private-public cooperation, - on the image of local government as an indicator of trust	The public's perception of the mayor/administration plays a role in the success of the municipality in terms of signing contracts with the private sector and implementing the projects	- Newspapers - Internet news - Other secondary resources - Interviews with the mayor, planners and lawyers
	<b>Market capacity/conditions</b> - socio-economic factors that influence the availability of and demand for property	When the property market conditions are ready for such large scale urban projects, the chance of the project succeeding is higher	- Central Statistics Office of Poland - Newspapers - Internet news - Other secondary resources
	<b>Readiness of national PPP law and regulation</b>	When the law is ready and is applied consistently, the chance of success is higher than in the transitional era where the regulatory framework is not clear	- PPP Law and some legal commentaries on regulation

PPPs success indicators

Source: Authors' own review.

These success indicators are evaluated in the case of Poland in chapter 3.4, 3.5 and 3.6.

## **2.4. The experiences of various European cities with state aid and public procurement rules in urban development: risks and potential problem areas**

As indicated above, this report is specifically focussed on the risks of the implementation of anticipated projects in the form of PPPs in terms of non-compliance with European regulations. Although barriers to the involvement of the private sector in urban development are discussed in the literature, information on the risks that state aid or procurement rules create for the implementation of PPPs in urban development is limited to a few publications (see Korthals Altes, 2006; Korthals Altes, forthcoming; Korthals Altes and Tasan-Kok; 2009; Tasan-Kok and Korthals Altes, 2008a and 2008b; Benett, 2006; Helsinga et. al, 2008). On the basis of our review, the risks and problem areas relating to the implementation of large-scale urban projects can be placed in three main groups (see Figure 3):

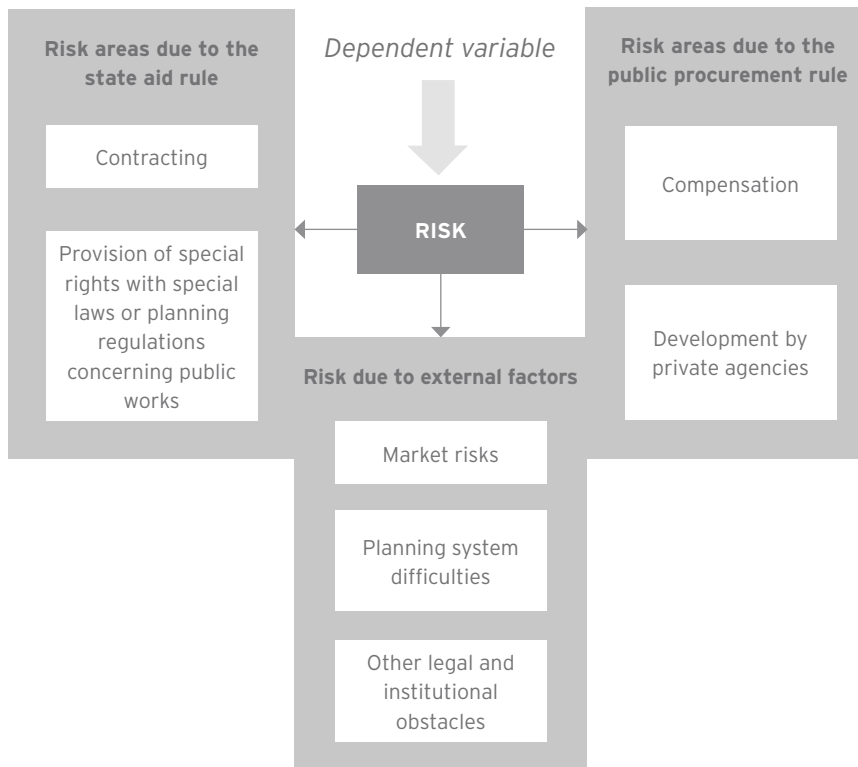
1. Risks areas due to the state aid rule
2. Risk areas due to the public procurement rule
3. Risks due to external factors

However, unlike the success factors, these risks cannot be compared with Polish cases, nor can it be measured whether or not these risks apply in the Polish implementation of PPP projects, due to the reasons listed in the methodology section. These are rather factors that are underlined here for the future reference of Polish municipalities.

### **2.4.1. State Aid**

One of the main principles indicated by the EC concerning the success of PPP projects is to "Ensure open market access and fair competition, in the respect of State aid principles when applicable" (Guidelines for Successful Public - Private Partnerships, March 2003, EC Directorate General, Regional Policy). Article 87 (1) of the EC Treaty defines certain criteria for aid to be qualified as state aid in public contracts. This rule also applies to urban development/regeneration projects in the PPP format, as the experiences of a number of member states prove that traditionally there has always been room for state aid in this type of project, in which the public authority aims at the rapid transformation of an area.

**Figure 3. Risks and potential problem areas for the implementation of PPPs in urban areas**



Source: Author's international review of secondary data and literature.

In PPP structures (especially in urban regeneration projects) the EC generally looks at whether the costs of the private partners are not overcompensated by the public party, whether the procurement rules were followed for the tendering process (a detailed investigation will take place to see if an overcompensation or breach occurred), and at whether the contractual arrangements between the parties were compatible with Community anti-trust rules (European-Commission 1.03.2006). Thus, in project development, the correct collaboration structure is important (Tasan-Kok and Korthals Altes 2008a).

On the basis of the review of problematic European cases, we can collate the risks and potential problem areas for infringements due to the state aid rule into two main topics:

- 1) Compensation
  - a. Compensation via provision of public services
  - b. Compensation via prices lower than market rates
  - c. Compensation via land transactions in PPPs

Risks: state aid

- 2) Development by private agencies, which creates unfair competition
- a. Bridging the gap between the costs and benefits of urban regeneration
  - b. Private participation in local public companies

On the basis of EC Press Releases, we can list a number of European cases that involve PPPs in urban development, which were affected by the state aid rule (Table 2):

**Table 2. Examples of common faults that risk the success of PPPs within the framework of State Aid rules (in terms of selected relevant criteria for urban development)**

Instrument	Fault	Case	Project
1. Compensation  Compensating costs or additional costs by giving advantages to the private parties	a. Compensation via provision of public services	Haaksbergen, The Netherlands	City centre regeneration
	b. Compensation via lower than market prices	Rotterdam, The Netherlands	Renovation and development of Ahoy complex
	c. Compensation via land transactions	Alkmaar, The Netherlands	Construction of a new stadium
2. Development by private agencies	a. Bridging the gap between the costs and benefits of urban regeneration	UK	Gap funding program

Source: Authors review of Official EU Press Releases.

The table shows that the common faults may also risk the success of individual projects such as regular urban regeneration projects (Haaksbergen case) or large-scale complexes that the municipality anticipated to build or re-build (Rotterdam and Alkmaar cases); however, they may also risk the success of nation-wide programmes such as the British Gap funding programme

#### **2.4.2. Public procurement**

Any act (or deal) whether it will be contractual or unilateral, whereby a public entity entrusts the provision of an economic activity to a third party must be examined in the light of the rules and principles resulting from the Treaty, particularly as regards the principles of freedom of establishment and freedom to provide services (COM(2004) 327). The Public procurement Directive requires all procurements above

certain threshold value (of about EUR 5,000,000) to be published in the Official Journal of the European Commission and the contract to be awarded to the lowest bidder. The choice should always be transparent; that is, the criteria and their relative weight must be published in the tender, and all parties should be privy to the same information. In addition, the tender may not include provisions that conflict with internal market regulations. For example, it is forbidden to reserve a proportion of public works for regional sub-contractors (Bovis, 2002, see also ECJ, 1988). As the experiences of member states prove, this also applies to urban development or regeneration projects in PPP format, as for these projects the public authorities (i.e. municipalities) seek cooperation from the private sector. The local governments' traditional ways and instruments for dealing with the private sector had to be altered by these rules, but in time there occurred instances of non-compliance with procurement rules, especially with those concerning the special planning and zoning instruments that are developed to facilitate the easy implementation of these complex PPP projects.

Risks: public  
procurement

The current public procurement directive defines public contracts as "contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities, and having as their object the execution of works, the supply of products or the provision of services" (EP and CEU, 2004, article 2a). The use of public contracts extends beyond central government procurement, i.e., the definition of a contracting authority includes not only all kinds of local, regional and specific purpose authorities, but also entities in the private market that work in the general interest and operate under public ownership or control (Korthals Altes and Tasan-Kok, 2009). Next to public contracts there are also 'public works concessions', which are the same, "except for the fact that the consideration for the works to be carried out consists either solely of the right to exploit the work or in this right together with payment" (EP and CEU, 2004, article 3). These concessions thus have the potential to significantly affect planning practice, in the sense that under certain conditions the sale of land or the granting of development rights might be considered to be a public works concession (Korthals Altes, forthcoming).

Thus, contracting with a tendering process is the basic expectation of the EU Treaty. However, there are some weak points in the implementation of this rule in urban projects. For instance, the EC does not have instruments to follow each large scale PPP project in each municipality. Although risky, if a municipality cooperates with a selected company using its own local tendering methods and nobody complains, the chances are high that it will never be noticed by the EC. We can list

the risk areas for the public sector in the field of public procurement in urban development under the following main two topics:

1) Contracting

- a. Contracting without tender
- b. Insufficient competition
- c. Public contracts for social housing
- d. Dividing services to avoid the threshold
- e. Contracting procedures

2) Provision of special rights with special laws or planning regulations concerning public works

- a. Land development agreements or planning obligations
- b. Special implementation agencies

On the basis of EC Press Releases, we can list a number of European cases involving PPPs in urban development, which were affected by the Procurement Directive (Table 3)

**Table 3. Examples of common faults that risk the success of PPPs within the framework of the Public Procurement rule (in terms of selected relevant criteria for urban regeneration)**

Instrument	Fault	Case	Project
<b>1. Contracting</b> Realizing public works without a tendering process required by the European public procurement rules even for the provision of part of the infrastructure	a. Contracting without a tender	Amersfoort, The Netherlands	New town development in the form of a PPP between Amersfoort Municipality and a private consortium of developers
		Limburg and Quedlinburg, Germany	New services park contract for planning and development of municipal land
		York, UK	Residential development on public land - 'Osballdwick'
	b. Insufficient competition	Reggio Emilia, Italy	Maintenance and construction of council houses
		Hoogezand-Sappemeer, The Netherlands	Renovation of the city centre
	c. Public contracts for social housing	Val-de-Marne and Paris, France	Public management and construction of low-rent housing (Logirel Corporation)
		UK	Registered Social Landlords
	d. Dividing services to avoid the threshold	Genoa, Italy	Development of school buildings

## Impact of Single European Market regulations on the successful implementation of PPPs in urban development

	e. Contracting procedures	France	Definition of contract procedure
		Roanne, France	Mixed contract for development of a leisure centre
		Brussels, Belgium	International architectural competition for the area where the EU institutions are located
		Brussels, Belgium	Housing construction Societe de developpement regional de Bruxels
		Holyrood, Scotland, UK	Design and construction of new Scottish Parliament Building
<b>2. Provision of special rights</b> Making contractual agreements with private parties for the provision of public infrastructure within the project area in exchange of special rights for the private parties	a. Land development agreements or planning obligations	Scala, Italy	Restoration of Teatro alla Scala, the conversion of municipal buildings and the construction of a theatre in the Bicocca area
	b. Special implementation agencies and planning rules	France	Local development agreements and ZAC (Zone d'Amenagement Concerte)
		Spain	LUV Ley Urbanistica Valenciana (Urban Regulation Valencia)

Source: Authors review of Official EU Press Releases.

The most common consequence of not complying with the public procurement rule is that the EC sends a 'notice of default', which would open the case for investigation and may lead to the cancellation of the contract. Time and financial losses are inevitable in this case for both the public and private sector parties.

### 2.4.3. External factors

The institutional environment for using PPPs in urban development projects is usually case-specific and the conditions are defined by the institutional framework and property market traditions of each country. Although the risks differ widely because of this, the common potentially problematic areas for the public sector in the implementation of urban development projects can be grouped under three topics:

- 1) Property market condition risks that are due to the opportunity-driven and speculative character of the property markets
- 2) Risks due to planning system complexities (procedural issues, unclear regulations or legal framework, and informalities, etc.)
- 3) Other legal and institutional obstacles.

### 3. Current practice and success potential of PPPs in the form of large-scale urban development projects in Poland

#### 3.1. Short history and existing use of PPPs in the form of large-scale urban development projects in Poland

Under the socialist system no attention was paid to the principles of rational land development and city planning, and the industrial development resulted in massive production sites in large city areas, including city centres. With the development of the market economy from the early 1990s most industrial companies turned out to be unprofitable. Large plots in cities, often with industrial buildings and polluted soil, constituted an excessive burden for the companies and later for the local governments. The development and management of these areas has been a problem. The local governments, province governors and other public representatives who acquired the state land and property sought new functions for the land, and investors for implementing these projects. These brownfield sites have become the most popular locations for large-scale urban development projects since 2000, when the commercial property market became more mature. However, the role and interest of local governments in using PPPs in urban development has been very vague due to the ongoing regulatory transitions.

During the first years of transition conflicts were noted between the public stakeholders' responsibilities (mainly amongst municipalities and state organizations dealing with urban development), due to changing regulations, organisational responsibilities, privatization activities, and structural changes relating to public finance (Tasan-Kok, 2004). In the case of Warsaw, for example, since boroughs were given equal authority and they were inclined to promote their own interests, decision-making was a complex and inconsistent issue when it came to large-scale urban development (Buczek, 2001). In Warsaw, problems arose over the contribution of individual boroughs to city-wide projects approved by the Warsaw City Council. It became quite difficult to redevelop a number of very valuable brownfield zones in the city centre due to these problems. New ideas were usually of a commercial character with some social tasks. Due to legal problems with the application of the PPP formula in Poland, the cooperation of public and private entities in land development was not called PPP, although the



scheme was quite often similar to a regular PPP. The problems with nomenclature were caused by the fact that the legal act dealing directly with PPPs was introduced only in 2005, and stated that PPPs were only partnerships established according to this act. This rule was responsible for the previously-created public private partnerships being called "quasi-PPPs." Conflicts among administrative bodies often obstructed the formation of partnerships and thus delayed the construction of several large projects. Particular legal regulations concerning the protection of historical buildings and the environment, etc., often spell additional costs and long waiting time for the necessary administrative decisions. Little knowledge and experience with PPPs as well as the unwillingness, or sometimes even opposition, of local communities, has created additional barriers. Generally, it seems that some barriers occurred for both private investors (low profitability, long duration that increases risk, and lack of clear interpretation principles) and for public entities (mainly fear of corruption accusations and poor knowledge of PPPs).

Another problem was, and still is, the land ownership pattern in big cities in Poland. The post-socialist economy was engaged in transferring real property from public to private ownership (privatisation and restitution). In Poland there is still no general restitution law, which would be necessary to bring back real property to former owners or to compensate them on a larger scale. Due to the absence of such a law, any possible claims may expose investors to a higher risk, as they are unsure about the timing and security of their investments, since a project can be stopped if an individual lawsuit is filed.<sup>2</sup> There are many examples from Warsaw, Lodz and Krakow, which show detailed problems. Moreover, the State's finance is exposed to a possible strain, as compensation in cash will have to be paid to those former owners who succeeded in long and expensive court hearings. It also poses a threat to local communities; if a lawsuit with a former owner is lost, the claimed property has to be returned or huge compensation paid. Moreover, the land registry has not been operating properly, and despite the new electronic system, even now there are many time-consuming problems (especially with legal documents). Furthermore, city centre plots were small, making it difficult to develop large-scale projects (Tasan-Kok, 2004).

Generally, during the transition period, demand for developing large-scale projects often came from international commercial companies, which, on the basis of negotiations with the public authority responsible, tried to develop projects using various forms of public-private cooperation. Due to financial and administrative difficulties during this early era of public and private cooperation, land was usually

sold by the municipalities with some restrictions or with special designation.

### **3.2. Legal basis of PPPs in Poland**

The first projects emerged in Poland in the 1990s as preliminary forms of PPP (according to Polish legislation they are quasi-PPPs). These involved municipal services and the construction/improvement of technical infrastructure facilities, and were mainly small investments implemented by local governments (Moszoro 2000). The A2 Konin-Nowy Tomysl motorway, which was built and finished in 2004 by Autostrada Wielkopolska SA., is among the first examples of a Polish PPP. At that time, the institutional basis of PPPs did not exist within the legal system and no legal act defined this concept, although PPPs were increasingly used<sup>2</sup>.

The full potential of PPPs in Poland was not realised, since the legal risk for the public sector was too high as the regulations were not ready (Izdebski 2008). The municipal officers faced problems with legal interpretation as they tried to use the Civil Code, company law, and other legal acts, although they did not directly address public-private cooperation. For instance, in some urban revitalization projects there was a need to exchange the land for the development rights of the project; however, municipal officers were afraid to do this even if it seemed to be the only legal way of dealing with the private sector. In some cases, after changes in the local government (after the local elections) the previous municipal officers were sued by the new local government due to lack of clarity concerning previous public-private cooperation. It was believed, however, that the introduction of a new act together with executive acts would resolve this issue (Jacyszyn, Kalinowski, 2006)<sup>3</sup>. In October 2005, the principles that govern PPPs in Poland finally became unambiguously defined. The new law settled the question of the nature and legality of PPPs (Brzozowska, 2006). The law was not, however, used in practice, so its implementation cannot be considered a success (Gonet, 2008a). On 6 January 2009, the President of Poland signed the new PPP law<sup>4</sup>. The regulation of PPPs is analysed in more detail in section 3.6.3.

### **3.3. Indicators of success of PPPs in Polish cities (soft, hard and external factors)**

The implementation of large-scale urban development projects is experienced differently in each institutional context, because of the diverse local/traditional relationships between the public and private sector actors, the diverse ways of deal making, the informalities

(oral deals and indirect relations, etc) and other local contingencies that create case-specific situations in each context.

The authors conducted interviews with local government representatives to gather opinions, ideas and views from different parts of Poland, searching for some similar and different patterns. Three groups of cities were selected for the research (see 1.4 for a detailed explanation of the selection criteria for these cities). The surveyed cities represented different levels of wealth, which did not correspond to the size of the population. For instance, Slupsk from group III has higher figures for municipal spending per capita, (PLN 3,802,04), compared with a large city (Lodz) in group I (with PLN 3,198,37) (Central Statistics Office of Poland). The differences are explained by the different ways of development, main industry and tradition in local city co-operation. As explained earlier, we defined hard, soft and external factors to evaluate the chances of a successful implementation of PPPs in urban projects. In the following sections, an evaluation is given of the selected Polish cities for each factor (on the basis of our interviews).

### **3.4. Evaluation of Polish cities for soft factors (experience, awareness, interest, and willingness)<sup>5</sup>**

#### **3.4.1. Experience**

Having experience with PPPs means being aware of the bottlenecks, knowing the behaviour of market parties, and having more (formal and informal) instruments/methods to cope with the challenges. The PPP experiences of interviewed Polish municipalities are mainly in the form of:

- 1) quasi-PPPs (very wide scope),
- 2) concessions,
- 3) special purpose companies,
- 4) tenders/procurements,
- 5) land lease contracts.

It should be underlined, however, that the municipalities could not treat public-private cooperation like a legal PPP, as they could not make use of the Polish act. In selected cities, the experience was based on attempts to re-develop land and regenerate the inner city. However, the experiences were not always very positive.

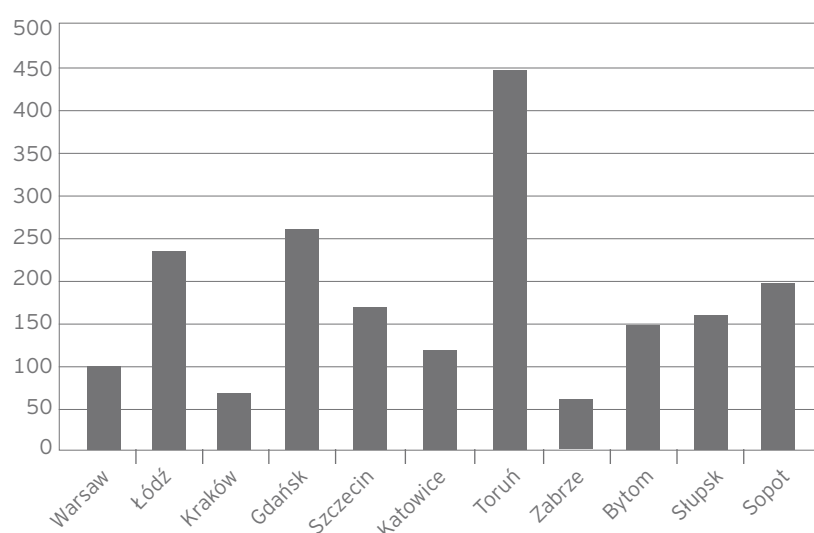
There may be a correlation between the size of a city and its experience: the larger the city, the better (and more) the experiences with PPPs. As expected, the experiences of large cities are significant with PPPs but are in a variety of forms. Our interviews with three large

## City size and PPP

cities show that they have indeed this type of project implications in diverse fields although not in a complete PPP format. The largest cities have the highest number of opportunities for investors, even for foreign investors. These cities have to solve many serious problems with modest finance so they have to prepare potential projects with private cooperation. The variety of opportunities creates more space for PPPs. As our interviews confirm, the experiences of medium-sized cities with PPPs seem to be more problematic than the experiences of large cities. This is because the interest shown by private investors in medium-sized cities is not very high. Gdansk, which is relatively larger and more international, compared with the others in the group, is an exception.

From the local government perspective, after individual cases of negative experiences there has been much more hesitation and caution. Some small cities (such as Slupsk and Sopot) indicated very good experiences with PPPs and this can be explained, especially in the case of Sopot, due to the city having experience in using EU funds and foreign capital (see Figures 4 and 5). We argue that experience with EU bureaucracy for any level or type of funding may be an indicator of the future success of PPPs, as municipal experts would be aware of the complications with the EU regulations. Sopot as a city with many historical neighbourhoods attracts private and public cooperation.

**Figure 4. EU funds to co-finance public tasks, as revenue for city budgets (2006-2007), PLN per capita**

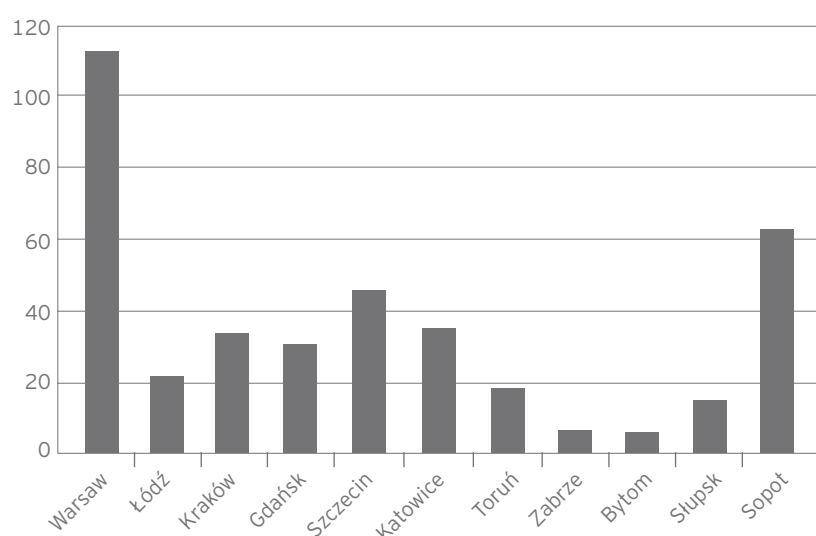


Source: Central Statistics Office of Poland.

One of the main advantages of PPPs, mentioned by municipal officers, was the possibility to use private money when the public sector was involved in projects co-financed by the EU. It is also interesting to note

that Toruń, having the most involvement with EU funds in recent years (Figure 3), seems to have limited experience with PPPs (Figure 4). During an interview in Toruń the vice mayor indicated very strongly the need to use private finance sources in future. The city used funds not only for infrastructure but also for social integration issues. However, the vice president underlined strongly the need to use PPPs due to problems with the limit on public debt.

**Figure 5. Number of companies with foreign capital per 10,000 inhabitants in 2008**



Source: Central Statistics Office of Poland.

### 3.4.2. Awareness

Awareness means not only knowing the opportunities for PPPs in urban development but also being aware of the legal complications. The chance of success is high for PPP implementation, as the local government is expected to be more prepared to deal with any potential bottlenecks. In general, municipalities are aware of the disadvantages of both the old and the new PPP law. The municipal officers were trained on PPPs and some were even involved in individual projects. The knowledge of these attempts (though very often with negative results) was disseminated. This experience gave the opportunity to create a list of real problems under the previous PPP Act (for example: lack of some form for public procurement announcement and problems with finding a professional company to conduct analyses). The officers are now analysing the new PPP Act. They are aware of the potential opportunities in PPPs. In general, the old Act (on PPPs) was criticised for being impractical, even not applicable and the current act for being too general and open to broad interpretation.

Experience with PPPs and awareness of regulations seem to go hand in hand. In the past, almost all municipalities used the Civil Code, company law and various local government acts to fill the legal gap for PPP implementation before PPP law was introduced. Almost all municipalities are also aware of the problems with the previous PPP law and used other legal instruments to overcome the problems. The Civil code and company law were the most popular legal forms to be used (in Lodz, Warsaw and Krakow, etc). All of the group I cities received external legal support and were more prepared to deal with legal issues. Coming to today, even in the group III cities, the municipalities are aware of the limitations of the new PPP law. Municipalities are generally aware of EU regulations, but to various degrees. Although they know that compliance with EU regulations is needed (especially for the procurement rule), they agreed that the current law did not provide a clear understanding on specific issues connected with the EU Treaty. Some municipalities stressed the changing attitude, from selling land to private companies to developing the land in partnership with them. This shows their awareness of the market conditions and PPP advantages.

The surveyed municipalities listed the following aspects concerning the PPPs:

- 1) Awareness of legal aspects:
  - a the new Polish Law on PPPs and the old acts that dealt with PPPs
  - b the public sector is uncomfortable with the new law due to the legal uncertainties
  - c using consultancy companies to assess risks and legal complications
- 2) Awareness of the potential disadvantages/problems
  - a long procedures, infringement of public procurement rules and disagreements with private sector actors
  - b difference in objectives between public and private partners
  - c the unclear legal status of property ownership, the long duration of planning procedures and project implementation
  - d the municipality has to deal with the problems alone if the private partner fails
  - e the private sector depends on financial support from banks and other investors, and on the economy,
  - f lack of societal support
  - g uneven risk-sharing between private and public actors
  - h sharing the risks with other municipalities
- 3) Awareness of PPPs in urban development
  - a conditions and consequences of using private sector money
  - b difficulty with defining the most effective conditions for PPPs

- c choosing between selling land and establishing a PPP, as selling the land is less risky (and complicated) although in this case the municipality loses control of the development.
- 4) Awareness of other aspects
  - a the necessity to have commercially attractive projects
  - b the need to save public money
  - c the need to decide, at the beginning, to use either procurement or concession

Awareness of the legal aspects is important for successful PPP implementation. In terms of awareness of the legal aspects, our interviews show that the previous PPP Act was not applicable because of lack of awareness of public procurement. There was also a problem with the amount of detail and the short analysis period (one year) when seeking a private partner. Thus, negotiations took much longer. Because of these reasons municipal experts saw the old PPP regulation as a huge obstacle and preferred to use alternative legal ways.

The new act is, however, seen as a much more flexible regulation, although it is too general. Municipal experts agreed that it gives too much freedom to the cooperation, which is difficult to control. The results of inspection could be various, and depend on the attitude of the controlling entity. Too much freedom means trouble, as the possibility of being accused of corruption still exists. The required analyses are still present in the new law, but there is no indication in the act regarding about the content of these analyses. This problem is also connected with the need to use consultancy companies to assess risks and legal complications. Warsaw is the most advanced city in this area. The city selected four international companies with great PPP experience as strategic advisers for PPP projects. When the city has a PPP project, the municipal officers choose the most suitable company as an advisor, as it is obvious that the municipal officers are unable to organize everything on their own. The city plans to transfer the knowledge to smaller municipalities. There would be a special data bank established with the possibility of exchanging information, experiences, and ideas.

When it comes to awareness of the potential disadvantages/problems, our interviews confirm that the most important ones are the long procedures concerning public procurement appeals, problems with creating a good long-term contract and the allocation of tasks between private and public partners. The municipal experts are aware of the private partners' expectations for profit, while for the public sector it is the fulfilment of public duties. Problems with using PPPs are connected with gaining enough profitability from the private partners' point of view, financial support (banks are not generous to private partners now

#### Costly regulations

and municipality will not issue guarantees), the unclear legal status of property (restitution claims), the long-term duration of the projects and finally the knowledge that when something goes wrong the municipality has to deal with this alone by taking over the project. The municipal officers agreed that the general mentality is also a problem in public and private cooperation. They thought that people's perception of cooperation between public and private actors was linked to corruption.

As for awareness of PPPs in urban development, most of the interviewees indicated that the simplest way to get funding for the city is to sell the land or sell the perpetual usufruct. However, they also agreed that using PPPs gives the possibility to control – when a city sells land there is no such possibility. In the case of large urban projects old railway stations for regeneration and other run down parts of the city are often mentioned. Some private actors aim to invest in public land, however, negotiating conditions suitable for both partners appear unclear for the public sector. The municipal officers see many positive aspects of cooperation with private actors: sharing the obligation and saving money, using the know-how and experience of private partners especially in an area where the city has no experience at all. However, when the general costs were calculated, in some cases PPP costs were higher than revenues for the public sector and so it was inefficient to create a PPP. The interviewees also questioned the extent to which it would be possible for the public sector to evaluate the ability of a private party to fulfil the contract.

For other aspects, problems with public-private cooperation have their roots in the divergent aims: the private partner wants to have the highest profits, the public partner needs to fulfil its public tasks. According to municipal officers, a very strong barrier exists when profits are too low for private investors; this means there is a need to look for compensation for private investors. Only a few projects are commercially very attractive. However, according to the municipal officers, the crisis has changed the plans of some private investors as they want to co-operate with a public partner because it means lower risk and secure money. From the municipal point of view, the most important task is to prepare the proper documentation at the beginning and to decide which procedure should be applied – public procurement or concession.

#### **3.4.3. Interest**

It can be expected that when a local government shows interest in preparing tenders, it means that it is more aware of the possibilities of



PPPs and that it is willing to use private sector investment for urban development. However, it should be noted that an indication of high interest does not mean real action aimed at preparing a PPP. In general, there is great interest in attracting private investment in the surveyed cities, with some even arguing that it is the only way to develop. Only in one case, however, in Krakow the municipal officers stated that there was enormous interest from the investors' side. Another general conclusion is that the municipal officers understood that the investors' focus is to make profit, although in many cases the investors' initiative was not welcome due to the many legal constraints. In some cities, the municipal officers stressed that politicians and citizens have to understand that a PPP does not pass all risks and responsibilities from the public to the private sector.

Interest in PPPs

Municipalities are interested in PPPs mainly for the following reasons:

- private companies offer better and more efficient project management,
- projects can be developed without increasing the public debt to save public money,
- the knowledge and experience of private partners can be transferred to the public.

Municipalities are interested in using PPPs in the following areas:

- building sports and recreation centres and car parks,
- renovating/building municipal housing,
- constructing entertainment centres such as aqua parks,
- regenerating railway station areas,
- revitalising city centres,
- building large-scale prestigious projects,
- infrastructure projects,
- developing marinas,
- hospitals.

#### 3.4.4. Willingness

It can be argued that when willingness to use PPPs in urban development is high, the chance of success is also high, because the local governments are more motivated to use these instruments. In general, however, there is a big difference between theory and practice of 'willingness to use PPPs'. Thus, willingness to use PPPs does not go hand in hand with 'being prepared to use PPPs'. While some cities really wanted and were prepared to set up PPP projects, they were not keen to take the initiative. The attitude of 'wait and see' and 'first court case will show the mode' was repeated during the interviews. Some of the interesting outcomes can be summarised as:

Willingness to use PPPs

- the fear of failure and legal uncertainty restricts the willingness of Polish municipalities to use PPPs. Due to the legal uncertainties, the willingness of the municipalities is only at the level of an interest, as they are hesitant to initiate projects, so as to avoid accusations related to corruption or the infringement of other laws.
- the absence of model PPP contracts reduces municipalities' willingness and creates hesitation
- the current economic crisis also affects willingness as municipalities believe that the private sector will be less willing to cooperate
- fear of the financial failure (or bankruptcy) of the private party also reduces the willingness of municipalities.

### 3.5. Evaluation of Polish cities for hard factors (administrative effectiveness and institutional capacity)

#### 3.5.1. Administrative effectiveness

It can be expected that when a municipality has an effective administration system, it is able to cope with the irregularities of dealing with the private sector. This means that a well-organised administration system for PPPs within the municipalities will give the public authority a strong position to negotiate the conditions of a project and cope with the unforeseen risks brought about by the involvement of the private sector. There is no common general administrative structure for municipal cooperation relating to PPPs. Municipalities usually use two main models to deal with PPPs: a separate department is established for cooperation with PPP projects, with a team of municipal officers (lawyers and economists, etc); or some ad hoc duties are given to people in different departments, and sometimes one person is fully responsible for a project. Although the first solution seems to be very effective, it is not common practice.

Interviewees often stressed that the organisational structure for preparing PPPs is not well developed because:

- there are too few municipal officers,
- there is no cooperation between departments,
- there are many procedural mistakes.

The fact that the municipal officers who took part in this survey are from very different departments is also an interesting indication of how the administrative structure is still not very clear in relation to PPPs in Poland. The interviewees were mainly from the Investor Service Departments, the Departments of City Strategy and Development, City

Promotion and Development, the Revitalization Departments and the Departments of Real Estate Management of Municipal Property.

In the early years of transition, both public and private actors were unaware of the time-consuming planning process. After some changes in the legal environment some solutions emerged. However, in large cities the planning process is still problematic, sometimes discouraging investors. In Poland, as a spatial planning rule two planning documents are needed: *studium* (study), a strategic obligatory document, and the optional zoning plan. The zoning plans are legally binding, although they should be prepared in accordance with the local 'study.' If, however, there is no plan and the demand of the developer is different than the study suggests, the project can still continue. In this respect, the planning system is flexible enough to accommodate the different demands of private parties. From the point of view of the city's planning strategy, however, this rule results in negative impacts for cities. Since the zoning plans cover only part of the cities and were usually created a considerable time ago, long negotiation, consultancy and agreement procedures, and the number of appeals prolong the implementation. If there is no plan, the private company may have a high chance getting a more favourable outcome in terms of planning decisions and location. If there is a plan, the planning procedure for the project is much easier. However, if the private party wishes to include a new idea, it would be time consuming and problematic to change the plan. In some cases, the investment would only become certain if the plan is ready. More serious problems with planning occur in large cities, although small cities have also experienced issues with planning due to the complicated procedure and the length and cost of preparing a plan.

### 3.5.2. Institutional capacity

When a municipality has a high institutional capacity (regulations are completed, organisational structure is clear, and the roles of actors and public employees are clear, etc), it means that they are able to cope with the irregularities of dealing with the private sector and with the legal complexities. All of the interviewed professionals agreed that Polish municipal officers have a low level of preparation for negotiating with the private sector. In many cases, hired external experts provide a solution. However, the interviewees agreed that the public negotiator should be better prepared. They also emphasized that the external experts do not usually know the local reality. Another problem is the difficulties of controlling the private actor during the long cooperation period, as companies may have financial problems, and may even go bankrupt. Moreover, their priorities may change, which may conflict with the public priorities. As some cases have proven, the municipality

Institutional  
capacity

has to carry the burden of an unsuccessful PPP; it is very important to develop institutional capacity to cope with any contingencies.

### **3.6. Evaluation of Polish cities for external factors (public opinion, market capacity/conditions and the readiness of national law and regulations)**

#### **3.6.1. Public opinion**

The local community's attitude to public-private cooperation and local administration plays an important role in the success of signing contracts with the private sector and implementing projects. This is especially important in the case of Poland because of the historical fear of corruption and because of informalities. Accordingly, municipalities are afraid of taking risks, as cooperation with private actors is not appreciated.

As an outcome of the socialist experience, people in Poland generally have little trust in the state or local governments, and traditionally see them as profit-makers. According to the European Social Survey 2002-2003 conducted among 21 countries on the legitimization of the government system, Poland had less than 10 points, which put it last in the ranking. This attitude is mainly the result of the old "them-us" division seen in the socialist times. This attitude creates a more complicated situation for public officers than in other countries. People usually do not know, nor understand that the involvement of private capital can be used for public interest. Moreover, Polish media are traditionally suspicious of such deals. Therefore, public support for this kind of cooperation is very low. In Poland, positive public opinion is very important for local governments, because this defines the support they will get in elections. In some municipalities, such as Gdansk, even among local politicians PPPs are misinterpreted. In fact, in Szczecin, Katowice, and Torun mental barriers to PPPs exist even among municipal employees. All of the interviewees agreed on the need for a change in mentality concerning PPPs. Municipalities agreed on the common social problem of the *homo sovieticus* attitude. This means that people become suspicious when a private sector company is making profit on public assets. This attitude was emphasized repeatedly by the majority of interviewees. They also highlighted the lack of education among people concerning public economy, as people cannot compare the costs. This is why there is little public support for this kind of cooperation. Local politicians are willing to use accusations of corruption as negative political capital against their opponents.

### 3.6.2. Market capacity/conditions

We argued that when the property market conditions are good and ready for large-scale urban projects, the chance of success is higher. Although market conditions differ enormously in each city, we must underline that except for the cities in group I, market conditions are still not very promising for attracting private sector companies. Warsaw, the capital, is the biggest city in Poland and has the highest number of investments due to its economic and cultural attractiveness. One of the problems that hinder development is unsettled land ownership claims. Warsaw was the first city in which foreign investors showed interest and developed properties throughout the 1990s. Lodz, previously a textile-industry city has been greatly affected by the post-socialist transformation. The industrial heritage has been in the hands of court representatives after the bankruptcy of companies. The buildings and land have been sold to investors who are willing to conduct projects. The city has market potential for brownfield regeneration, but it does not have a strong economic basis for this. Krakow is one of the most advanced markets, with a number of successful projects and with its historical and tourist assets. It is not only attractive for foreign investors, but also residents' attitude towards foreigners is more relaxed. Problem areas, such as Nowa Huta, built in the socialist era, have potential for redevelopment. Although Gdansk is similar to Krakow, due to its historical and geographical characteristics, it did not attract as much market interest as Krakow.<sup>6</sup>

Due to their industrial history, many cities have contaminated land, old buildings, old coalmine infrastructure, and mine damage. However, these brownfield sites may offer development opportunities in the future, when the market conditions improve.

### 3.6.3. Readiness of national law and regulations

We have argued that when the law is ready and applied smoothly, the chance of success is higher than in the transitional era where the regulatory framework was unclear. The new PPP law has been in force since February 2009<sup>7</sup>. It is generally thought that the basic fault of the previous law was its excessive regulative character. The biggest obstacle to using PPPs was the requirement to prepare a profitability analysis, especially in the case of smaller projects. According to the old Act, results of the analyses of various potential ways of implementing a project should be compared, and PPPs may only be used if they bring the greatest benefits to the public interest (Kulesza, Bitner, Kozłowska, 2006). The previous Act stressed the subsidiary character of PPPs - a partnership might be used to implement a project only if it were more

Market capacity  
for PPPs

PPP: Polish regulations

favourable to the public interest<sup>8</sup>. Also elusive was the concept of “prevailing benefit” and particularly its quantitative measurement, which in a given situation would justify the choice of PPP. Moreover, a general approach to other types of project implementation created ambiguity, since there were many possibilities for choosing the manner of the implementation of public tasks (Gonet 2008b). Apart from legal problems, major obstacles to the development of PPPs included psychological barriers and a lack of supporting institutions (Cenkier 2008).

The new act, developed by the Ministry of Economy, promises a new direction in the use of PPP, in a sense that whether partnership is to be adopted will be now determined by the way in which the private entity is remunerated and by the way risks are divided between the private and public entities. It means that when the private actor will operate and take fees, the concession should be applied, in other cases the public procurement rules should be used to select the private actor. The new Act abolishes the obligation to prepare preliminary analyses, which, as it was pointed out, used to be one of the main reasons of not using the previous legal regulations concerning PPP. However, it will still be necessary to demonstrate benefits resulting from public-private partnership. The private partner should be chosen according to two sets of standards. If its remuneration is fully covered by the public entity, the use of the Public procurement Law will be mandatory, especially the provisions concerning competitive dialogue. On the other hand, if part of the private partner’s remuneration is to be covered by profits resulting from the partnership, it will be obligatory to use the Act on Building and Service Concessions.<sup>9</sup> In the new Act, the parties are given the possibility to create flexible partnership with reference to the general system of law in Poland and also to best practices and behaviour patterns, without imposing statutory obligations. It should be noted that the Act does not impose the subject matter of PPP. Contrary to the previous Act, the regulations do not define what types of projects may be implemented under a partnership. If the parties decide that remuneration is dependent on the results of the private partner’s work and parties to the partnership share risks – a wide range of solutions are acceptable.

The development of a new law aimed at the elimination of unnecessary administrative obligations and excessive limitations, also with respect to the subject matter and content of contracts. All the provisions follow five basic principles:

- 1) Granting the entities involved the biggest possible freedom in forming partnership.
- 2) Protecting the most important public interests.
- 3) Protecting the justified interests of private partners.

- 4) Protecting public debt.
- 5) Compliance with the European Union law.

It should be stressed here that the Act clearly refers to the existing institutions of Polish law, and in particular to the civil code. Rather than creating new institutions, it makes use of existing reliable ones. Because of this, the proposed regulations are easily understandable and applicable. The flexibility of the new Act is reflected by the fact that it adopts general clauses, which are used in civil and commercial law. In this way the Act on Public-Private Partnerships acquires a new character.

Opinion on the new law was divided among the surveyed municipal officers. Everybody accepted the change in regulation as a step in the right direction, but some of the surveyed officers emphasized their dissatisfaction. According to them, the relaxation of legal regulations was too wide, leaving too much space for divergent interpretations.

### **3.7. General evaluation of Polish municipalities of the success and risks for PPP implementation**

As the final stage of our evaluation, a general assessment can be provided to reflect back on the pre-defined aims (see chapter 1.4):

*To what extent do cities face potential problems in PPP implementation?*

The cities presented in the survey were chosen due to their announced interest in PPP projects. However, during direct contacts with the municipal officers responsible for PPP activity, it was understood that interest and willingness are in theory often the only important success factors. On the one hand, there is the cities' knowledge of the advantages of PPPs, on the other hand, there are many factors that suspend, postpone or even totally discourage PPP implementation. Cities that intended to introduce PPP projects have not finalised them yet, due to obstacles and difficulties connected with differences in the interpretation of Polish legal regulations. Cities with real willingness have grounded their activities on external experts' opinions. However, there was also a common opinion that external experts may not be able to provide municipalities with clear answers and solutions, even if they have international experience, as best practices are not available. It was also agreed that all the problems and obstacles could not have been predicted. However, it is possible to reduce the risk by learning from the European cases, so as to have knowledge of potential issues in the future.

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evaluation

*To what extent does awareness of EU regulations go hand in hand with experience, and to what extent does this awareness matter for the implementation of PPPs?*

The survey results confirm that experience rooted in some PPP attempts helps to identify problems to a great extent. Cities willing to opt for PPPs were unaware of the real problems in dealing with EU regulations, such as state aid and public procurement rules. In all of the surveyed cities, the municipal officers experienced or predicted difficulties in finding a private party for the PPP. However, in very attractive cities (Warsaw and Krakow) they also mentioned interest expressed by investors who earlier (before the crisis started) did not want to take part in a PPP.

EU rules were mentioned as part of the PPP legal framework by municipal officers with some PPP experience. In Krakow (one of the most advanced cities in terms of PPP preparation), the municipal officers stated that the PPP Act would give rise to state aid problems. To make sure it did not, they chose a concession model, believing that they are secure (although this may not help). The awareness of EU rules seems to be an important factor for PPP implementation in Poland. Lack of standards and practice makes these projects more exposed to rule-breaking. There is a danger that the first instances of breaking EU law may hinder the full implementation of PPPs in Poland. Generally, the more experienced cities have a higher level of awareness, but there are still some gaps in the knowledge of municipal officers.

*To what extent is the risk of non-compliance higher in small or big cities?*

The risk of non-compliance with EU regulations arises in both small and big cities, however the reasons may be different. As expressed by many municipal officers with different education, knowledge and skills, in big cities with bigger institutional capacity an educated and trained PPP team can be established to deal with PPP implementation. However, it should be stressed that the high-level of project complexities, the high costs and negative public opinion, can add more risk of non-compliance with EU regulation in big cities. In small cities problems with lack of experience and knowledge of local staff, and the lack of money for training or external analysis may produce misunderstandings or mistakes. In relation to these problems, Warsaw's initiative of transferring knowledge to the smaller municipalities seems very promising.



*What are the potential dangers of non-compliance for Polish cities?*

The potential dangers for Polish cities for non-compliance with EU regulations have roots in the complex and multi-dimension framework of PPPs, especially for large urban projects. Knowledge of some legal aspects does not protect municipalities from possible infringements, as every project and institutional context is different. Besides problems with breaking state aid and public procurement regulations due to lack of knowledge, there are some additional aspects caused by institutional and the non-formal Polish socio-political environment. In Poland, the society and economy are still in a state of institutional change, though the society is accustomed to having new rules that are sometimes imposed by external powers (Gaciarz 2004). The survey feedback indicated that the law is seen as a tool, though its use depends on people. The big differences between surveyed cities in the perception of risk and success factors in PPP implementation are not only the result of the differences in size but are also caused by different cultural backgrounds, the approach to the cooperation idea, self-governance and civic responsibility. The *homo sovieticus* attitude can spoil every initiative. Therefore, local governments' interaction with the local society in explaining these new strategies in a transparent way is very important, so as to re-establish trust.

## 4. Assessment of risks, and evaluation of current legal status of PPPs in Poland. Recommendations.

### 4.1. Assessment of the risks for non-compliance with EU regulations in Polish cities

The research has confirmed that currently in Poland many municipalities are preparing for PPP implementation and are searching for private partners for joint projects. However, due to Polish law this type of cooperation is rarely officially referred to as a PPP. Many municipalities expect PPPs to be a vehicle for fulfilling their duties, public tasks with private money, without increasing public spending. A very important field where PPPs could be used in Polish cities are the large urban projects aimed at rebuilding part of a city, redeveloping of brownfields by changing function, urban regeneration and revitalisation, etc. As indicated at the beginning, these are usually costly and complex projects; however, their commercial potential encourages private investors.

State aid and public procurement rules should be taken into consideration by Polish municipalities that are starting PPP activities. Polish municipalities do not have great experience with PPPs in urban areas. The process of creating changes in the urban structure involves many different subjects, and it is often long, complex and complicated, as the increasing number of infringements across Europe proves. The other risk areas are combined in a common group – risks due to external factors. We can mention here the risks brought by the property market conditions due to the opportunity-driven and speculative character of the property markets (the socio-economic environment of the property market strongly influences this characteristic), risks due to planning system complexities and other legal and institutional obstacles.

Land and property have their own unique characteristics, which can generate problems with their efficient use, exchange and development. Land and property have fixed location. They are heterogeneous and require substantial resources to acquire and develop them. Determinants characterising the Polish property markets are inseparably connected with Poland's history, economic and political transformations, as well as successive changes to the legal regulations that control the markets. The property markets in Poland are not yet

fully mature, but their steady evolution can be observed. A public actor, who aims to cooperate with the private sector in developing urban projects with the use of a PPP, needs to have knowledge of real property market mechanisms and instruments to be prepared for the possibility of fast and unforeseen changes. There is also the imperative of remembering the local character of the real property – success in one project does not mean that there will be success in other projects.

Planning system complexities can increase the risk level of urban project. Solutions adopted in Poland are generally similar to the solutions used in other EU countries. Certain mechanisms and instruments are reiterated due to their universal nature. However, detailed analyses indicate that there are significant weaknesses in the regulatory framework. In Poland, there is a mixture of a discretionary system (non-binding plans, more market-driven development) and a planning-driven system with legally binding plans (Izdebski, Nelicki and Zachariasz, 2007).

The existing system has issues, as decision-making is conducive to corruption, which contributes to the exceptionally low level of social trust in local authorities in Poland. This is connected with one of the main problems of PPP acceptance in Poland – social obstacles. Studies conducted in Poland in the 1980s showed that in the relationship between the citizens and the authorities, the citizens felt helpless (Koralewicz, Wnuk-Lipinski 1987). Since the late 1980s, due to the political transformation, people have started to expect the authorities to reckon with the citizens, and this expectation has grown stronger. However, to be able to participate in making the most important decisions, both the authorities and the citizens must demonstrate a certain level of competence. The competences are multifaceted and concern ethical, social, organisational, technical, and professional issues. Lack of said competences often leads to mutual misunderstanding and increasing frustration of some members of the community (“us-them” mentality). In Poland, many citizens believe that working for local government means to have a very good position for doing business. This is caused by a lack of trust in the central and local governments (Staniszki, 2006). The role of local authorities is not seen to be a public service in the common interest.

Local co-operation may be seen as one of the indicators of the level of social capital. The lack of cooperation at the local level is particularly severe in terms of social development management. According to the European Social Survey 2002-03, Polish society is much more distrustful of the central and local governments and fellow citizens than other societies. One of the most important factors responsible for

PPPs and  
social capital

the disintegration of social capital in Poland is the dysfunctional administration of justice that creates the social conviction that only naive people abide by the rules, which is one of the greatest dangers for a democratic state (Kochanowski 2006). The decay of social capital is also a consequence of the law being used to gain advantages. This problem arises not only among people adhering to the rules but also refers to the legislative body that proclaims them (Kochanowski 2006).

The bad climate for PPPs is responsible for the stiff approach to them by the local government. The public partner is afraid of being accused of corruption or misconduct, especially by political opponents. The municipal officers are afraid of taking risks, as cooperation with private actors is seen negatively by the local community as a door to corruption. Local media are suspicious and local politicians are willing to use such accusations as political ammunition. The instrumental attitude to the law may enforce the formal use of EU rules, however, this may not prevent non-compliance with EU regulation in particular cases. However, it can be noted that in some municipalities the climate for PPPs is better, especially in Krakow. This is probably the result of the higher level of trust towards local government resulting from the path dependency of the city.

#### **4.2. Evaluation of state aid regulations in the implementation of PPPs in urban projects in Poland: Risks and potential issues**

The risk areas for the implementation of projects for the public sector concerning the state aid rule seems to be quite wide, due to the generally unsettled area where state aid is unlawful. If there are no additional profits and there is no change in the competition position of the private partner, there is no unlawful state aid. The public partner should conduct analyses to evaluate the economic sense of the PPP and the possibility of state aid. Even the PPP Act does not mention this need. The public partner should also be aware that the analysis of the possibility of state aid should be repeated in the case of every change in the contract. However, fulfilling this obligation does not always protect the public partner. In the case of the private partner having better than predicted conditions (higher profits or smaller tasks), the state aid problem will arise. The risk of unlawful state aid seems quite high due to the traditional formal approach of typical Polish municipality officers: "we have to have an analysis so we will have it".

The concession does not exclude the possibility of unlawful state aid, although the use of a tendering process should free the project of this

problem. Any change in the contract may introduce some unlawful state aid. There is also another risk area - it is stated in the Concessions Act that an additional contract can be made for building works not included in the primary contract when there are new circumstances impossible to forecast and these additional works are indispensable for the concession works. In this case, competition, and unlawful state aid problems may arise.

In some PPP projects the public input has the form of real estate (donation, sale, and lease) and the elimination of the unlawful state aid problem requires normal market transaction conditions. It is possible to pass the rights to the property to the private party with some bonuses for the PPP or even without any payment, but in these cases there is a need for evidence that these benefits are a compensation for services of general economic interest (the compensation should be counted in a proper manner). The risk margin here is also quite wide, due to the fact that bonuses when selling public real estate can be given in many circumstances under Polish regulation, not only when there are services of general economic interest. The public actor should be aware of the importance of this aim when establishing a PPP. There is also a practical problem - the level of bonus should be counted together with the level of compensation (detailed costs of PPP activity are needed). This can be difficult due to the fact that in Polish regulations the bonus should be indicated earlier, when the real estate is passed to the PPP company (Dzierzanowski, Stachowiak, Cichowicz, Zasłona, 2007). When a PPP company uses real estate as a leaseholder it is also necessary to ensure that the contract fulfils the principles of normal market competitiveness. The public actor should always remember the superior rule that any contribution he makes should be transparent.

It is possible to use EU funds for PPP projects but the conditions mentioned earlier should be met. To omit the threat of unlawful state aid there is a possibility of using a special procedure of notification or *de minimis*. However, these solutions require action to be taken by public bodies and in case of their not seeing the problem of unlawful state aid the consequences could be painful for municipality.

State aid is regulated in Poland by the Act on the Procedure for Granting State aid<sup>10</sup>. Both public and private partners are cautious when considering cooperation in the form of a PPP. In general, potential partners are aware of the possibility of being accused of breaking state aid rules. The legal framework for PPPs at EU level lacks a detailed procedure for preventing municipalities from being accused of corruption. This gap should be filled by national legislation, which should not leave room for misinterpretation, while being compatible

with EU rules (Dzierzanowski, Stachowiak, Cichowicz, Zasłona 2007). An important issue that emerged was the approach to *services of a general economic interest*. There is no state aid when cooperation between public and private partners is in the field of services of a general economic interest. This means that the rights that are transmitted to the private partner are just compensation for the services provided and that there are no additional profits to or changes in the competitive position of the private partner.

The Polish Act on PPPs describes two possibilities for choosing a private partner – public procurement and concession. The difference comes from the right to charge. If it is possible to profits from charge because of the nature of the PPP project or if the profit are from the charge together with a payment made by the public actor - concession should be used. In other cases, public procurement should be applied. According to the PPP Act, the choice of the best partner should be made using pre-defined criteria. Potential private companies know the needs of the public partner and their competition fulfils the market principle. Although it is forbidden to change the contents of the contract, there is one exception where new and unforeseeable circumstances arise. This, however, can introduce state aid problems. Also in case of better than predicted economic conditions for the private partner (higher profits or smaller tasks) state aid problems may arise.

Use of concession should also be connected with competition among potential private partners. The concessionaire profits from the right to use the building or service and the payment made by the concessioner. As a rule, this payment cannot compensate all the costs covered by the concessionaire. The value of the concession should be counted using the estimated costs of the works or services. The procedure for choosing a private partner should be transparent, it should involve competition, and it should be non-discriminatory. These rules assure that there is no state aid problem.

Another state aid problem can arise when the public partner's contribution is considered. If the input is a kind of subsidy (money input) an important issue arises concerning the economic efficiency of PPPs. Without public financing, the surveyed activity (public task realization) may not be possible and the competition rule within given conditions has to be implemented otherwise. If the public input has the form of real estate (donation, sale, lease) the elimination of the state aid problem requires normal market transaction conditions (Commission communication on state aid elements in the sale of land and buildings by public authorities, Official Journal No C 209 of

10.07.1997). The sale of real estate should take the form of an open tender that is aimed at finding the best offer, or when there is no open tender, the price should (in principle) not be lower than the value of the real estate.

In Polish law there is an act that describes the conditions for the sale of public land- the Act on Real Estate Governance (management)<sup>11</sup>, in which conditions are introduced that relate to bonuses for buyers. In these cases there may be a state aid problem. To eliminate this, it should be proven that this constitutes compensation for services of general economic interest (which ought to be calculated in a proper manner). Practical difficulties may emerge, as the level of refund should be calculated together with the compensation. The level of refund depends on costs, so it should be calculated based on a detailed description of the PPP activity - in Polish law, the refund should be indicated earlier, when the real estate is passed to the PPP company. The refund is justified only for services of general economic interest.

PPPs and taxes

When a PPP uses real estate as a leaseholder, it is also necessary to ascertain whether the conditions of the contract fulfil the principle of normal market competitiveness. The public actor should always remember the main rule that all contributions should be transparent. Another problem is the tax on PPPs, as some tax exemptions raise state aid issues. In general, the tax neutrality of a PPP is a kind of justified compensation for realizing services of a general economic interest. However, in specific cases an analysis should be made of whether these tax rules are compatible with the socio-economic function of the right and the scope of the tax risks taken by the public partner. There is an additional issue that concerns the allocation of the tax risk referring to VAT. A general clause in the contract that the public partner is going to reduce some VAT costs can result in a state aid problem. This would be eliminated in specific cases by an analysis based on the economic efficiency of the PPP activity. In changed tax conditions, this compensation is justified.

There is also a real estate tax problem in the scope of state aid. The tax exemption or bonuses given to the PPPs should be analysed. When the PPP activity is not in the category of services of a general economic interest or if the level of privileges is too high, state aid problems may emerge. There is a possibility of a state aid problem where changes are made in favour of the private partner after negotiating the contract. Of importance here is the level of profit of the private partner; when the level is above then market it is qualified as state aid.

#### **4.2.1. The surveyed municipalities' experience and awareness of state aid**

When it comes to EU regulations, most municipality officers were aware of the state aid regulation, but in a general and abstract sense. State aid is an issue for them when it concerns the establishment and activity of municipal companies, but not yet in relation to PPPs (as there is not much experience). Only some of interviewed municipality officers stated clearly that they were not going to use the PPP Act, referring to a possible problem with state aid. They agreed that using concessions makes the public actor's situation more secure as there is no possibility of the state aid breach. However, in reality it can be more complicated.

It is imperative to analyse any specific PPP case in a very scrupulous way to evaluate the possibility of state aid. The surveyed cities can infringe EU Law due to their lack of knowledge about the situations that give rise to state aid problems. They do not have experience in monitoring PPPs from the point of view of the market. Treating the private partner in a better way than market conditions indicate infringes EU rules.

#### **4.3. Evaluation of public procurement rules in the implementation of PPPs in urban projects in Poland: Risks and potential issues**

Polish public procurement legislation dates back to 1994 when the first Act on Public procurement was adopted. The Act was amended a couple of times in the following years, mainly with the aim of clarifying its rules and definitions, broadening the scope of application and making the procurement process more transparent. Adapting Polish procurement provisions to EU requirements was a major factor in the preparation of new legislation. The new Public procurement Act was adopted on 29 January 2004 and replaced the Act of 1994. In April 2006 and April 2007 the Public procurement act was largely amended in order to implement the provisions of EU directives 2004/17 and 2004/18.

PPPs and public  
procurement

Risk areas concerning the public procurement rule also appear to be large, due to the many possibilities of breaking public procurement law. Contracting should be based on prescribed rules. However, there is the issue of whether the municipality is aware of all the situations when applying these formal rules is necessary. The European cases show that due to the nature of the contracted works, or additional circumstances, public procurement may be seen by the municipality as inappropriate, which is not true. Furthermore, there are also situations where public



procurement law is broken as a result of insufficient competition, dividing services to avoid the threshold or breaking contracting procedures. Polish municipal officers stated that these kinds of infringement exist; however, in general, awareness of public procurement rules is high.

The provision of special rights with special laws or planning regulations concerning public works does not seem to exist in Poland. When planning a public task that is not realized by developers, the problem of special implementation agencies does not exist either. However, it is very important to be aware that this type of activity is recognised as an infringement of EU regulations.

Public procurement in Poland is regulated by the Public procurement Act<sup>12</sup>, which contains the principles and procedures indicated in EU law. As mentioned earlier, the PPP Act envisages two possibilities for choosing a private partner – public procurement and concession. Public procurement law and particularly the competitive dialogue procedure should be applied directly. This mode is so flexible that it is possible for it to be used by a PPP and it gives the best chance of finding the most suitable solutions and private partner.

The PPP Act contains rules that are *lex specialis* to public procurement law. They refer to a definition of “the best offer”, the choice of a provisional (interim) partner and the procedure for changing a contract. The best offer, according to the PPP Act is the one that gives the most advantageous outcome from the point of view of earnings and the following criteria:

- The division of tasks and risks between the PPP partners.
- The term and level of anticipated payments or other anticipated services.
- The division of profits given by the PPP between the PPP partners.
- The relationship between the contributions of the public and the private partners of a PPP.
- The efficiency of the PPP activity (efficiency in using financial assets).
- The criteria linked directly to the PPP activity: quality, functionality, technical parameters, level of offered technologies and maintenance costs.

Non-compliance with public procurement rules when preparing a PPP can generally be divided into two sections – the first one referring to contracting, and the second referring to the provision of special rights with special laws concerning public works. As indicated in chapter 1,

the European Commission does not have the necessary instruments to follow each large scale PPP project in each municipality. Although risky, if a municipality cooperates with a selected company through its own local tendering methods, and nobody complains, there is a good chance that the EC will not be aware of this.

#### ***4.3.1. Surveyed municipalities' experience and awareness of public procurement***

The Public procurement procedure was not a problem for municipal officers, as they were mostly from departments that specialized in procurement; including one informant responsible for public procurement in the PPP department. The cities make national tenders in the scope of public procurement law, which is based on EU procurement law. Some years ago, the officers were not as aware of the procurement rules as they are today, and consequently some problems were noted due to the complicated public procurement procedures, which was new to municipal officers. However, after some years of application, a group of specialists emerged. It should be stressed that the previous PPP Act was not deemed applicable because of the lack of a proper form for public procurement announcement; this means that municipal officers paid attention to the public procurement rules.

As in every state, despite the fact that everyone should know the rules, some cases of breaking the law occur, but this issue was not mentioned by any municipal officers during the survey. The results of recurring inspections carried out in recent years by the Supreme Chamber of Control<sup>13</sup> reveal the extent of the problems that affect the activity of municipalities in the planning and managing of real property.

A number of problematic cases were noted during the field survey. In the first case, the City was looking for a private partner, without the public procurement procedure, during the regeneration process of an urban neighbourhood. The municipal officers did not think it necessary to use a tender in this project. They claimed that it was only an exchange of land, and not procurement. They seemed unaware of the relevance of the rules on procurement, in his case. In the second case, the municipal officers indicated that the City compensated the money spent by the developer on public infrastructure; however, this could be seen as compliance with public procurement (the contract would be decisive). This begs the question, do the municipality officers have enough knowledge to recognize when they have to use the public procurement rules? In these cases, having separate departments with different specialists cannot be the best solution. In two other cases, the municipal officers expressed the opinion that the cooperating company

could have a better position in the next tender (more points due to the fact that this company is known as a good and honest partner). However, none of the municipal officers denied the need of the next tender. It should be underlined that the elaborated criteria should be well-known and clear, in order to avoid any infringement of law.

#### **4.4. Recommendations for dealing with potential problems**

In Poland, the number of public tasks executed by local entities is enormous and public funds rather modest. The solution is to use credits and loans taken by local governments, but legal regulation is strict in describing the public debt limit. Polish cities and villages currently have the opportunity to apply for EU funds. The inflow of money stimulates rapid development, especially in the scope of the infrastructure. However, to ask for additional means municipalities must have seed capital.

Large urban projects, very often linked to the revitalisation of inner city areas, are long and complex, which increases the level of problems and risks of PPPs.

In some cities, there is a growing understanding of the need for PPPs as a means for utilising existing property and land potential in inner city areas. Focusing on big urban projects in Poland the most common projects are sports and recreation halls, often with aqua parks and some commercial space (hotels and shopping centres), commercial car parks, rail station re-developments, and regeneration of city areas. This is probably the result of an evaluation by public officers of the commercial capacity of the projects and their contribution to public needs. They predict those projects can be encouraging for private investors. However, in some cases there are problems. For instance, aqua parks, being very popular projects, seem not to be very profitable.

The problems that block the introduction of PPPs have an informal character, due to the post-socialist mentality of citizens and local government actors.

Bearing in mind that some local government officials have stated clearly that without private means the number of this kind of projects, will be very limited due to their financial and organisational complexity, it should be stressed that PPP projects require very scrupulous preparation in terms of documentation and social support. Citizens do not understand market powers; they blame public and private partners that use public money or goods of having some additional private profits. The local media are also suspicious and they look for corruption cases, so municipal officers need to be careful. An additional factor

#### **Recommendation**

is often previous negative experiences. The problem of preparing municipal officers for negotiations, and their required knowledge and time is also very current and serious. Having the burden of a very high level of responsibility without financial gain does not encourage the initiation of PPPs. Due to existing problems, some municipalities have chosen simple land sales. Some have a "wait and see" approach aimed at following well-trodden paths. There is also the problem of the low level of administrative efficiency in some cases. Misunderstandings and mistakes are rooted in lack of team work and the fact that too many obligations have been given to municipal officers.

Lack of understanding of some introduced rules, and simple application without analyzing the sense of the rules decreases the respect citizens should feel for the law and diminishes the results of the application.

Another problem is connected with the Polish attitude to legal regulation and knowledge of existing rules. There is a common attitude that these rules only make life more difficult and are prepared for a small group to gain profits. Additionally, municipal officers, who are unaware of some of the complex requirements of PPPs in urban projects can make mistakes, the effects of which can discourage local governments from this form of cooperation, due to the prolonged legal disputes.

Recommendations for commonly-experienced problems and PPP development in Poland can be summarised as:

- For public sector activities:
  - a special public centre for the exchange of information should be established to produce some standards for contracts and detailed legal solutions (the announced Warsaw initiative in this scope is very important),
  - local government officers with experience in PPPs should share their knowledge and experience with others. This activity should be a model organization for PPP departments in the local government structure,
  - there should be a special media campaign explaining the idea and advantages of PPP to Poles.
- A detailed description of international mistakes in PPP procedures should be prepared to reflect Polish circumstances
- Best practices should be prepared regarding the administrative structure of municipal cooperation in PPPs in small and big cities

- Transparency should be the number one principle while preparing specific cases to avoid any corruption accusations
- Translations should be made of information on PPPs in the EU, especially connected with state aid and public procurement infringements, and distributed to Polish municipalities

#### **4.5. Recommendations for the implementation of PPPs in urban development: Lessons to be learned from the experiences of old members states**

Our review of problematic European cases (see chapter 2) suggests that there are a couple of lessons that local governments can learn, in order not to breach those provision of the EU Treaty that deal with urban development. If we recall specific cases we summarised in section 2, we can list some lessons to be learned from the application of state aid and procurement rules in several member states.

To prevent the risk of the infringement of state aid rules, especially concerning the compensation issue, local governments can be advised to:

- Make sure that the private parties do not obtain any profit from the project, while granting projects for renewal purposes, where national funds are available to support development (Haaksbergen case)<sup>14</sup>
- Make sure that the land transaction procedure does not cause infringements and that the sales price for the land does not go below market price without justification (Ahoy and Alkmaar cases, the Netherlands)
- Make sure that the public does not fill any financial gaps in urban renewal projects and does not take any financial risks under PPP agreement (Gap Funding Case, UK)

According to the Procurement Directive the procurer should:

- Make sure that within the PPP consortium there is no separate contract for carrying out part of the works (Amersfoort case)

- Make sure while awarding a service contract that the services that are awarded to a private company are not in the scope of application of Directive 92/50/EEC on the procurement of services. If they are, a public tender has to be carried out (Limburg case).
- Make sure that there is a tendering process, even if the contract is only for purchasing the land. The Commission considers the goal of the contract as the main reason for applying the procurement rules, while awarding a public contract for the building of a public property (Quedlinburg case)
- While awarding a public works concession contract, make sure a tendering process is carried out on the basis of the public procurement Directive (York case)
- Make enough advertisements to attract enough competitive parties to be involved in an open tender process. Even if the proposal is below the threshold, the Commission may find the low amount of competition as an infringement on the basis of the principle of non-discrimination and transparency (Reggio Emilio and Hoogezand-Sappemeer cases)
- Make sure to comply with the requirements of EU public procurement Directives, while awarding contracts dealing with social housing, affordable or low-rent housing (British and French cases).
- While calculating the value of contracts, make sure that that services cannot be divided with the intention of avoiding the application of the threshold, and if the contracts are divided into lots, the values of the lots have to be cumulated when calculating the value (Genoa case).
- While making contracts, make sure that the characteristics of the contract are clear for the Commission when semi-public agents are involved in the process. Tendering is required to award projects in any case (see Appendix 2 for the Roanne case)
- While preparing tender announcements and bids, make sure that the information is clear and correct on the tender document. Moreover, procedural rules such as the bidders' identity and weighting the bids, etc., should be carefully followed up (Belgian and Scottish cases)
- While applying development (or planning) obligations, make sure that any pecuniary interests are carefully screened to prevent an unlawful contract (Scala case)

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## Appendix 1. EU initiatives concerning PPPs

Year	Initiatives concerning procurement, contracts and concessions	Initiatives concerning competitiveness policy	Initiatives directly concerning PPPs
1992	Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts-OJ L 209, 24.7.1992		
1993	Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts-OJ L 199, 9.8.1993	White Paper on Growth, Competitiveness and Employment-COM (93) 700	
1997	European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively-OJ L 328, 28.11.1997		High Level Group on PPP Financing on TEN-T Projects (Kinnock report) -COM (97) 453
1998	Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors-OJ L 101, 1.4.1998		
1999		Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty-OJ L 83, 27.3.1999	
2000	Commission's interpretative Communication on Concessions under Community Law (OJEC (2000/c 121/02) )		
	Public Procurement: Commission Proposes to Simplify and Modernize the legal framework-IP/00/461		

## Appendix 1. EU initiatives concerning PPPs

Rok	Inicjatywy związane z zamówieniami, kontraktami i koncesjami	Inicjatywy związane z polityką konkurencyjności	Inicjatywy bezpośrednio odnoszące się do PPP
	Proposal for a Regulation of the Council and Parliament concerning the Granting of Aid for the Coordination of the Transport by Rail, Road and Inland Waterways-COM (2000) 5		
2001	White Paper on European Transport Policy for 2010: Time to decide-COM (2001) 370		
	Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2236/95 laying down general rules for the granting of Community financial aid in the field of trans-European networks-COM (2001) 545		
2002		Treaty establishing the European Community, Article 87, 88 and 89 (Part Three: Community policies - Title VI: Common rules on competition, taxation and approximation of laws - Chapter 1: Rules on competition - Section 2: Aids granted by States) - C 325 , 24/12/2002 P. 0067 - 0067; C 340 , 10/11/1997 P. 0211 - Consolidated version; C 224 , 31/08/1992 P. 0030 - Consolidated version	Building a Valuable Approach to PPPs, working session on the draft guidelines-COM (2001) 370
2003	Amended proposal for a Regulation of the European Parliament and of the Council amending the amended proposal for a Regulation of the European Parliament and of the Council amending Decision No 1692/96/EC on Community guidelines for the development of the trans-European transport network-COM (2003) 564	Regulation Amending Council Regulation (EC) No 2236/95 laying down General Rules for the Granting of Community Financial Aid in the Field of TEN-T - OJEC COM (2003) 561	Guidelines for successful Public-Private Partnerships - DG Regio and dissemination at a series of international conferences -DG Regional Policy

## Appendix 1. EU initiatives concerning PPPs

Rok	Inicjatywy związane z zamówieniami, kontraktami i koncesjami	Inicjatywy związane z polityką konkurencyjności	Inicjatywy bezpośrednio odnoszące się do PPP
		Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions-Internal Market Strategy Priorities 2003-2006 -COM (2003) 238	
		Green Paper on Services of General Interest (COM (2003) 270)	
2004	New Procurement Directives-Including Introduction of Competitive Dialogue -2004/18/EC	Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty -OJ L 140, 30.4.2004	
	Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors -OJ L 134, 30.4.2004		Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions -COM (2004) 327
	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 -OJ L 134, 30.4.2004		
2005	Commission Regulation (EC) No 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council -OJ L 257, 1.10.2005; OJ L 287M, 18.10.2006		Communication from the Commission to the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions-COM(2005) 569

## Appendix 1. EU initiatives concerning PPPs

Rok	Inicjatywy związane z zamówieniami, kontraktami i koncesjami	Inicjatywy związane z polityką konkurencyjności	Inicjatywy bezpośrednio odnoszące się do PPP
			Report on the public consultation on the public-private partnerships and Community law on public contracts and concessions -SEC (2005) 629
2006	The Public Contracts Regulations 2006 -SI/2006/5	Commission Regulation (EC) No 1627/2006 of 24 October 2006 amending Regulation (EC) No 794/2004 as regards the standard forms for notification of aid -OJ L 302, 1.11.2006	Public-Private Partnerships; How to make them work?" (speech of Danuta Hübner, Member of the European Commission responsible for Regional Policy) -PA_TA-PROV (2006) 0462; 2006/2043 (INI)
			European Parliament resolution on Public-Private Partnerships and Community Law on Public Procurement and Concessions -2006/2043 (INI)
2008	An exchange of views on Public Procurement BSA (Business Services Association) -SPEECH/08/699		Public procurement: Commission issues guidance on setting up Institutionalised Public-Private Partnerships -IP/08/252
			Commission interpretative Communication on the Application of Community Law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP) - C (2007) 6661

Source: Developed by the authors on the basis of the information gathered from <http://eur-lex.europa.eu/>

## Endnotes

- 1 See: COM(2004)327
- 2 The problem concerns Warsaw especially, which was subject to the Decree on proprietorship and use of grounds in the capital city of Warsaw dated 26 October 1946 (known as the "Bierut decree") - ed. note
- 3 The description of the circumstances surrounding the draft PPP Act states that the act is supposed to, among other things, "remove obstacles that under the present legal system create high risk for both partners to a public-private partnership".
- 4 The Act on Public-Private Partnership, dated 28 July 2005 (Journal of Laws No. 169, Item. 1420); the Resolution of the Minister of Economy on the Detailed Scope, Form, and Rules for Preparing Information Concerning Public-Private Partnership Contracts, dated 9 June 2006 (Journal of Laws No. 125, Item 867); the Resolution of the Minister of Economy on the Risk Related to the Implementation of Public-Private Partnership Projects, dated 21 June 2006 (Journal of Laws No. 125, Item 868); the Resolution of the Minister of Economy on the Mandatory Elements of Project Analysis in Public-Private Partnership, dated 30 June 2006 (Journal of Laws No. 125, Item 866).
- 5 Act on Public-Private Partnership, dated 19 December 2008 (Journal of Laws of 2009 No. 19, Item 100).
- 6 In Krakow, new projects are now being developed under the new concessions law. The most advanced is a sports and recreation hall. Krakow has finished one project using the PPP formula - underground Car Park "Na groblach". The Spanish company Ascan Empresa Constructora y de Gestion built the car park, spending PLN 62.7 million. It will operate and have profits from the car park for the next 70 years. The other projects that used the quasi PPP formula, were the Krakow Centre of Commuting, which partly involved city land, Local Investment Initiative (cooperation between the city and residents in the provision of infrastructure, the share of the private parties was about 20-30%), and a local housing initiative (cooperation with developers in housing infrastructure).
- 7 Act on Public-Private Partnership, dated 19 December 2008 (Journal of Laws of 2009 No. 19, Item 100).
- 8 Public interest is mentioned in the Constitution, where a list of cases of public interest in the Land Management (governance) Act is provided. Views on this issue are widely disputed in the literature, especially by the judicature: M. Kastelnik: „Pojęcie 'interes publiczny' w orzecznictwie sądu antymonopolowego", *Glosa* 2004, No. 10.
- 9 Act on Building and Service Concessions, dated 9 of January 2009 (Journal of Laws of 2009 No. 19, Item 101)



- 10 Act on the Procedure for Granting State Aid, dated 30 April 2004; (Journal of Laws No. 59/2007, Item 404 with amendments).
- 11 Act on Real Property Governance (management), dated 21 of August 1997 (Journal of Laws No. 261/2004, Item 2603 with amendments).
- 12 Act on Public Procurement, dated 29 January 2004 (Journal of Laws No. 223/2007, Item 1655 with amendments).
- 13 The Supreme Chamber of Control (NIK) is one of the oldest state institutions in Poland, the country's supreme supervisory body, empowered to exercise wide-ranging control of the revenue and expenditure of the state and all institutions and corporations that make use of public funds.
- 14 All the cases described previously - see Tables 2 and 3; full description of cases may be found in the communicates of the European Commission (<http://ec.europa.eu/transparency/regdoc/registre.cfm?CL=en>)

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