Joint project of the Public Services Agency under the Ministry of Justice of the Republic of Uzbekistan, United Nations Development Programme in Uzbekistan "Improved public service delivery and enhanced governance in rural Uzbekistan" financed by European Union

Analytical paper

Legal and regulatory frameworks in European Union on private sector involvement in public service delivery

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Contents

Executive summary

The legal and regulatory framework build the basis in which any contractual relationship is defined and regulated. A solid legal framework can foster the development of key national policies and advance a country towards delivering improved, effective and efficient public services and goods. The current analytical paper describes basic regulations, general principles and peculiarities of the legal and regulatory framework in five countries in the European Union with significant experience in involving private sector in delivering public services and goods.

The study is related to previous research papers created within the framework of the joint project "Improved public service delivery and enhanced governance in rural Uzbekistan". It builds on desk research of the current situation in the European Union, where the European Commission released directives related to Public Procurement which all countries gradually adopt.

Uzbekistan is on a new path of opening up its public functions and services to be provided by the private sector, and is faced with the important task to modernise the legal system, in order to accommodate legal and regulatory provisions to foster the development and implementation of public-private-partnerships, concessions and any other form of involving private agents in delivering quality public services.

The legal revision should be holistic, understand and cross-check provisions in related laws that might affect the successful design and management of public-private associations. Potential constraints should be removed by considering whether such amendments are possible or practical; adapting a general PPP/ Concession law and sector specific legislation; and by making amendments at regional or municipal level, (if this is possible, depending on the legal provisions in Uzbekistan).

The five countries studied are very different from the legal point of view, stemming from the legal system's belonging to the civil law systems (Napoleonic legal system, German or hybrid legal systems). Uzbekistan has a civil legal system belonging to the group of Napoleonic law with Germanic law influence. The definition of PPP, concession, or any other form of partnership varies widely across countries, and are regulated individually, sometimes even across sectors in the same country.

In the context of Uzbekistan, the PPP Law since 2019 has been improved in January 2021, provided clearer roles and conditions to design and manage partnerships between public and private entities. The next step is to focus on regulatory decisions in the sectors of interest, especially relevant for the public services provided by the Ministry of Justice through the Public Services Agency.

Introduction

The joint project of the Public Services Agency under the Ministry of Justice of the Republic of Uzbekistan, the UNDP "Improved Public Services Delivery and Enhanced governance in rural Uzbekistan", financed by EU, is being implemented with the aim to improve the quality of life of vulnerable populations in rural areas (women, youth and children, the elderly and people with disabilities), by expanding their access to the public services and improving the quality-of-service delivery.

As a result of the analysis preformed in 2020 in a related research report ("Summary of Best Practices of Public Private Partnerships in Public Service Delivery", September 2020), the private sector expert analysed a series of previously implemented PPP projects in the European Union. The studied cases were implemented in established markets in Western Europe, and these countries will be the focus of the present study: France, Germany, Netherlands, Spain and Portugal. The reasons for choosing these countries to analyse is the long experience (30 years and more) and quantity of projects involving private sector in delivering public services and goods. This experience also brings successive refinements in the legislation, thus providing the best examples of legal frameworks.

For the European Union, European Commission enacted directives on public procurement[1], which are gradually adopted by its Member States. They cover tenders that are expected to be worth more than a pre-set amount. The core principles of these directives are transparency, equal treatment, open competition, and sound procedural management. They are designed to achieve a procurement market that is competitive, open, and well-regulated. This is essential for putting public funds to good use.

Based on the desk research of existing primary and secondary data, the consultant analyses the legal and regulatory frameworks in the mentioned countries, highlighting the particularities of adapting the legislation and implementing norms to the local conditions. The differences stem from the major systemic distinctiveness of the legal systems in different countries (Napoleonic, Germanic, Nordic or mixed).

[1] https://ec.europa.eu/growth/single-market/public-procurement_en

The theory of involving private sector in delivering public goods and services

While discussing the ways of achieving the Sustainable Development Goals, the international community realised a major financing gap should be bridged. During the Third International Conference on Financing for Development (Addis Ababa, 2015), the Addis Ababa Action Agenda (AAAA) was agreed, mentioning in paragraph 48 the strong need for PPP capacity building: "build capacity to enter into PPPs, including as regards planning, contract negotiation, management, accounting and budgeting for contingent liabilities". Further, the text highlights the need to "share risks and reward fairly, include clear accountability mechanisms and meet social and environmental standards". These elements should be taken into account when designing the legal framework and implementing norms for the public sector in Uzbekistan.

When managing designing and managing joint projects with private actors, the major risks to be tackled are: projects are costly to build and finance; provision of poorer quality services; and services are less accessible compared to publicly built and operated projects; essential services might become less accountable to citizens when private corporations are involved. Additionally, the partnerships fill a space between traditionally procured government projects and full privatisation. The civil servants should understand, be trained on legal aspects of these contracts. The technical risks enumerated above are sometimes doubled with risks related to frequently changing legislation (especially in transitioning countries) or corruption issues. These risks are covered by the private sector agents with transferring the costs to the end consumer, annihilating the price advantage derived from the higher efficiencies associated with the private sector operations.

General considerations in creating legal frameworks

Legal references related to managing and implementing complex contracting modalities involving partnerships between public entities and private partners are made at different levels, specific for each country's legal system: in constitution, legislative enactments, judicial decisions, treaties and other sources.
As the World Bank's PPP Legal Resource Centre[2] outlines, several key issues in civil lay systems may impact partnerships between public and private entities: rights of contracting authority that may override contractual provisions, protections of operator implied by law, and other civil laws (e.g., contractual penalties, gross-up clauses, bankruptcy, financial assistance, or security interests and syndicated loans).

[2] https://ppp.worldbank.org/public-private-partnership/legal-framework

In order to design, adopt and enforce effective legal and regulatory frameworks relevant for PPPs, concessions and similar contractual forms of involving private partners in delivering public goods and services, a broad array of considerations and related legal provisions should be considered: contract law, dispute resolution, insolvency laws, insurance provisions, labour laws, environmental and social issues, procurement regulations, restrictions on foreign investors or currency exchange controls, taxation, and others.
When analysing the degree of how conducive a PPP Law or any law related to allowing private agents to perform public services, a holistic examination should be performed of all connected laws and regulations. It might be possible that some regulations in other laws will act as constraints for the PPP law. These constraints should be removed through

- Considering whether such amendments are possible or practical. If the legal constraint is enshrined in the constitution of the country, then it may be very difficult or impossible to amend;
- a general PPP/ Concession law or through sector specific legislation; and
- by making amendments at regional or municipal level, (if this is possible, depending on the legal provisions in Uzbekistan).

Country analysis

France

France has a long tradition of involving private capital and expertise in delivering public services and goods. Public-private partnerships are implemented in many economic sectors (e.g., transport, health, justice, education, urban equipment, environment, energy efficiency, telecommunications and culture) for around €100 billion of activity each year.

The French PPP legal framework was reshaped a few years ago through the transposition of the European directives pertaining to public procurement and concession agreements under Ordinance No. 2015-899, dated 23 July 2015 (relating to public procurement and partnership agreements - Partnership Contract Ordinance), and its implementing Decree No. 2016-360, dated 25 March 2016, and Ordinance No. 2016-65, dated 29 January 2016,3 relating to concession agreements and its implementing Decree No. 2016-86, dated 1 February 2016.

Even though the transposition of the European directives and the enforcement of the aforementioned ordinances and decrees were aimed at clarifying and modernising the French legal framework, the legal rules governing public procurement agreements (including partnership

contracts) and concession agreements remained scattered throughout about 30 different texts. Therefore, in 2018, it was decided to carry out the adoption of a Public Procurement and Concession Agreements Code (PPP Code). It was finally enacted at the end of 2018 through Ordinance No. 2018-1074, dated 26 November 2018, Decree No. 2018-1075, dated 3 December 2018 and Decree No. 2018-1225, dated 24 December 2018. The new PPP Code entered into force on 1 April 2019.

As defined in the Code, there are two types of PPPs that are mainly used in France: concession agreements, which serve to implement major infrastructure projects (canals, motorways, water distribution systems and toll bridges), and partnership contracts, which can be compared to private finance initiative contracts.

Concession agreements and partnership contracts are both administrative contracts under French law. This distinction is important as the contractual relationship in an administrative contract is different from that in a private contract.

Concession agreement is defined as an agreement under which a grantor assigns, for a limited period of time, to one or several economic entities, the performance of works or the management of a service. The agreement has to specify clearly the risks linked to the operation of the works or services (involving exposure to the market fluctuation) and the fee to be paid in favour of the entity.

Partnership contract is defined as an administrative contract under which a grantor entrusts to a private party, for a period set according to the amortisation of investment or agreed financing terms, a comprehensive project. This might imply the design, construction or conversion, maintenance, operation or management of works, equipment or intangible assets necessary to the public service, as well as to the total or partial financing of the latter.

The two main PPPs can be differentiated according to their payment terms: under a partnership contract, the grantor pays a rent to the private partner in exchange for the performance of the mission, while under a concession agreement, the compensation of the concessionaire mainly arises from payments made by users of the service.

Further, the Code defines the roles of the authorities, bidding and award procedures, evaluation and award mechanism. The contracts should contain clear terms on payments, state guarantees, distribution of risks, adjustments and revisions, ownership of the underlying assets, the early termination conditions and dispute resolution.

The legal situation of public services similar to the ones envisaged to be teste by the project:

- the cadastral services are still entirely under public management. An important step is modernising the service was implemented since 1993 with the digitalization of the

service. A digital map is published annually in each French municipality and has been available free of charge to the general public since 2008 on the website www.cadastre.gouv.fr The digitalisation was implemented through a national protocol between the Directorate General of Taxes and the major geographical information providers in France, at the forefront of which are local authorities.

- With the process of energy market liberalization in France, private operators are able to produce and supply energy. The distribution network is still owned and managed by the state. ENEDIS (formerly ERDF) is the electricity grid operator for much of France. Created in 2008 with the opening of the French electricity market, Enedis is responsible for the management and distribution of electricity to 95% of the territory, and oversees network maintenance including meter connection, power failures and repairs, and meter readings. No third-party, private operators deliver this kind of service;
- The private driving schools are functioning as any other private business according to the commercial laws of France.

Germany

The term of PPP is not conclusively defined in Germany. It has been introduced in the German Federal Constitution since 2017 (Article 90(2) and has generated references into the German Code on Capital Investments e.g., Sections 1(19), (28). As such, the concept involves forms of long-term cooperation between the government and a private company, often relating to cost-intensive infrastructure projects.

The cooperation focuses on projects involving collaboration in the construction, maintenance or operation of public roads and buildings (e.g., hospitals). Apart from these projects, public–private cooperation has other, practically important, forms. Several German cities have granted concessions to private companies for the refurbishment and operation of urban electricity grids. Out-of-home advertisers conclude long-term contracts with major German cities. They offer professional advertisement services to the private sector, but also contribute to the investment in and maintenance of cities' infrastructure. The German toll collection scheme for the use of motorways by heavy goods vehicles (HGVs) was designed, built and, until recently, operated, by a joint venture of private sector companies. The agreements require substantial investments from the private sector companies and include cooperation obligations. Further, public authorities and the private sector established institutionalised PPPs in the form of joint ventures, inter alia, for the operation of airports (e.g., the international airports in Frankfurt, Dusseldorf and Hamburg).

In the context of the Covid-19 pandemic, PPPs involved the development and operation of digital infrastructure, most notably the government's coronavirus exposure and tracking notification app. Similarly, a form of public–private cooperation is the government's large-scale funding of research into and development of a Covid-19 vaccine and the rapid scale up of manufacturing capacity in exchange for a reasonable share of the vaccine.

The Law doesn't foresee the possibility of making the contracts public; for instance, the Federal Ministry of Transport and Digital Infrastructure had to seek agreement from the private partners on a case-by-case approach to make some data available for public consultation[3].

In 2016, the federal government initiated a *public procurement procedure* for the operation of the toll collection scheme for HGVs on all federal roads. The government envisaged using a call option on the shares in the current project company. The public tender provided for the acquisition of the shares in the project company by a private investor together with a new contract for the operation of the toll collection scheme for HGVs for a duration of 10 to 15 years. In January 2019, the government terminated the public procurement procedure without any contract award and, having used the call option, will keep running the project company and toll collection scheme as state-owned.

PPP projects may be structured in very different manners in Germany. For the construction of public buildings (such as hospitals, schools or administrative buildings), the public authorities in most cases want to continue to hold the property rights in the real property and only transfer the right to build and operate or manage a building used for public purposes to a private investor. From a legal perspective, it is also possible that the private investor acquires title to the real property and either has an obligation to re-transfer the real property to the public authority or remains the owner at the end of the fixed term.

Public authorities may also award concessions to private investors. The main difference between a public contract and a concession is the type of consideration granted to the contractor. While the contractor under a public contract usually gets a remuneration, a concession holder obtains a right to use or market the provided service or goods (e.g., market the service to third parties). These types of contracts are predominant, for example, in the transfer and operation of electricity and gas grids in municipalities and cities (see Section 46(2) German Energy Industry Act[4] (EnWG)), with approximately 20,000 agreements in Germany.

Although in recent years some municipalities and cities have shown a tendency to establish or mandate a public entity to operate the electricity and gas grid (re-municipalisation), the law

[3] https://www.bmvi.de/SharedDocs/EN/Articles/StB/ppp-contracts.html
[4] http://extwprlegs1.fao.org/docs/pdf/ger52893.pdf

provides that municipalities may not award concessions in-house without a public procurement procedure (see Section 46(4) EnWG).

In addition, public authorities may establish joint ventures with private partners (sometimes called institutional PPP), for example, in the corporate structure of a limited liability company. Such entities may be used, for example, in the areas of waste management, water supply services and sewage treatment. Alternatively, a public law structure – institution under public law – has been used for such public-private joint ventures (e.g., previously for the operator of Berlin's water supply system, Berliner Wasserbetriebe, until October 2012). This requires, however, an act of parliament that explicitly allows the participation of a private investor.

As a federal state, each of the 16 states further define in their regulation details on the roles of authorities, bidding and award procedures, evaluation and award of contracts. The contracting further details the payment mechanisms, state guarantees, distribution of risks, ownerships of underlying assets, and conditions for early termination.

The legal situation of public services similar to the ones envisaged to be teste by the project:

- In 15 of 16 states (except Bavaria), licensed surveyors are mandated to do the cadastral surveys. Notaries are involved in the legal part of the business authenticating all kinds of contracts associated with buying and selling of land, mortgages etc. Each state has its own licensing law for private licensed surveyors (except Bavaria, which does not have licenced surveyors). The prerequisites for getting a license for one specific state is a university diploma for surveying and an education for becoming a civil servant with a final examination. The German Association of Surveyors defined objectives in it bylaw: to promote the disciplines of geodesy, geoinformation and land management in science, research and practical experience; contribute to the education, further training and professional development of its members, and in this context, to promote national and international co-operation; contribute to legislative proceedings at federal level as far as the concerns of geodesy, geoinformation and land management are affected.
  Other services provided by private agents are:
  - driving schools, are subject of general private entrepreneurship legislation. When applying for certification, the agents need to proof necessary training, experience and material equipment.
  - technical inspection for vehicles is provided independent technical associations (e.g. TÜV - Technischer Überwachungsverein, English: Technical Inspection Association, associations with long history dating back to 1860s. After successive deregulations, they are now private companies formed in several regions of Germany and they compete against each other.

Netherlands

When it comes to involving private partners in delivering public goods and services over the past 20 years, the most used contract form in Netherlands is the design, build, finance and maintain (DBFM) and design, build, finance, maintain and operate (DBFMO) contracts. DBFM(O) contracting modality appeared on the Dutch market in the late 1990s and early 2000s. A first move in this direction was made in 2004 when the Ministry of Finance introduced a policy whereby, subject to the outcome of a public-private comparator, PPP was deemed the preferred option for all projects with a value above certain thresholds (e.g., €60 million for infrastructure projects). However, the enthusiasm in the Netherlands for DBFM as a contract form has started to wane in the last years. Concerns were raised about the lack of flexibility and the division of risks within the standard DBFM contract. The risk division, in particular, increased with the complexity of the projects tendered. When market conditions in the building sector improved, certain large Dutch contractors decided against bidding for new PPP projects and re-focused on the private market, citing risks and costs as the main reasons. In 2020, no DBFM(O) contracts were awarded or even tendered.

The contracts are mostly tendered by central government. At the local government level, one occasionally can find alliance-type contracts, where the decentralised authority and the private agent share most relevant project risks. For smaller projects, other integrated forms of contract (e.g., Design and Contract) are being applied more often.

There is no centralised Dutch PPP authority. In practice, however, the vast majority of PPP projects are tendered by central government, in particular by the agencies Rijkswaterstaat (part of the Ministry of Infrastructure and Water Management) and Rijksvastgoedbedrijf (part of the Ministry of the Interior and Kingdom Relations). Occasionally, the Ministry of Defence acts as the contracting authority in PPP projects. There is no restriction, legal or otherwise, which prohibits local government bodies from entering into PPP contracts, but so far this has rarely happened. Examples of DBFMO projects by decentralised authorities are a new city hall in the municipality of Westland and an international school in the municipality of Eindhoven[5].

There is no comprehensive legislative framework for PPPs in the Netherlands. The use of PPP-similar approaches is policy-based. The current policy of central government with regard to DBFM is that it can be a tool to achieve better quality for less money (value for money). A possible choice for DBFM is made on the basis of a comparison between different contract forms by means of the Public-Private Comparator tool.

[5] https://docplayer.nl/19734052-Pps-campus-internationale-school-eindhoven.html

All Dutch PPP projects tendered by central government are governed by standardised DBFM contracts developed by the responsible Ministries. By 2021, version 5.0 (since June 2018) of these model contract forms applies. Contracting authorities adhere strictly to these standard forms and are unwilling to deviate from these, other than on project-specific matters.

The legal framework broadly follows the EU public procurement directives. It defines the roles the national, regional and local authorities play, the bidding, proposal evaluation and award procedure, the functions of the contract (including payment, state guarantees, distribution of risks, assets ownership, early termination), and foresees financing modalities.

The legal situation of public services similar to the ones envisaged to be teste by the project:

- The Netherlands' Cadastre, Land Registry and Mapping Agency – in short Kadaster – collects and registers administrative and spatial data on property and the rights involved. This also applies for ships, aircraft and telecom networks. They are responsible for national mapping and maintenance of the national reference coordinate system. Kadaster is a non-departmental public body, under the political responsibility of The Ministry of the Interior and Kingdom Relations, and private operators are not involved except through procurement services.
- The car registration is entirely performed by the public authorities (through Netherlands Vehicle Authority – RDW). Some front-office activities (document proofing, pre-registration) are performed by private agents, based on public procurement regulation;
- The public-private and purely private schools in Netherlands are nor established following the PPP or procurement laws, but following education laws specific for each level: Primary education: Primary Education Act (WPO, 1985); (Secondary) special education: Expertise Centres Act (WEC, 1998); Secondary education: Secondary Education Act (WVO, 1998); Higher education: Higher Education and Research Act (WHO).

Portugal

Portugal (who entered the European Union in 1986) stated to employ private partners in providing public goods and services since 1990s. The main sectors benefitting from private involvement were road infrastructure and health sectors. In the health sector, one particularity of Portugal is placing clinical national health service (NHS) hospitals under private management, with an aggressive risk allocation to the private sector.

Existing PPPs have been the subject of public disapproval, given the heavy burden that payments by the state under those projects impose on the national budget. Given the variable performance of the Portuguese economy (especially after the Economic crisis in 2008-19 and the sovereign

debt crisis experienced in 2011), the Government places new emphasis on involving the private sector, and recent changes to the PPP legal framework, carried out in 2019, are a strong indicator of the government's willingness to enhance the adoption of the PPP model.

PPP projects are governed by Decree Law 111/2012 of 23 May 2012 (as amended by Decree Law 170/2019 of 4 December 2019) and by the Public Contracts Code (approved by Decree Law 18/2008 of 29 January 2018, as amended regularly). Both institutional and contractual PPP structures are available in Portugal. However, institutional PPP structures are not commonly used. In fact, the majority of PPP projects closed to date in Portugal are based on project finance contractual structures and typically follow a build-operate-transfer or design-build-finance-operate model.

In the vast majority of the Portuguese PPP transactions closed to date, the concession-based construction contracts used do not follow any standard form, such as those issued by the International Federation of Consulting Engineers, the Joint Contracts Tribunal or the Institution of Civil Engineers. Hence, the form of construction contract used in each case has varied depending on the sector of industry at stake or the sponsors involved.

In relation to the infrastructure projects closed in Portugal in the 1990s and early 2000s, it was generally accepted that, given the need to adapt the legal structure of facility agreements to international syndication, the whole financing package other than the security documents had to be governed by English law, while the project documents, notably the concession contracts, were subject to Portuguese law. That ceased to be the case from the mid-2000s onwards, at which point project financiers active in Portugal had become sufficiently comfortable with Portuguese law and, therefore, most finance documents executed thereafter have been governed by Portuguese law, notwithstanding closely following the structure of a typical English law project finance documentation package.

Until recently, PPP projects in the health sector were governed by a specific legal framework, approved by Decree Law 185/2002 of 20 August 2002, which established rules regarding the development of PPPs for the construction, financing, operation and maintenance of healthcare units forming part of the NHS. An important feature of these PPPs is that they may envisage the private partner not only managing the hospital facilities but also providing clinical services as part of the NHS. When both managing facilities and clinical services provision are foreseen, two separate project companies must be incorporated. In such case, both project companies are bound to comply with their own obligations under a sole concession agreement, and one concessionaire is liable before the other provided that non-compliance with its own obligations may give cause to the other concessionaire's infringement under the concession agreement.

Health sector concession agreements set out different contractual periods for each concessionaire (10 years for clinical services providers – which may be extended for additional

10-year periods up to a maximum of 30 years – and 30 years for concessionaires responsible for the design, construction and operation of hospital buildings).

Law 95/2019 of 4 September 2019, which approved a new Health Basic Law and established the revocation of Decree Law 185/2002 of 20 August 2002, was further regulated by Decree Law 23/2020 of 22 May 2020, which sets out that the creation of new PPP projects in the health sector may only occur on a temporary and supplementary basis and depends on the existence of a justified necessity for the creation of such PPP project (that necessity having to be demonstrated by a study elaborated by the Health System Central Administration and approved by the government member responsible for the health sector). Additionally, the Decree also established the main guiding principles for entities responsible for the management of health-related facilities that are the object of a PPP contract.

The Laws further detail the roles played by the authorities, bidding and award procedures, the contract provisions (including payments, state guarantees, risk distribution, adjustments and revisions, ownership of underlying assets, and conditions for early termination.

Spain

In Spain, PPP is not a legal concept strictly speaking. It is regarded as a type of public policy or management method that implies cooperation between a public body and a private partner. These types of contracts were governed by the Spanish Public Procurement Law in force until 9 March 2018 (Royal Legislative Decree 3/2011 of 14 November, approving the Consolidated Public Sector Contracts Law), and defined three types of cooperation forms: public works concession contracts; public service management contracts; and partnership agreements between the public and the private sector. Only the first two types of partnerships are widely used in Spain.

Public Works concessions: are designed under Spanish law as a contract where the concessionaire develops a public good or service delivery project and is indemnified for it through the right to operate the project (by collecting a fee or toll from users), at its own risk, during the term of the concession. It is the most commonly used in practice for new projects like: projects where the private entity is involved in the design of the intervention; projects in which the private entity only administers the public facility for the public partners, which – in turn – provides the services to the citizens; projects in which the contractor is not remunerated directly by users, but by the public entity. The remuneration is either based on the number of users using the infrastructure (payment for demand), or on the duration under which the facility is made available to the public authority (payment for availability).

Among the specifics of this type of contract modality is that the concessionaire may also be in charge of preparing the relevant project on the basis of the preliminary plan or study approved by the contracting government department. The intention of the public works concession contract includes not only the construction of new infrastructure, but also the renovation and repair of existing constructions, as well as the preservation and maintenance of the constructed elements. Thus, this contract can cover not only new infrastructures but also the operation of existing ones that require a significant investment with regard to renovation or maintenance.

Public service management contracts: The public service management contract is an agreement under which the public entity entrusts a third party to manage a public service on its behalf. The standard public service management contracts are under revision, but currently still classified as follows:

- Public service management concession. A contract under which the public authority – responsible for a public service – awards the management of such service to a private entity to operate it at its own risk. The private entity may be paid by the users, the public entity or both;
- Special agreement. This is another subcategory of the public service management contract. It is characterised by the fact that the public entity awards the management of the service to an individual or legal entity that already provides similar services to the relevant public service. It is common in the education and health sectors.
- Public service management by a semi-public company. The semi-public company is a type of institutionalised PPP under which a company is incorporated through a contract between private and public capital, to then become a public contractor with the characteristic rights and obligations of a concessionaire. Semi-public companies have a long tradition under Spanish law in managing local public services.
- Besides these two widely used contracting modalities, the Law recently created a new modality, in the light of recovering the economy post Covid-19. The modality is named Strategic Projects for Economic Transformation and Recovery (PERTEs). The rules governing PERTEs are in Chapter III of Title II of Royal Decree-Law 36/2020, of December 30, 2020, published in the Official State Gazette (BOE) on December 31, 2020, which defines them as a new public-private partnership device. They are created as a permanent feature for the express purpose of achieving an expedient public-private partnership device. The new implementing regulations are in drafting stage by the end of 2021, and will be accompanied by the future Order by the Finance Minister and the other ministerial orders contemplated in the Royal Decree-Law.

The concessions are governed by an old law, 13/2003 revised subsequently in Law 30/2007 and Law 2/2011, and parts of its provisions were again updated in the Public Procurement Law 9/2017. Accordingly, it introduces new services concession contract into the national legislation,

whereby the concession contract is subdivided into two types of contracts: (1) works concession contracts, and (2) services concession contracts. The common characteristic of these two forms is the need to transfer the operational risk to the concessionaire.

The most relevant new features introduced for the two concession contracts are:

Works concession contract: The content of the feasibility study is extended to include issues such as the need to justify the impact of the concession on budgetary stability or the existence of possible State Aid and its compatibility with the Treaty on the Functioning of the European Union.

With regard to the effects of the termination of the concession contract for reasons attributable to the public sector, although the administration still needs to pay the concessionaire the amount of the investments made in connection with the expropriation of land, the execution of construction works and the acquisition of assets necessary for the operation of the works covered by the concession, taking into account the rate of depreciation, the period for determining the straight-line method of depreciation is reduced from 6 to 3 months.

Service concessions contracts: a maximum term of forty years is established for services concession contracts involving the execution of works and the operation of services, as opposed to the maximum of fifty years established in the previous regulation.

The legal framework also defines the roles the national, regional and local authorities play, the bidding and award procedure, the functions of the contract (including payment, state guarantees, risk management and distribution, assets ownership), and foresees financing modalities.

The legal situation of public services similar to the ones envisaged to be tested by the project:

- The Property Cadastre is an administrative register under the Ministry of Finance. The Directorate General for Cadastre is, within the State Secretariat for Finance, the managing body in charge of the creation and maintenance of the Property Cadastre, as well as for the dissemination of cadastral information. These tasks are to be carried out directly or through the different partnership agreements established with public administrations, institutions and corporations. The Directorate General for Cadastre carries out these tasks through the Central Services and Territorial Services, the latter constituted by Regional and Territorial Management Boards. There also are 3,500 Cadastral Information Points (PIC, by its Spanish acronym), mainly located in municipalities and Provincial Councils spread throughout the national territory, where information, certificates and other cadastral services can be obtained. Cadastral Electronic Site started up in May 2003 with the main goal of providing other Administrations with information which, up to that moment, citizens were requested to present in the suitable office after collecting it themselves from the cadastral office. While this is also a public service entirely, some

services are provided (mainly IT-related services) through public procurement. For example, the private company Seresco[6] performs services of maintenance and updating tasks on Cadaster Databases.

An example of project implemented with private involvement in the health sector is the health services provided in autonomous community of Valencia, known as the Alzira model, which was implemented through administrative concession since 1999. The termination of the Alzira model in 2018 led to further regulatory changes enacted in the Law for Health 8/2018, which clearly states that public provision is the preferred model of service delivery and new (tighter) requirements are defined for any future PPPs aiming to settle in the autonomous community of Valencia.

A special note, regardless is to be made regarding the services of metering and billing. In the European Union, they are regulated by the Energy Efficiency Directive 2012/27/EU (gradually adopted by all member states. The Directive regulates aspects related to electricity, hot water and gas delivery to end consumers. Articles 9, 10 and 11 and Annex VII of the Directive cover specifically the metering and billing principles, remote reading, etc. The requirements apparently foresee quality and technological provisions that entail high investments, limiting the attractivity for the private agents to get involved. The state-owned energetical infrastructure are better suited to provide integrated services, that compensate the high services costs and maintenances with the gains in producing and distributing energy.

Conclusions and Recommendations

The definition of PPPs and other contracting modalities where a public institution partners with a private actor to deliver public goods or services is not clear and straightforward in the studied countries. The legal framework doesn't make a clear distinction among the modalities, and provisions are scattered across several pieces of law. Most commonly, the definitions and regulations are made under Procurement Laws, and – as the studied countries are member of the European Union – are following EU directives.

In France, legal references on public procurement agreements (including partnership contracts) and concession agreements were scattered throughout several laws and regulation. Only in 2018, the new PPP Code was enacted, compellingly regulating two main forms of involving contractually the private sector in delivering public goods and services: concession agreements and partnership contracts. The main difference between the two forms lays in the payment terms to the private operator.

[6] https://www.seresco.com/cartografhy/cadastre-services

In Germany, the situation is complicated by its statute as a Federal State, whereas each of the 16 composing states – run by its own parliament and government – steers often different laws. Only recently (2017, references to PPP and similar contracting modalities are made in the Federal Constitution, which in turn, generated references into the German Federal Code on Capital Investments e.g., Sections 1(19), (28). Besides the main infrastructure projects, the rest of activities performed by private operators delivering public goods and services are regulated by public procurement or commercial laws.

In Netherlands, the preferred contracting modality involving public and private partners is the design, build, finance and maintain (DBFM). There is no comprehensive legislative framework for PPPs in the Netherlands, and the use of PPP-similar approaches is policy-based. All Dutch PPP projects tendered by central government are governed by standardised DBFM contracts developed by the responsible Ministries.

Portugal has a long history in involving private initiative in delivering public services, and presents several peculiarities. One particularity of Portugal is placing clinical national health service (NHS) hospitals under private management, with an aggressive risk allocation to the private sector. Another one was the hybrid legal usage in contracting until mid-2000s; given the need to adapt the legal structure of facility agreements to international syndication, the whole financing package had to be governed by English law, while the project documents, notably the concession contracts, were subject to Portuguese law. This approach changed, and given the renewed interest in this contracting modality, recent changes to the PPP legal framework carried out in 2019 are a strong indicator of the government's willingness to enhance the adoption of the PPP model.

In Spain, PPP is not a legal concept strictly speaking. It is regarded as a type of public policy or management method that implies cooperation between a public body and a private partner. After 20 years of using the old legal framework, following EU directives on public procurement, Spain has recently modernized its Public Procurement Law in 2017. Since then, the focus is set on concessions modality, with works concession and service concession contracts, with differences in re-payment, risk-management or contract duration among them.

In the context of opening the public functions market for private actors, and in the process of adapting the legislation to the latest needs, the Uzbek Government should carefully analyse and reconsider legal provisions in order to facilitate and stimulate the involvement of the private agents in delivering public goods and services.

Through the Law No. 669 (January 2021), the Government of Uzbekistan addressed several gaps existing in the Law No. 537 "On Public-Private Partnership" adopted on May 10, 2019 (the PPP Law), in order to make the legal framework even more attractive to private investment. It

improves regulation on 12 topics, among which introduced the definition of “project company”, regulates the concessions, public information on PPPs, empowers the local executive bodies with enhanced roles, and other.

Further, the Government should foresee detailed provisions across sectors of interest, mainly the reform of the public services provided by the Ministry of Justice through the Public Services Agency.

When it comes to the list of public services envisaged by the Ministry of Justice through the Public Services Agency, some of them are already established and successful (private notary, private or public-private partnerships kindergarten and schools) and can be rolled out at national level.

Other services will genuinely be tested as pilot initiatives, as not many countries (if any) attempted this. Cadastral services in European Union continue to be provided by the public authorities, as they handle sensitive information and processes related to property.

Following EU Directives for energy efficiency, the energy market deregulation came with stricter requirements for the operators. They need to invest in modern equipment and certifications, creating relatively high entry barriers for connected services such as checking metering systems. They are usually integrated in the energy supply-chain, and the costs are covered from the profits in generating energy.

The health services bring a mixed story of success and failures. They reflect the complexities of each national systems they serve, and the replicability is limited across countries. The pilot initiatives should test the applicability and feasibility on a case-by-case scenario, learn from the pilot projects and then refine the legal framework adapted for the particularities of the Uzbek society.