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Structuring of Special Purpose Vehicle (SPV) Within the Scope of Public-Private Partnerships (PPPs) Under Latvian and Turkish Law

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STRUCTURING OF SPECIAL PURPOSE VEHICLE (SPV) WITHIN THE SCOPE OF PUBLIC-PRIVATE PARTNERSHIPS (PPPs) UNDER LATVIAN AND TURKISH LAW

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Abstract. The establishment of a specific project company most commonly known as a Special Purpose/Project Vehicle (SPV) is a key feature of most PPP transactions in Turkey. According to the competent authority, the SPV is considered to fall under the definition of a Securitisation Special Purpose Vehicle (SSPE) then it should not be considered a financial sector entity. In order to meet the increasing infrastructure needs of Turkey, it is generally accepted necessary to utilise alternative financing models to be provided with the participation of the private sector in addition to the use of public resources. In this framework, PPPs model, which has been widely used in realisation of infrastructure investments in developed and developing countries in recent years, is also applied in Turkey. PPPs model takes its legal root from art.47 of Turkish Constitution no.2709 and various legal regulations for PPPs have been adopted since 1980s. The private sector, which is one of the contracting party of the PPP model and entitled to participate as a tenderer in the tender in Turkey, is usually a business partnership which is legally evaluated as ordinary partnership. In Latvia an institutional PPP can be chosen in a case if the public partner wishes to have a stronger control over the execution of the PPP contract and participate in the administration of the established capital company, since both a public partner and a private partner jointly participate in the administration of an established joint venture. PPP risks, income and losses usually are shared in proportion to the shares of a public partner and a private partner that they have in a joint venture.However capital companies also bid for the tender opened by the contracting public authority according to the relevant laws. If the tender is awarded to a business partnership or a capital company according to the relevant law, the documents regarding the establishment of the special purpose vehicle shall be requested. Generally the SPV structured as a joint stock company. SPV is a feasible and an effective option for the lenders and financiers, who take into account the cash flow of the project and security over its assets for the repayments of the debts.

Keywords: Turkey Latvia SPV

A. Legal Development of PPPs under Turkish Law

Public-private partnerships, which aim to provide certain public services, particularly infrastructure services that require advanced technology and high capital, jointly by both sectors through the joint use of the facilities and resources of the public administrations and the private sector, involves the joint undertaking by the public sector and private sector organisations of functions such as construction, renovation, operation, management, financing, supervision and control needed for the provision of a specific public service under a long term contract.(Emek,2009; Gözler&Kaplan,2012; Parlak et al.,2020; Yılmaz,2021) With governments bringing the private sector expertise and profit-oriented approach to public service delivery projects through PPPs, collaborative models between the public and private sectors have attracted a great deal of attention in the last four decades and have been widely used in infrastructure and also other public services such as transportation, water and sewerage, energy, environmental protection, public health.(Ayanoğlu,2021) From this perspective we may easily assume that PPPs are based on two main needs: private financing to overcome budgetary constraints in the organization of public services, and leveraging the operational capacity and techniques of the private sector.(Yalçın,2014)

In order to meet the increasing infrastructure needs of Turkey, it is thought necessary to utilise alternative financing models to be provided with the participation of the private sector in addition to the use of public resources. In this framework, PPPs model, which has been widely used in realisation of infrastructure investments in developed and developing countries in recent years, is also applied in Turkey. In many areas of public services in Turkey, such as health, transportation, energy and education, it has been stated by the administration authorities that the use of public-private partnerships will have positive effects on public borrowing and taxes, that projects will be completed through public-private partnerships, and that policies to support PPPs are among the priority agenda items of governments. (Yalçın,2016)

PPPs model takes its legal root from art.47 of Turkish Constitution no.2709. This article of Constitution indicates that Turkish law and legal regulations shall determine which of the investments and services carried out

by the Turkish State and state economic enterprises and other public legal entities may be outsourced or transferred to real persons or legal entities under private law contracts. While the preliminary studies of PPP investments projected in Turkey were first carried out by the State Planning Organisation and then by the institutions reorganised under the name of the Ministry of Development, as of 2018, these duties and responsibilities are carried out by the Presidency of the Republic of Turkey Strategy and Budget Directorate (CSBB). According to the "Public-Private Partnership Report 2019" prepared by CSBB, a total of 243 projects with an investment amount of 63.8 billion dollars were implemented under the public-private partnership model in Turkey between 1986 and 2019, and the total contract value of the projects was determined as approximately 140 billion dollars (Bayansar&Özer, 2021).

Effective identification and contractualisation of risks and mutual obligations are critical for the success of PPP projects. Another factor that will increase success and motivation is the setting of performance targets, ensuring that the private sector organisation bears the consequences of failures and is rewarded for high performance. Various methods are used in the realisation of public-private partnerships. The most common of these methods are Concession Right Transfer (CRT), Build-Transfer (BTR), Build-Operate-Operate (BOO), Build-Operate-Transfer (BOT), Build-Improve-Operate-Transfer (BID), Build-Lease-Operate-Transfer (BOT), Build-Lease-Transfer (BTL), Build-Own-Operate-Operate (BOT) and Build-Own-Transfer (BOT). Unlike privatisation, in this model, the state does not completely transfer the production of public goods and services to the private sector, but as the owner and main actor in the process, it determines the definition, content and scope of public service and assumes the responsibility of supervision and control. (Köse, 2018)

In Turkey various legal regulations for PPPs have been adopted since 1980s. These are can be summarised as follows:

Law No. 3096 dated 4.12.1984 on the Assignment of Entities other than the Turkish Electricity Authority with Electricity Generation, Transmission, Distribution and Trade was the first legal arrangement regarding the Build-Operate-Transfer model and the Transfer of Operating Rights Model in the energy sector. (Şirin, 2017)

Following the Law No. 3096, the Law No. 3465 dated 28.5.1988 on the Assignment of Entities other than the General Directorate of Highways with the Construction, Maintenance and Operation of Access Controlled Highways (Motorways), which regulates the assignment of capital companies subject to the provisions of private law for the construction, maintenance and operation of motorways and the service facilities there on according to the BOT model, entered into force upon publication in the Turkish Official Gazette dated 2.6.1988 and numbered 19830.

In order to provide a legal basis for the BOT model, Law No. 3996 on BOT of Certain Investments and Services The Law on the Realisation of Electricity Generation Facilities within the framework of the Build -Operate model was published in the Turkish Official Gazette dated 13.6.1994 and numbered 21959 and put into force.

In the energy sector, the BO model was regulated by the Council of Ministers Decree No. 96/8269 on the Establishment of Electricity Generation Facilities published in the Official Gazette dated 8.6.1996 and numbered 22660.

Law No. 4283 on the Establishment and Operation of Electric Energy Generation Facilities with Build - Operate Model and Regulation of Energy Sales was published in the Turkish Official Gazette dated 19.7.1997 and numbered 23054. Law No. 4283 excludes hydroelectric, geothermal, nuclear power plants and power plants to be operated with other renewable energy resources, and regulates the principles and procedures regarding the granting of permission to establish and operate facilities and the sale of energy to the production companies under the Build-Operate Model for only thermal power plants.

Within the framework of Telegraph and Telephone Law No. 406 and Wireless Law No. 2813, the contract between the ministry and the operator for the execution of telecommunication services and/or operation of the infrastructure is considered as a concession. Law No. 3974 dated 2.2.1994, which entered into force upon its publication in the Turkish Official Gazette dated 1.3.1994 and numbered 21864, and which added 5 additional articles to the Privatisation Law No. 3291, regulated the privatisation of the Turkish Electricity Corporation by selling its shares and assets (additional articles 1-4) and that the contracts to be concluded on the basis of this Law or for the private sector to establish and operate new energy generation, transmission and distribution facilities or to take over the operating rights of the existing ones shall be subject to "private law provisions" and shall not be considered as "concession contracts".

Article 18 of the Law on Privatisation Practices dated 24.11.1994 and numbered 4046, which lists the privatisation methods, regulates the granting of operating rights. By Law No. 4446 dated 13.8.1999 amending the 1982 Turkish Constitution, two paragraphs added to Article 47 of the Constitution stipulate that, on the one hand, the principles and procedures regarding the privatisation of enterprises and assets owned by public legal entities shall be determined by law, and on the other hand, the law shall determine which of the investments and services carried out by public legal entities may be made or transferred to real or legal entities through private law contracts. On the other hand, with the provision added to the first paragraph of Article 125 of the Constitution, it has been determined that disputes arising from public service concession agreements and contracts may be resolved through

national and international arbitration. With the amendment made to the second paragraph of Article 155 of the Constitution, the power of the Council of State to review concession agreements and contracts has been transformed into the power to express an opinion. After the Constitutional Amendment in 1999 with this Law, it has been made possible for the administrative authorities to delegate the public services via contracts which actually have private law nature under Turkish law. (Bayazıt&Alper,2017)

Within the framework of the laws harmonising with the Turkish Constitution, the Law No. 4501 dated 21.1.2001 on the Principles to be Observed in the Event of Arbitration in Disputes Arising from Concession Agreements and Contracts Related to Public Services entered into force. On the other hand, necessary amendments were made to the Law No. 2575 on Council of State and the Law No. 2577 on Administrative Procedure regarding public service concessions.

Article 33 of the Law No. 5335 dated 21.4.2005 on Amendments to Certain Laws and Decree Laws stipulates that the General Directorate of State Airports Authority may transfer the airports it operates and the terminals and other necessary facilities built and operated by it within the framework of the BOT model to the private sector to private law legal entities through tenders for a period not exceeding 49 years by using the leasing and/or granting of operating rights methods specified in the Law No. 4046 on the Regulation of Privatisation Practices.

Law No. 5396 of 2005 on the Addition of an Additional Article to the Basic Law on Health Services stipulates that health facilities, which are deemed necessary by the High Planning Council, may be constructed by the Ministry of Health within the framework of the preliminary project and basic standards to be determined, on immovable properties owned by the Ministry of Health or the Treasury, in return for lease to real or private legal entities to be determined by tender, for a certain period of time and at a price not exceeding 49 years. Two amendments were made to the Regulation on the Construction of Health Facilities in Return for Lease and the Renovation of Health Facilities in Return for the Operation of Services and Areas other than Medical Service Areas in the Facilities. With the first amendment, 13 articles of the first Regulation published in 2006 were amended and a provisional article was added. Accordingly, it is seen that some amendments and additions have been made on various issues such as the purpose of the Regulation, contract and right of override agreement, financial criteria for tenderers, joint venture and special purpose company, rent and rent increases. The second amendment was made by the Council of Ministers Decree No. 2011/2011 published in the Turkish Official Gazette No. 27981 in 2011.

Finally Law No. 6428 dated 21.02.2013 on the Construction, Renovation and Procurement of Facilities and Services by the Ministry of Health through the Public Private Partnership Model and Amendments to Certain Laws and Decrees with the Force of Law is put into force. The purpose of this law is to determine the procedures and principles regarding the construction of the facilities needed to be constructed by the Turkish Ministry of Health and its affiliated institutions within the framework of the public-private partnership model according to the provisions of private law by tender and private law, within the framework of the preliminary project, pre-feasibility report and basic standards to be determined, by establishing an independent and permanent right of superficies on the immovable properties owned privately by the Turkish Treasury for a period not exceeding thirty years, excluding the fixed investment period specified in the contract, to ensure the renovation of existing facilities, and to provide consultancy, research and development services to be received for these projects and some services requiring advanced technology or high financial resources.

The legal regulations that they have been prepared for certain sectors and projects, the distribution of PPPs across sectors have been limited to large-scale projects concentrated in the energy, transportation and health sectors (Uysal, 2018; Bayansar&Özer,2021) and there is no general framework and law for PPPs. (Kalender İlhan,2011; Bayazıt,2020) It is of great importance that the legal infrastructure for the public private partnership model is formed in the best way. Considering the world practices, it is considered that a single framework law would be appropriate. (Şirin, 2017) The PPP process has a structure that may impose a high financial burden on the public sector for many years and needs to be properly designed and managed. Therefore, it is important to improve the institutional capacities of public institutions based on expertise in project planning and management processes in the field of PPPs. Some of the problems encountered in PPP implementations are based on the lack of an adequate and appropriate legal framework and the disorganisation of the existing legislation. The fact that the regulations in various laws are under some conditions not compatible with each other and this makes it difficult to design and execute the implementation in a standardised structure to a certain extent. Besides the scattered regulations in different laws carry the risk of causing non-standard practices and legal disputes, especially in cases of overlap and contradiction. In order to solve such problems, there is a need for a framework law and standardised regulations for PPP applications. With the implementation of the relevant regulations, the effectiveness of both implementation processes and control and audit activities will increase. (Köse, 2018; Keçeligil, 2018) However *Şirin* argues that it would be a much more practical solution to overhaul the Law No. 3996 in this sense instead of making a completely new law. Although Law No. 3996 regulates only the build-operate-transfer-operate model and determines that only "some" investments and services can be made within the framework of this model, it is successful in terms of its basic operational fiction and systematics. Therefore, it would be an appropriate solution

to make this Law more comprehensive to cover other models and all investment areas. While doing this, of course, the order of priority among the projects where these models can be implemented should be determined, and it should also be taken into consideration which ones may be attractive for the private sector and under which conditions. On the other hand, the lack of political, economic and to a certain extent legal infrastructure, as well as mistakes made in contract design and the lack of a balanced risk distribution between the public and private sectors may cause some negative effects in terms of public and private sector co-operation and may prevent the design and implementation of the models from being sufficiently successful. (Şirin, 2017)

B. **Legal Development of PPPs under Latvian Law**

Latvian government also is interested in implementing PPP projects. Overall PPP projects worldwide have been both positive and negative results, which makes us cautious in assessing risks and value for money. As PPPs PPP projects involve large investments and long it is imprudent to rely solely on luck.

PPP projects involve increased risk, are legally complex, have a long execution period, are subject to many different factors to calculate and take into account when choosing PPP investments. Taking into account global trends and available information in Latvia, there are the demand for PPPs as a solution to finance significant public sector investments, will increase, and therefore a key issue is the appropriate assessment, quantification and transparency of risks ensuring. (Brezaucka I 2018)

By Latvian PPP law section 7 Selection of Institutional Partnership A joint venture may be established for the performance of a public-private partnership contract if the public partner wishes to exercise reinforced control of the performance of the public-private partnership contract and to take part in the management of the capital company, and conforms to the following provisions:

according to the State Administration Structure Law the commercial activity which will be performed by the joint venture according to the public-private partnership contract may be performed by the public partner as well; b) the joint venture will carry out some administration task assigned to the public partner according to the laws and regulations or the procedures laid down in the State Administration Structure Law if it conforms to the delegation provisions.

The public partner which wishes to establish a joint venture for the performance of a public-private partnership contract shall specify it in the decision on initiation of the public-private procedure (Section 16, Paragraph six PPP law Latvia). If a joint venture is established, the private partner in co-operation with the public partner as the shareholder of the joint venture shall manage the joint venture so that the joint venture as a private partner would ensure the performance of the public-private partnership contract.

In general, directors' liability is limited to cases where a managing director can be made a sufficiently serious personal reprimand. Recent case law shows that directors' liability can also occur in transactions where "empty" special purpose vehicles ("SPVs") are used. (van Amersfoort Ch.,2017)

Very importans is Statistical (Eurostat) accounting and management of fiscal risks of PPPs

It is often argued that the statistical accounting rules for PPP projects (often used as "Eurostat laws") are a barrier to PPP projects because they make it difficult to classify them outside the government balance sheet according to the Maastricht criteria. An excessive focus on off-balance-sheet accounting may adversely affect the preparation of a sound project and may encourage procurement authorities to create PPPs where they are not needed.(EIB 2016)

PPPs create an "illusion of affordability" (due to deferral and splitting of public sector payments over a period of time), which is amplified/exacerbated by being off-balance sheet. When a project is off-balance sheet, there is a risk that the resulting fiscal liabilities are not properly managed.

C. Structuring of SPV within the Scope of PPPs under Turkish Law

The private sector, which is one of the contracting party of the PPP model and entitled to participate as a tenderer in the tender, is usually a business partnership which is legally evaluated as ordinary partnership. However capital companies also bid for the tender opened by the contracting public authority according to the relevant laws.

Ordinary partnerships are regulated under Turkish Code of Obligations between art.620-644. Article 620 of TCO defines the ordinary partnership as a contract in which two or more real or legal persons undertake to bring their labor and property to achieve a common purpose. The real or legal persons forming the business partnership are jointly and severally responsible for the fulfilment of the commitment of the ordinary partnership. For the PPPs these private sector business partnerships mostly consist of many parties such as design engineers, construction companies, lawyers, bankers, insurance companies, expert managers, consultancy companies, companies providing production inputs, marketers, organisations purchasing the product, etc. (Bayansar&Özer, 2021)

At the tender stage, a Declaration of Business Partnership shall be requested from the business partnerships regarding their partnership. If the tender is awarded to a business partnership the documents regarding the establishment of the special purpose vehicle shall be requested.

Generally the SPV is formed as a joint stock company. According to Law No. 5396 establishment of the SPV as a joint stock company is a compulsory condition. Special purpose company is defined in art.1/2(o) of this Law and it defines special purpose company as a joint stock company established by the contractor who is a party to the contract to be signed with the contracting authority as a result of the tender, whose field of activity is limited to the subject of the contract. Besides due to the art.12 of Implementation Regulation on The Construction, Renovation and Service Procurement of Facilities by The Ministry of Health Through Public-Private Partnership Model, after the tender for construction works is finalised, a separate and new special purpose joint stock company must be established by the contractors before the contract is signed. In the articles of association of this company, the facility project to be realised and the works to be performed within this scope shall be specified as the field of activity. Before signing the contract after the tender decision, the notarised articles of association of the special purpose company, the copy of the Turkish Trade Registry Gazette in which the articles of association is published, the necessary documents regarding the establishment of tax and social security liabilities, notarised signature circulars showing the person or persons authorised to sign the contract on behalf of the special purpose company must be submitted. The rights and responsibilities belong to the tenderer on whom the tender is made until the special purpose company is established, and to the special purpose company after the special purpose company is established. Law no.3096,3996 and 4283 regulates that the tenderer shall be capital companies.

Joint stock companies are commercial and also capital companies that are regulated under Turkish Commercial Code no.6102. According to the art.329 of this Code, a joint stock company is a company whose capital is fixed and divided into shares, and which is liable for its debts only with its assets. The shareholders are liable only for the capital shares they have subscribed and against the company. Besides according to the articles 330 and 330 of the Code, joint stock companies may be established for any economic purpose and subject not prohibited by law. The articles of association must include the subject of the company's business, with its essential points specified and defined. In PPP agreements the subject and field of activity are limited to the subject of the contract.

The SPV structure is finalised after the tender is concluded. After SPV obtains legal capacity to act, it starts its operations by signing the contract with the contracting authority. Here the contract shall be subject to the provisions of private law and its duration shall be determined by the administration, depending on the relevant law and the characteristics of the facility. The contract and its annexes concluded between the contractor and the administration in accordance with the provisions of private law for public services between the special purpose vehicle and the administration within the framework of the related law and for the performance of some services requiring advanced technology or high financial resources and the contractor is tenderer and the SPV on whom the tender is made and the contract is signed. The responsibility, legal rights and obligations of the SPVs are determined by and derived from the PPP agreement.

D. Legal design for SPV and risk management

Legal design is the application of human-centered design to the world of law, to make legal systems and services more human-centered, usable, and satisfying.

Figure 1. Legal design for SPV for Users centred (https://lawbydesign.co/legal-design/)

Legal capacity is water, legal traditions of company law in each state.
Interest for profit is fire elements or innovation , new products high standarts new hot trends for management efficacy. Allocating risks in PPPs, however, is inherently challenging. Risk transfer to the private sector comes at a price, and transferring risks that the public agency is better able to manage is likely to erode value for money VFM. (Hovy P 2015).
Disign of SPV, or new version design thinking through design of company law.
Psychologically, it is quite unreasonable to postulate that matter is composed of more than a hundred elements of SPV. The easiest way to speculate about the composition of matter is to begin with four elements. Our perception is not prepared to deal with hundreds of elements at once – therefore, we need mathematics. The concept of the chemical element has evolved from the simplest (one, four...) to the more complex (more than a hundred) by combining new experiments with new theories. Even considering the epistemological rupture of the four elements with the modern chemical element, we might say that the theory of four elements was important to ancient chemistry and gave us fundamental concepts like combination, proportion and balance.

Figure 2
Four elements of SPV for monitoring risks and interests

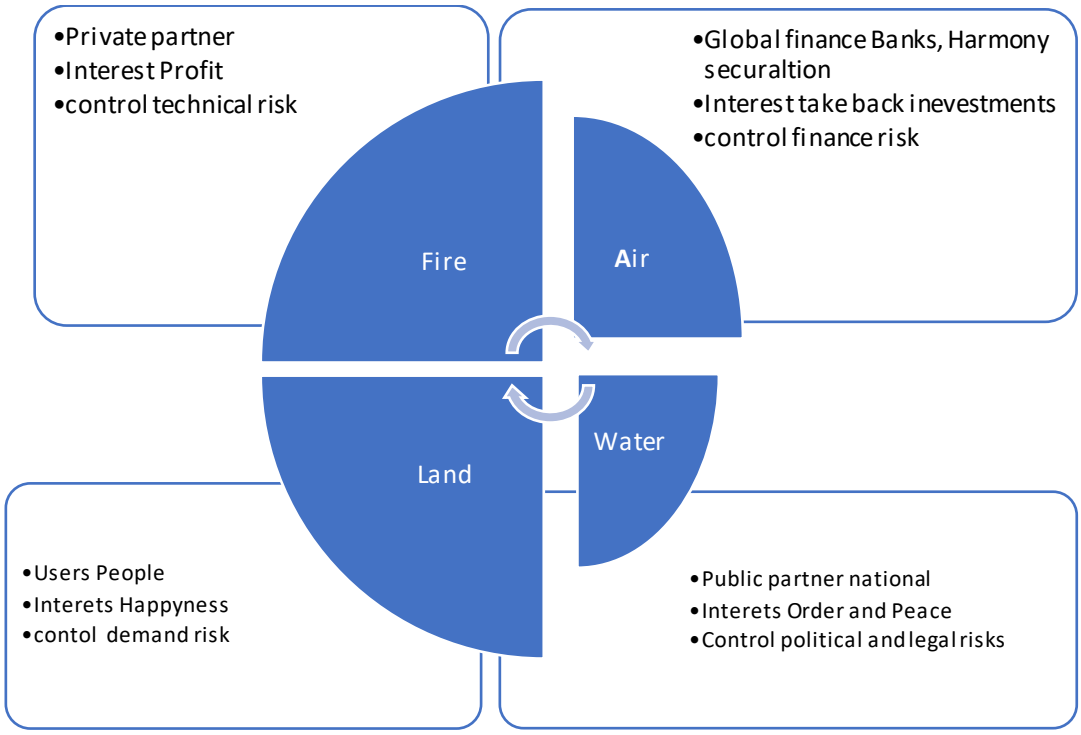
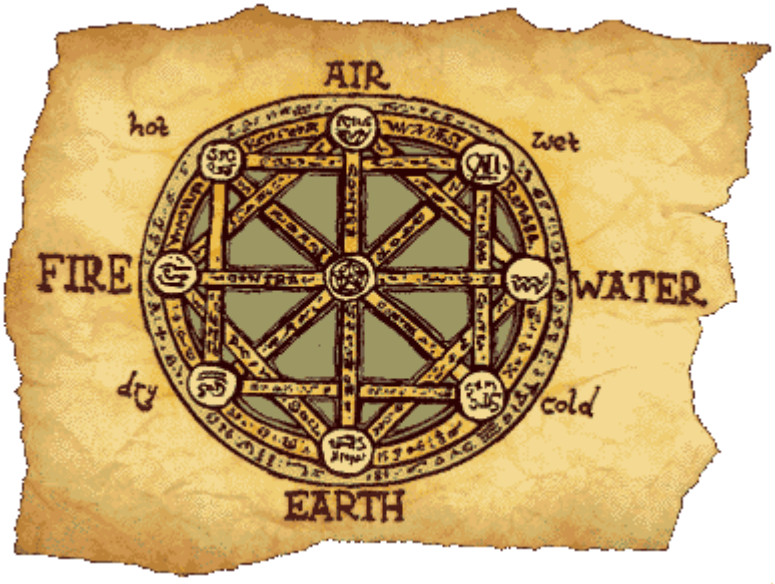


Figure 3. Aristotle



Aristotle classified the elements on whether they were hot or cold and whether they were wet or dry.

- Fire and earth were dry. (Technical risks)
- Air and water were wet. (Political and legal risks)
- Fire and air were hot. (Financial risks)
- Earth and water were cold. (Demand risks)

Latvian law in context of EU framework

Implications for EU Grant Co-Financing European Union grant funding is, in principle, available for DBO projects in sectors eligible forinfrastructure financing.

The European Union encourages contracting authorities to consider the relative benefits of structuring projects as DBOs using EU grant financing when they undertake an options study of all of the different potential contracting structures open to them. EU grant financing is a straightforward and transparent form of funding, which can help to make projects feasible. It is eminently suitable for DBO projects. While section 4 highlighted issues to be taken into consideration by contracting authorities in the structuring of a DBO, this section looks at key issues authorities need to bear in mind when considering applying for EU grant funding. The section does not purport to give detailed instructions on the application process - we recommend that contracting authorities refer to EU and national guidelines in order to understand in detail how to apply for grants. Key consideration Contracting authorities should be aware of the following considerations and take them into account in their planning:

1. Preparation of grant application: The contracting authority will be responsible for preparing the grant application and will therefore need to plan for the time required in its resourcing of its tender procedures.
2. Combining of EU grants with other forms of public financing: EU grants can be combined with other forms of public financing, e.g. national or local funds which might be available to finance infrastructure or public service projects. Financial modelling and options appraisal will be required to evaluate the different options available and to help the contracting authority to make a decision as to the best route.(Jaspers 2010)

Monitoring and evaluation of PPP SPV in EU

The joint undertakings are continuously monitored to ensure the greatest impact, their scientific excellence and the most effective and efficient use of resources. Results will be fed back to the Horizon Europe project.

Positive example is an agreement to construct the Ķekava bypass in Latvia gave the start to the first major industrial public-private partnership project in the Baltics. This bypass will improve the connectivity between the Baltic countries and the rest of Europe while diverting transit traffic away from densely populated areas. According to the Chairman of the Latvian State Roads (LSR) Mārtiņš Lazdovskis, the project is a breakthrough not only for the road network, but also for boosting other large infrastructure developments in the region.

A public-private partnership (PPP) involves the public sector contracting private partners to deliver a public sector project or service. The key contrast between PPPs and public procurement is that in the former returns are linked to service outcomes and performance of the asset over the lifespan of the contract. The private service provider is not only responsible for financing and building the infrastructure, but also for the quality and efficiency of the operation for several years thereafter. In the case of the Ķekava bypass, the construction and maintenance will be implemented by an international consortium, AS "Ķekava ABT". The project is co-financed by a long-term EUR 61.1 million loan from NIB, and an equivalent amount from the European Investment Bank. (Lazdovskis M. 2021)

It is important to set procedures for the cooperation and exchange of information between supervisory authorities, where the special purpose vehicle is established in a Member State which is not the Member State where the insurance or reinsurance undertaking, from which it assumes risk, is established. The cooperation and exchange of information between those supervisory authorities is particularly important during the process of the supervisory approval of the special purpose vehicle. Also, if there are material changes that potentially affect the special purpose vehicle's compliance with the requirements of Article 211 of Directive 2009/138/EC and when the authorisation is withdrawn or lapses, the cooperation and exchange of information between those supervisory authorities is necessary to ensure effective and efficient supervision. (Regulations 2015/462)

Demand risk of end users for SPV PPP Problems of production, access, and control of information will be at the heart of moral challenges surrounding the use of smart contracts. Scientific sources are of the opinion that, of course, moral values are more important. However, in life, everything happens the other way around. We strive to possess material values, often sacrificing non-material ones. The aim of article is to prepare guidelines for smart contracts and moral values in public private partnership. In 2021 we live in a consumer society in which material values are paramount. We live in a world whose values are determined by fashion and advertising. And no matter what arguments you give, you will have to come to terms with the fact that this is so. Smart technologies for public private partnerships are being increasingly applied to all types of service delivery, but they are becoming particularly relevant to urban development and moral values (Ozolins Kisnica 2021)

The main responsibilities of the SPV are as follows:

1. Construction works

Construction works are the design, construction, renovation and other forms of works necessary for the provision of the service subject to the project. In contracts where there is a construction element, the design and construction of this construction may be a contractual obligation, as well as the maintenance, repair and renovation of this structure in a way to ensure that the service subject to the contract is provided in accordance with the contract, and if necessary, all of the expansion activities are among the obligations of the SPV within this scope.

SPV fulfils its contractual commitments by concluding contracts with goods and service providers. Essentially, the PPP system consists of a chain of contracts. In the execution of investments and services realised through PPP models, there are many parties and multiple contracts regulating the legal relations between these parties. In practice, the issues regarding the design, financing, establishment and operation of the investment and/or service can be determined with the "Implementation Contract" signed between the contracting authority and the SPV established by the tenderer to be specific to the project, and the construction works within the scope of this contract can be carried out by the sub-contractors specialised in construction works or by another construction contractor within the scope of the "Construction Contract" concluded with the SPV. The construction works within the scope of the Regulation on Construction Works Tenders are carried out within the scope of the contract concluded between the administration and the contractor as a result of the tenders held within the scope of Law No. 4734. On the other hand, it is understood that there is no regulation in the Regulation on Construction Works Tenders regarding the definitions and legal relations within the scope of the works carried out within the scope of PPP models.

The fulfilment of the contractual obligations of the sponsors and other shareholders of the SPV, who take risks in the project and work for the completion of the project, means the performance of the performances that are the subject of the PPP contract, which is the reason for the establishment of the SPV. It shall be specified in the tender document whether or not subcontractors will be allowed to be employed in the work subject to tender, and whether the works to be subcontracted due to the nature of the work and the contract to be made with the subcontractors will be submitted to the approval of the administration. The works delegated by the SPV to the subcontractors are construction, procurement of equipment and maintenance and operation activities. Although the responsibilities of the SPV towards the administration are fulfilled by subcontractors specialised in their field, subcontracting the works to subcontractors does not remove the legal responsibility of the SPV for this work. (Keşli,2012) The SPV shall also be liable for any damages to third parties during the contract period. In case the SPV fails to fulfil its obligations stipulated in the contract, provisions regarding the compensation of the damages incurred by the administration and penal conditions shall be included in the contract.

The contractor shall also transfer all its rights and obligations arising from the contract under the same conditions and in the tender document to another real or private law legal entity that meets the qualification requirements determined by the Administration with the approval of the Administration. In construction works requiring the establishment of a special purpose company, the transfer can only be made to the special purpose company established. In this case, the contract for the overriding right shall also be transferred on behalf of the transferee. In the event that the contract is transferred in this manner, other contracts shall be deemed to have been transferred to the transferee real person or private law legal entities. The transferor and transferee contractors are jointly and severally liable for the obligations arising before the transfer of the contract.

One of the most important features of PPPs is the termination of the contract in the event that the construction works cannot be completed within the time specified in the contract and therefore the contractor cannot claim any compensation from the administration in the event of failure to start the performance of the commitment to produce and deliver the service on time or the contract is terminated under the obligation to compensate the demolition costs if it has not built in accordance with the project. (Keşli, 2012) In case of termination of the contract, the account of the works subject to the contract shall be made according to the contract and general provisions and the contractor's relationship with the administration shall be severed.

In the event that the contractor damages the structures and facilities the cost of the damage is also taken from the contractor. On the date of termination of the contract, the current status of the works shall be determined by the administration together with the contractor or its representative, and a status report shall be issued. If the contractor or its representative is not present on the previously notified day, the due diligence report shall be drawn up in the absence of the contractor and the situation shall be stated in the report. In case of termination of the contract, the compensation and penal conditions to be paid by the faulty party shall be included in the contract.

2. To produce and deliver the service

Since the subject matter of the PPP contract mainly focuses on issues of public service nature, it is the primary performance obligation expected by the public party in the contract to produce this service in accordance with the standards stipulated in the contract and to provide it to the public in the same standards. *Keşli* argues that it should be emphasised that in PPP contracts, although the service is provided to the public by the private sector, the service provided is a public service. Therefore, a lawsuit can be filed against the administration based on service defect due to this service. This is one of the most important differences between outsourcing or privatisation of a service and PPP. Unconditional termination of the contract is possible if the service is not provided within a certain period of time. Moreover, according to *Keşli*, if equity requires, it should be possible to continue the work

in case the remaining portion is less, without prejudice to the obligation to pay compensation for the delay. The service subject to the contract is provided to the public by the SPV. Both the production of the service and its provision to the public are carried out by the SPV. It is also possible that there is a public entity in the SPV and certain parts of the work are provided by the public entity. The production and provision of the service is predominantly related to the element of the transfer of operating rights in the case where the enterprise is in the private sector. (Keşli, 2012)

By Latvian PPP law section 117. Division of the Remainder of the Property of a Joint Venture

Upon termination of the activity of a joint venture, the property of the company shall be divided within the framework of the liquidation quota so that the public partner resources which the public partner has invested in the equity capital of the joint venture would be returned to the public partner together with the permanent investments. If the value of the liquidation quota pertaining to the public partner is smaller than the value of the public partner resources and the permanent investments referred to in Paragraph one of this Section, the procedures for compensating the decrease of the liquidation quota to the private shareholder of the joint venture shall be provided for in the public-private partnership contract. Shareholders of a joint venture may take the decision to continue the activity of the joint venture only if the institution referred to in Section 16, Paragraph one or two of this Law has previously taken a decision thereon and all shareholders of the joint venture agree thereto.

3. Conformity of the service to the prescribed standards

In the PPP contract, it is agreed that the service will be produced to a certain standard, often at a higher quality than the quality offered or can be offered by the public sector. In the contract, a technical specification is also issued as an annex to the contract and technical details are determined in detail in this specification. It should also be analysed how to deal with matters not specified in the specifications. In this context, according to *Keşli*, in cases where it is possible to interpret that the SPV does not have a commitment, although it is possible to interpret it in this way, it would be appropriate to capture the standards required by the work and to extend the standard perception that dominates the overall contract to that part as well. (Keşli, 2012)

In the event that the contractor fails to fulfil its commitments under the contract during the fixed investment period after the signing of the contract, except for the cases of immediate termination specified in the contract, the contractor shall be given a period of time appropriate to the nature of the work in order to fulfil the requirements by clearly stating the arbitrariness with a written notice to be made by the administration through a notary public. In addition, the contractor shall also be notified to the finance providers that provide funding for the financing of the project. This period shall not affect the duration of the contract, nor shall it prevent the application of the penal clause arising from the delay. In the event that the commitment is not fulfilled at the end of the period specified by the notice, the finance providers may ensure that the work is carried out by making a change in the partnership structure of the contractor in agreement with the administration. If this cannot be achieved, the contract shall be terminated by the administration.

4. Obtaining the necessary financing for the project

The investment amount foreseen in the implementation contract concluded within the scope of PPP models is generally the estimated fixed investment amount proposed by the tenderer within the scope of its proposal. This amount is mostly not used as an evaluation criterion in the finalisation of the tender for the relevant work, but is taken as basis in applications such as financing, guarantee, penalty, etc. Within the scope of the contract, and items outside the scope of the construction work such as project design, consultancy services, financing, expropriation, furnishing may also be included in the investment amount. In the implementation of the model, risks or responsibilities that may arise from conditions that may affect the profitability of the private sector (natural disasters, war, legal infrastructure, etc.) are undertaken by the public sector, while the private sector is more responsible for financing, know-how and technological equipment.

In PPP projects, the financing of the project must be provided by the SPV. One of the main obligations of the contractor is to provide project financing. At the point of financing, it is possible to provide financing as a capital investor partner within the SPV, as well as in the form of financing from banks or other funds and in the form of a contract with the SPV. Establishing and maintaining the cash flow of the project is one of the most important element and risk in PPP projects. The most important actors of PPP are financiers. When international projects are analysed, it is seen that the projects in which financing is provided either through the capital investor partner or through banks, financial institutions and funds participating in the project as financiers are predominant. In recent years, it is observed that the projects are directed by financiers. Contracts with financiers are in the form of loan agreements or partnership agreements. Since the project asset amount is the only asset to be owned by the SPV, the recourse right of the financier in case of default is limited only to the amount of the capital investment made in the SPV. Nevertheless, the lender often requires collateral from the project sponsors, their parent companies and/or the parent companies of the project companies. PPP structure involves the establishment of an SPV in which one or more of the banks, contractors and operators will be shareholders. The contracts necessary to provide finance to the SPV are concluded at the same time as the contracts of the main contractor and subcontractors are concluded. A prerequisite for this is the provision of sufficient revenue streams to provide financial institutions with the necessary collateral and incentives to become shareholders. The legal and factual

structure of the company must be such that the financing risk is acceptable. All financial obligations must be fulfilled until the end of the contract. When structuring the SPV, the establishment of a "financially viable" structure is a condition for project success. In addition, the legal structure should be established as a workable partnership structure, and the organs of the company and the powers of these organs should be clarified in the articles of association. Once these conditions are met, the company becomes self-financing. Following the financing of the project and the recycling of the financing provided, the SPV achieves its purpose. Since the cost of construction of the facilities is covered by a loan against a pledge, the private sector organisations providing the financing must make significant prepayments. PPP structures seem to be suitable for capital-intensive infrastructure contracts as they spread the project risk across multiple participants. This is because everyone will suffer losses in the event of project failure. As a result, the financiers are assured that the other participants will work in partnership to resolve potential problems. A successful PPP financial structure can be established in two ways, financing from internal and external sources. If the contractor is to finance from equity, it is possible for it to set up the structure as it wishes and to enter into contracts with any person or persons it wishes. However, in the case of a multi-participant SPV, and especially in the case of a corporate PPP model, it is beneficial to spread the project risk to all parties with an interest in the project through contracts. In many PPP projects, the project undertaker and borrower will be an SPV created specifically for that project. From the financiers' point of view, the SPV is a serious risk factor due to its limited liability. The project assets in the assets of the SPV are the only guarantee of the creditors. (Keşli, 2012)

When projects are financed through the issuance of debt securities, credit rating agencies are approached to provide credit ratings for the debt in question. These organisations are usually consulted early in the project preparation process. In this way, concerns about financing can be identified at an early stage and a new structure can be developed accordingly. For example, changing the scope of equity capital within the SPV. Insurance organisations can also be used to increase the amount of financing. (Keşli, 2012)

The public administration as a contracting authority shall audit or have audited the SPV's activities within the scope of the contract at all stages. The SPV to be authorised for audit shall be asked for the necessary information and documents to determine their economic and financial competence and professional and technical competence. For this purpose, the SPV shall be required to provide necessary information and documents: documents related to its financial status to be obtained from banks, its balance sheet or the required parts of its balance sheet that must be published in accordance with the relevant legislation, or equivalent documents, its total turnover showing its business volume or the amount of work undertaken and completed in relation to the work subject to the tender, and documents to be used in the qualification assessment according to the nature of the work subject to the tender, in the tender document and in the announcement or invitation regarding the tender or pre-qualification.

In the event that the contractor authorised by the audit does not fulfil its commitment in accordance with the tender document and the provisions of the contract or does not complete the work in due time, the performance bond and additional performance bonds, if any, shall be recorded as revenue and the contract shall be terminated and the account shall be liquidated in accordance with the general provisions, without the need to make a protest, if the same situation continues despite the notice of the administration and clearly stating the reasons, with a delay penalty at the rate determined in the tender document. The contractor authorised for audit shall be liable for the damages that may arise due to incorrect and misleading information and opinions in the reports they prepare and for the damages they may cause to the administration and third parties due to their activities within the scope of the contract, and for the accuracy and compliance of the information and documents, financial and technical tables and reports to be submitted to the administration regarding the audit with the contract and the relevant legislation, and for the audit according to generally accepted auditing principles and principles.

5. Revising the contract in case of fundamental changes

The main mission of the SPV is to focus on the objectives set by the contracting authority for the realisation of the project. However, it is the SPV's duty to take initiatives to make the necessary changes together with the public administration in case of major changes concerning the project. (Keşli, 2012) In cases of force majeure, extraordinary circumstances or the emergence of a situation affecting the implementation of the contract and its annexes, or in cases where the provisions in the contract and its annexes contain conflicts, in order to ensure the applicability or comprehensibility of the contract, the contract and its annexes may be amended by the parties with the approval of the higher administrative authorities. At this point, what is being negotiated is the revision of a commitment made in the tender offer. Therefore, the parameters that are the basis for the award of the tender are changed outside the tender. This is an important point that may be encountered in PPP projects. On the one hand, it is a matter of selecting the most advantageous bid among the bidders by eliminating the competitors, and on the other hand, it is a matter of preventing situations that would cause economic insolvency of a structure that cooperates with the public, and in some cases even partners with the public, and as a result, preventing the disruption of public service. Especially in contracts denominated in foreign currencies, a possible crisis creates economic difficulties in the performance of mutual obligations in the contracts. In this case, the collection of

receivables becomes difficult due to the filing of adaptation lawsuits and taking precautionary injunctions by the contractors related to the economic crises experienced.

When the reason for the request for revision is examined, *Keşli* argues that requests and decisions that would prevent those who participate in the tender and make commitments against the administration from fulfilling their commitments for whatever reason, if they are merchants, are incompatible with Turkish law. In Turkish law, the inability of the merchant, who has entered into a contractual commitment with the tender, to fulfil its commitments due to economic fluctuations is not a reason for adaptation alone. However, the existence of an explicit provision in the tender specifications and the contract is an exception to this. At this point, in view of the fact that the structure of the PPP involves the co-operation of the public and private sectors, it is necessary to include provisions in the tender specifications and contracts to prevent the insolvency of the special purpose company in extraordinary circumstances and to be flexible in this regard, provided that it remains within the framework of the rule of good faith. However, as a rule, if it is not included in the tender specification and contract, inflation and excessive increases in exchange rates are included in the obligation to act as a prudent trader and are accepted as the expected situation to be foreseen at the contract execution stage. (Keşli, 2012)

Since the PPP contract is a long fixed-term contract, in some cases, at the end of the term, there will be a public service operating facility. In some contracts, this facility must also be abandoned to the administration. However, in some cases, it may be obligatory to leave all or part of this facility to the administration. However, it is also possible to have a PPP where the contract may be terminated without abandonment to the contracting authority. At this point, while applying the provision on the transfer of the operating facilities, it should be considered whether these "facilities are separable from the service". In cases where the said facility and the service are combined, and the concession for the provision of the service and the operating facility cannot be separated, the transfer of the facility is mandatory. This obligation stems from Article 168 of the Turkish Constitution.[3] The decisions of the Turkish Constitutional Court[4] and the Council of State[5] have evaluated the issue in terms of the way in which the resource used in energy production is obtained, and based on the criterion of whether the facility and the natural resource can be separated from each other.

Conclusions

In order to meet the increasing infrastructure needs of Turkey, it is generally accepted necessary to utilise alternative financing models to be provided with the participation of the private sector in addition to the use of public resources. In this framework, PPPs model, which has been widely used in realisation of infrastructure investments in developed and developing countries in recent years, is also applied in Turkey. PPPs model takes its legal root from art.47 of Turkish Constitution no.2709 and various legal regulations for PPPs have been adopted since 1980s. The legal regulations that they have been prepared for certain sectors and projects, the distribution of PPPs across sectors have been limited to large-scale projects concentrated in the energy, transportation and health sectors and there is no general framework and law for PPPs. The private sector, which is one of the contracting party of the PPP model and entitled to participate as a tenderer in the tender in Turkey, is usually a business partnership which is legally evaluated as ordinary partnership. However capital companies also bid for the tender opened by the contracting public authority according to the relevant laws. If the tender is awarded to a business partnership or a capital company according to the relevant law, the documents regarding the establishment of the special purpose vehicle shall be requested. The private sector, which is one of the contracting party of the PPP model and entitled to participate as a tenderer in the tender, is usually a business partnership which is legally evaluated as ordinary partnership. However capital companies also bid for the tender opened by the contracting public authority according to the relevant laws. Generally the SPV is formed as a joint stock company and finalised after the tender is concluded. After SPV obtains legal capacity to act, it starts its operations by signing the contract

[3] Turkish Constitution art.168 "Natural wealth and resources are under the sovereignty and control of the State. The right to explore and exploit them belongs to the State. The State may transfer this right to real and legal persons for a certain period of time. The exploration and exploitation of any natural wealth and resources by the State in partnership with real persons and legal entities or directly by real persons and legal entities shall be subject to the express authorization of the law. In this case, the conditions to be complied with by real persons and legal entities and the procedures and principles of supervision, inspection and sanctions to be imposed by the State shall be specified in the law."

[4] Turkish Constitution art.148 "The Constitutional Court shall review the conformity of laws, presidential decrees and the Rules of Procedure of the Grand National Assembly of Turkey with the Constitution in terms of form and substance and shall rule on individual applications."

[5] Turkish Constitution art.155 "The Council of State is the final review authority for decisions and judgements rendered by administrative courts which are not reserved by law to another administrative judicial authority. It shall also hear certain cases specified by law as a court of first and last instance. The Council of State shall hear cases, give its opinion within two months on concession agreements and contracts relating to public services, resolve administrative disputes and perform other duties prescribed by law."

with the contracting authority. The contract shall be subject to the provisions of private law and its durations hall be determined by the administration, depending on the relevant law and the characteristics of the facility. The contract and its annexes concluded between the contractor and the administration in accordance with the provisions of private law for public services between the special purpose vehicle and the administration within the framework of the related law and for the performance of some services requiring advanced technology or high financial resources and the contractor is tenderer and the SPV on whom the tender is made and the contract is signed.

EU law suggested universal model for SPV PPP in case of preventing crimes Legal risks of A SPV PPP in the area of the prosecution of qualified economic crime could therefore mitigate the problems outlined above: it goes without saying that this would be beneficial to both parties. A contractual partnership of convenience exists between the state and the private forensic services provider. The contracted private forensic services provider is responsible for the efficient and timely provision of the agreed service, while the public sector – specifically the prosecuting authorities – helps the government enforce its right to punish criminal conduct with the most advanced equipment and techniques. (Hofmann C., Schrepfer S. 2022)

The responsibility, legal rights and obligations of the SPVs are determined by and derived from the PPP agreement. The works delegated by the SPV to the subcontractors are construction, procurement of equipment and maintenance and operation activities. Although the responsibilities of the SPV towards the administration are fulfilled by subcontractors specialised in their field, subcontracting the works to subcontractors does not remove the legal responsibility of the SPV for this work. The SPV shall also be liable for any damages to third parties during the contract period. In case the SPV fails to fulfil its obligations stipulated in the contract, provisions regarding the compensation of the damages incurred by the administration and penal conditions shall be included in the contract. The SPV shall also transfer all its rights and obligations arising from the contract under the same conditions and in the tender document to another real or private law legal entity that meets the qualification requirements determined by the Administration with the approval of the Administration. In construction works requiring the establishment of a special purpose company, the transfer can only be made to the special purpose company established. In this case, the contract for the overriding right shall also be transferred on behalf of the transferee. In the event that the contract is transferred in this manner, other contracts shall be deemed to have been transferred to the transferee real person or private law legal entities. The transferor and transferee contractors are jointly and severally liable for the obligations arising before the transfer of the contract. In the event that the contractor fails to fulfil its commitments under the contract during the fixed investment period after the signing of the contract, except for the cases of immediate termination specified in the contract, the contractor shall be given a period of time appropriate to the nature of the work in order to fulfil the requirements by clearly stating the arbitrariness with a written notice to be made by the administration through a notary public. In addition, the contractor shall also be notified to the finance providers that provide funding for the financing of the project. This period shall not affect the duration of the contract, nor shall it prevent the application of the penal clause arising from the delay. In the event that the commitment is not fulfilled at the end of the period specified by the notice, the finance providers may ensure that the work is carried out by making a change in the partnership structure of the contractor in agreement with the administration. If this cannot be achieved, the contract shall be terminated by the administration. In PPP projects, the financing of the project must be provided by the SPV. One of the main obligations of the contractor is to provide project financing. At the point of financing, it is possible to provide financing as a capital investor partner within the SPV, as well as in the form of financing from banks or other funds and in the form of a contract with the SPV. Establishing and maintaining the cash flow of the project is one of the most important element and risk in PPP projects. The public administration as a contracting authority shall audit or have audited the SPV's activities within the scope of the contract at all stages. The SPV to be authorised for audit shall be asked for the necessary information and documents to determine their economic and financial competence and professional and technical competence. For this purpose, the SPV shall be required to provide necessary information and documents: documents related to its financial status to be obtained from banks, its balance sheet or the required parts of its balance sheet that must be published in accordance with the relevant legislation, or equivalent documents, its total turnover showing its business volume or the amount of work undertaken and completed in relation to the work subject to the tender, and documents to be used in the qualification assessment according to the nature of the work subject to the tender, in the tender document and in the announcement or invitation regarding the tender or pre-qualification.

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