PPP legislation in Hungary
Background

Public private partnership (PPP) has existed for over a decade in the industrialised states as a means of providing public services. The original purpose of PPP was to bridge the growing gap between the cost of infrastructure and its maintenance, and the resources available to finance it. PPP has since evolved to a higher level of risk sharing while ensuring a more manageable burden on the state budget. The key objective is to ensure that infrastructure is delivered efficiently and at the lowest possible cost. However, PPP may not always be the most suitable method of financing a project and decision-makers must assess the pros and cons of each individual case.

Several attempts have been made to define PPP and distinguish it from other methods of procuring public infrastructure/services. Current Hungarian legislation does not define PPP, so that it remains a ‘best practice’ rather than an acknowledged legal term. Some commentators describe the defining characteristics of a PPP project as follows:

- the project realises a public service that has previously been provided by a state monopoly;
- the private sector not only delivers assets, but also is involved in operating and, sometimes, financing the infrastructure;
- performance measurement is often a factor in the remuneration of private sector participants; and
- the public sector closely monitors performance and costs.

In Hungary the projects of the early 1990s, which had the characteristics described in the first two points above, were mainly concession projects and can be regarded as predecessors of the PPP concept.

Other commentators believe the key difference between PPP and traditional procurement is that in PPP structures payments made to the private sector are based on the outcomes and the performance of the asset throughout the project period. In PPP projects the private sector service provider is responsible not only for the construction and delivery of the asset but also for managing the project and operating the asset delivered thereby becoming a provider of public services.
Legal framework

As there is no official definition of PPP in Hungarian law, no clear distinctions can be made when categorising a project as a PPP project. Therefore, no one piece of legislation can be identified as the supreme law governing PPP; several legal provisions may be relevant depending on the characteristics of the project.

Generally speaking, the legal framework consists of laws that are relevant to all PPPs and laws that are project specific. The most important piece of legislation is the Act on Public Procurement (Act 129 of 2003), which sets out the entire bidding procedure. The Act on Concessions (Act 16 of 1991) provides for additional procedural rules where the project matter is exclusively state or local government property under the Civil Code (Act 4 of 1959). For local PPPs, the Act on Local Governments (Act 65 of 1990) is the relevant piece of legislation. For central government projects, the Act on the State Budget (Act 38 of 1992) and a number of corresponding government decrees apply. When preparing bids and project agreements, the Civil Code and sector-specific legislation must be taken into account.

The first thing to consider is the procedural framework, which in most cases is dominated by the public procurement rules. The question of whether the contracting entity is considered a public entity under the Act on Public Procurement and the nature of services procured, together with the gross value of the PPP, determine whether or not a public procurement procedure must be followed. The European and national legislation governing public procurement clearly defines the entities and project values that necessitate the use of a transparent and competitive public procurement procedure when purchasing goods or services or facilitating construction projects. In most cases these criteria are fulfilled, making public procurement mandatory. However, as most of the public procurement rules were enacted before PPP projects became common, some provisions may hinder the development of PPP projects.

The nature of the services to be provided in a PPP structure may mean that the tendering procedure set out in the Act on Concessions is also applied. In certain cases both the public procurement provisions and the tendering procedure set out in the Act on Concessions must be applied at the same time. Both the Act on Public Procurement and the Act on Concessions contain provisions governing the interaction of the two procedures to resolve any inconsistencies.

Article 10/A of the Act on Concessions could be considered an example of specific PPP legislation. Where public services are provided by a concessionaire company in which the state or local government has a majority stake and that is being passed on to private investors, a tender must be issued for the provision of services that the concessionaire company has been performing and that fall under the Act on Concessions. This could be considered a case of the private sector taking over a public service, which may amount to a full blown PPP if, while purchasing majority stakes in the
concessionaire, the buyers undertake to develop those public services further at their own expense and, even, at their own risk.

The legislation leaves a number of questions unanswered, creating possible pitfalls for PPP projects. These inconsistencies are not necessarily caused by national legislation directly but may also go back to the problem of some EU-wide provisions not being completely PPP compatible. One example is the handling of perfected securities created over PPP assets where the private financing party steps in to replace an original service provider that failed to meet its financial obligations towards the financing party. In such cases there is a risk that the obligation to procure public services under the designated procedure laid down by the Act on Public Procurement may prevent the financing party from: (i) performing the services itself since it was awarded to the original service provider in a public procurement procedure; or (ii) if not providing the services itself, passing the assets gained by perfecting the securities to another enterprise that can provide the public services in question.
Governmental bodies handling PPPs

The Hungarian government has become reasonably active in using the PPP structures for an increasing number of deals and projects. It established the Inter-Departmental PPP Committee in 2003 to encourage the growth of PPP, spread information on PPP within different government departments and comment on plans for potential PPP projects before such plans are submitted to the decision-makers. The committee also prepares proposals for shaping the legal basis of PPPs. It is chaired by the administrative secretary of state of the Ministry of Economy and Transport (Gazdasági és Közlekedési Minisztérium) and comprises representatives from the Ministry of Economy and Transport, Ministry of Finance (Pénzügyminisztérium), Ministry of Justice and Law Enforcement (Igazságügyi és Rendészeti Minisztérium), Prime Minister’s Office (Miniszterelnöki Hivatal) and Central Statistical Office (Központi Statisztikai Hivatal), as well as the National Development Agency (Nemzeti Fejlesztési Ügynökség). PPP units also exist within certain ministries. For example, the Ministry of Economy and Transport has its own department of property management; the Ministry of Finance has a PPP working group; and the National Sports Office has a PPP project office. At the Ministry of Justice and Law Enforcement, the department of penalty enforcement was formed to supervise prison PPPs. In 2005, one of the secretaries of state in the Prime Minister’s Office was also engaged in the co-ordination of governmental PPP projects, although how this worked in practice is not clear from the official description.

The new Government Resolution No 2028/2007 (II 28) (Resolution) defined the provisions on the procedure of the PPP committee, which is the only piece of legislation dedicated to regulating PPP specific matters. Under the Resolution the PPP committee must:

- evaluate and opine planned PPP projects;
- ensure the professional background and conditions for encouraging and propagating the PPP structures in Hungary;
- publish information within the public administration about PPP structures;
- monitor and evaluate completed PPP projects; and
- develop a methodology for planning PPP projects and for related public procurement procedures and contracting, as well as for monitoring such projects.

The government has also adopted Government Decree 24/2007 (II 28) on the undertaking of long-term obligations with a specific view to the PPP concept, eg outlining the role of the PPP committee in evaluating whether a PPP structure or pure state financing is appropriate. As a result of the activity of the interdepartmental PPP committee, some laws have been slightly amended to facilitate PPPs.
Projects over a certain value must have approvals in addition to the PPP committee opinion. The Act on the State Budget requires that long-term state undertakings with a net present value of between Ft10bn (€38m) and Ft50bn (€190m) must have the prior authorisation of the government, while projects with a net present value of over Ft50bn must be pre-approved by parliament. Also, if parliament approval is required, it must be provided with information on the main elements of the contract and the need for state financing.
Procurement policy

For purely local projects, the tenderer proceeds in accordance with its internal rules until the publication of the tender. For central government projects or local projects that are financially supported by central government initiatives, the tenderer needs to obtain prior approval for the project from central government, which in turn consults the interdepartmental PPP committee. This preparatory phase may take a considerable period of time for the tenderer (perhaps more than a year).

A key element is conducting feasibility calculations on the proposed project and calculating the public sector comparator (PSC), which is a decisive factor. The PSC shows how much the proposed project would cost if it were financed purely from the state budget (or the budget of the local government concerned). The PSC should then be compared with the proposed budget of the PPP version of the project.

The rest of the procedure is run in accordance with the Act on Public Procurements. Most PPP procurements are announced as negotiated procedures with a pre-qualification phase (ie ‘negotiated procedures with a published invitation to participate’ under the Act on Public Procurement). It is also common for the tenderer to publish a preliminary summary on the potential project a few months before publication of the actual call for tender. Thereafter, the submission period for pre-qualification is usually around the legal minimum of 37 days and the tenderer evaluates the pre-qualification bids within a month. The negotiation period ranges from three to nine months, typically in two rounds.

The fees payable for the detailed tender documents are usually less than €1,000. Other costs (without advisory fees) may amount to a few thousand euros. It is also common for bidders to be required to provide approximately €4,000–€20,000 as a bid bond to enter into the negotiation phase. These costs are regarded as an investment by the bidders and are not reimbursed by the tenderer.

The procurement procedure is fairly transparent and each party has the right to file a remedy application with the Public Procurement Arbitration Committee (Közbeszerzési Döntőbizottság) and with the courts.
**Competition and market access**

Competition is primarily ensured by the compulsory application of open and transparent tendering procedures and the applicable laws expressly declare and acknowledge the principles of equal treatment and fair competition.

The Hungarian PPP market is open to foreign bidders irrespective of whether international expertise is important. Although foreign bidders have been successful in sizeable projects, only Hungarian bidders have been successful in smaller projects such as those launched under the central initiatives co-ordinated by the Ministry of Education (Magyar Universitas Program) and the National Sports Office (Sport XXI). This may reflect a lack of interest in smaller projects by foreign investors, who have shown a lot of interest in major projects (eg the construction and operation of the M5 and M6 motorways, as well as the Electronic Road Toll Collection System).