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# Joint Ventures and Government Shareholding in Project Companies

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## What are Joint Ventures

Joint ventures between the public and private sectors in PPP arise when:

- when a contracting authority requires an equity stake ("shares") in the project company/ operator. This approach has advantages and disadvantages and this section highlights some of these.
- when an existing public utility or SOE sells a stake in the utility to a private company. In the water sector in civil law countries, a model for public-private infrastructure projects that has been used extensively is "empresas mixtas" (joint venture enterprises). This section also provides examples of empresas mixtas and includes sample legislative frameworks for such entities.

In the case of an existing utility, shares in the utility are divested to the private sector (or a new holding company is created which holds the assets of the utility which is established with a joint ownership structure). In the case of a project financed project, the project company will be established with a joint share ownership structure with limited scope (usually focused on delivering the project with limited ability to diversify).

The level of share ownership will differ depending on whether the government is seeking to get the project off balance sheet and whether the government wishes to retain management control of the utility. However, there are ways of giving the government control, or even negative veto power over specific management issues, even where the majority of the shares in the entity are held by the private sector.

For strategic reasons, the public sector may prefer to keep control of the entity (at least initially), particularly if the joint venture company owns the assets. However, the private sector will want to be sure that it can manage the day to day management of the entity and so if in a minority may require powers of veto or weighted voting rights on certain issues.

Typically, in the case of a project company, most of the key functions (such as construction and operation and maintenance) are delegated to the private sector party (ies) operator through sub-contracts.

Rights attaching to shares and the rights between the shareholders are typically set out in the constitutional documents of the company (typically in the articles of association) and the shareholders' agreement.

It is also possible to have a joint venture in the form either of:

- A partnership (arrangement with profit sharing between partners) created for specific purpose – no separate legal entity created and each of the partners with full legal responsibility for the project; or
- A contractual consortium arrangement in which the parties contract to work together on a specific project. There is here, however, no concept of a sharing of a pool of profits as there is with a partnership. Each party is remunerated for specific services provided to the consortium and no separate legal entity is created.

It is therefore recommended that for joint ventures between the public and private sectors that this take a corporate form.

Before a public entity enters into a joint venture it will need to check that it is empowered to do so under law - this can be restricted at law.

## **Advantages and Disadvantages of Government having a stake in a Project Company**

Governments cite a number of reasons for why they would prefer to take a substantial stake in a project company or maintain a substantial stake in a utility involved in a PPP. However, as the public and private sectors work in very different manners and have different processes and priorities, in practice this can cause challenges:

### **Advantages:**

- Public party can exercise some degree of control over day to day operations or at least key decisions (at board and shareholder level)
- Transparency (accounts and finances presented to board)
- Public perception – this is not privatization or private provision of a service
- Sustainability – continuity of partners – even if private partner changes
- Share of profits

However, as share ownership alone does not necessarily guarantee these advantages, attention needs to be given to the shareholder agreement – see [Joint Venture checklist](#). Indeed, a public party can achieve a number of these advantages with a much smaller shareholding if the structure is properly designed.

### **Disadvantages:**

- In-built conflict of interest between public party as the contracting authority and as a member of the project company (in case of dispute under project agreement) (concern for financiers)
- Private party (and financiers) will want to ensure private party has autonomy to run day to day business
- Private party can ensure that project company never makes a profit by ensuring that all profits are paid out as fees to sub-contractors under its control (public party will need to watch out for this and ensure it has veto rights over certain liabilities being taken on by project company). No profits means no dividends.
- Board membership does not necessarily give control or visibility on operations
- Tax and accounting issues (if project is to be off balance sheet for government, need to ensure that arrangements do not bring it back on balance sheet)

## **Key Considerations for Minority Shareholders**

A minority shareholder is a shareholder that does not have control of a company. Typically, a party or parties holding (collectively) over 50% of the issued ordinary shares of a company are in control and so any party with less than 50% has limited protection.

Minority shareholders typically benefit from some limited protections at law – such as against fraud.

A shareholder that owns over 25% of the issued share capital is also typically under law granted powers of veto over issues such as changes to the constitutional documents of the company.

If a minority shareholder wishes to be protected further, these protections will need to be agreed in the shareholder agreement.

Some typical protections to consider would include:

- Right to appoint one or more board members, and requirement for that board member to be present in the quorum of board meetings
- Right to veto signature of any contracts or the company entering into obligations above a certain value (particularly with related parties such as the other shareholder(s))
- Right to veto distribution of dividends
- Right to veto change of shareholder agreement and constitutional documents
- Right to veto issue of additional shares or other changes in shareholding of company
- Right to veto sale of shares, or a right of first refusal to such shares

for more, go to [Joint Venture Checklist](#)

## **Joint Development Agreement Termsheet**

- [Joint Development Agreement Termsheet](#) - Short-form term sheet covering key issues that need to be established between parties to a consortium before they start developing a project/ preparing response to tender documentation for a project.

## **Examples of Shareholder Agreements for PPP Projects**

- [UK Treasury standard form shareholder agreement for PF2 projects](#)

## **Checklist of Issues Related to Joint Ventures/Empresas Mixtas**

- Click to download the [Joint Venture Checklist](#), which covers key issues to consider when putting together joint venture arrangements. The checklist covers questions regarding funding, division of

equity, corporate governance, and other issues.

- [Empresas Mixtas](#), a type of legal entity that receives financial funding from both a private company as well as a government –at a country, city or municipal level, hence the term a mix enterprise.

## Further Reading

- HM Treasury Guidance prepared by Partnerships UK: "[A Guidance Note for Public Sector Bodies forming Joint Venture Companies with the Private Sector](#)" (PDF)
- [Mixed Private-Public Ownership Companies “Empresa Mixta” \(2011\)](#) This review of the *empresa mixta* model was undertaken to better understand its structure, applicability and strength in mitigating risks in the water and sanitation sector. The last decade has provided many lessons on *empresas mixtas*, particularly in Latin America

## Additional Resources

- [Joint Venture Checklist](#)
- [PPP Reference Guide](#)
- [PPP Contract Management](#)
- [Empresas Mixtas](#)



## [Joint Venture Checklist](#)