

# The Legal Regime of Utility Services and Public-Private Partnership in Bosnia and Herzegovina

Zoran Vasiljević\*

The author analyzes the state regulation of utilities and public-private partnerships (PPPs) in Bosnia and Herzegovina and points to the different models of implementation of the PPP, as well as practical experiences. The conclusion is that there is a need for harmonization of regulation and the reinforcement of the role of supervisory authority.

## General remarks

Bosnia and Herzegovina (BiH) is a complex country whose legal nature provokes different views (federation, confederation, etc.). It consists of two entities, the Republic of Srpska (RS, 49% of the country) and the Federation of BiH (FBiH, 51% of the territory of Bosnia and Herzegovina), with Brcko District as condominium of both entities. Also, the FBiH is further divided into ten cantons. Each of these territorial units (entities, District and cantons) has its own legislation and constitutes a separate legal subsystem within BiH. The whole of the public sector is finally complemented by local government units (cities and municipalities) and public enterprises.

BiH, like other candidate countries for membership of the European Union (EU), has the obligation to create a three-year program of economic reforms<sup>1</sup>. End of January 2016, the Program of Economic Reforms (ERP BiH 2016-2018) has been adopted at the state level. In addition to the macroeconomic data, it contains the overall program of structural reforms to improve the growth and competitiveness of the country. BiH as a country of about 3.8 million inhabitants had a GDP in 2015 of about 29 billion BAM. Total public spending is about 41% of GDP (of which external debt is about 29%)<sup>2</sup>, while the unemployment rate is between 27-28%.

Like the territorial organization of BiH, the legislation relating to the issue of utilities and public-private partnership (PPPs) is also dispersed. RS, Brcko District and

each of the cantons of the FBiH have their own laws on public utilities and PPP, which are at different levels of alignment with the EU *acquis communautaire*. Thus, in the FBiH only Zenica-Doboj Canton has harmonized its Law on PPP<sup>3</sup> with the European standards. Although there are initiatives, the FBiH has not yet passed its law, but the Program of economic reforms of FBiH for the period 2016-2018 anticipated its adoption. Also, the law does not exist at the level of the overall state. However, at the state level, there are other laws related to the matter of PPP, for which provisions apply in the process of establishing partnerships, such as the Public Procurement Act<sup>4</sup> and Concessions Act<sup>5</sup>, which also exist at other levels of legislative power.

## The scope of utilities services provision and local government jurisdiction

Utility services as activities of general interest in BiH fall within the jurisdiction of local governments<sup>6</sup>, which are regulated by the constitutions of the entities (eg., art. 5 of the Constitution of RS), and on the basis of them, the laws on local government<sup>7</sup>. Only Brcko District, which operates as a unit of local government, is stated in the Constitution of BiH (art. 6/4). Independent competences of the local government units, *inter alia*, in the area of services include planning and providing performance of utility services: the production and supply of water, gas, thermal energy, public transport of people in urban and suburban transport, the purification and wastewater disposal, the funeral activities, maintenance, arrangement

\* Zoran Vasiljević is an Assistant Professor at the Faculty of Law University of Banja Luka. He performs the activities of the Vice Dean for Academic Affairs, holds lectures in the scientific area of Business Law (Company Law, Commercial Law, Banking Law) and is the head of the study program Business Law at the second cycle of study at the Faculty of Law. He is the editor of the faculty's journal „Serbian legal thought”. He is engaged as the lecturer of Business Law at the Faculty of Economics University of Banja Luka and at the Police College Banja Luka. [z.vasiljevic@pravobl.org](mailto:z.vasiljevic@pravobl.org)

<sup>1</sup> Stated programs have been adopted at both the state and at the entities level. RS thus recently (by the end of 2016) adopted Program of economic reforms for the period 2017-2019. See: [www.narodnaskupstinar.net/?q=la/narodna-skupstina/sjednice/materijali-za-sjednice/materijali-za-21-posebnu-sjednicu-nrs](http://www.narodnaskupstinar.net/?q=la/narodna-skupstina/sjednice/materijali-za-sjednice/materijali-za-21-posebnu-sjednicu-nrs).

<sup>2</sup> In RS, it is planned to spend a 5.5% of the projected GDP on the local government in 2016.

<sup>3</sup> Official gazette of Zenica-Doboj Canton, No. 6/16.

<sup>4</sup> Official gazette of BiH, No. 39/14.

<sup>5</sup> Official gazette of BiH, No. 32/02 and 56/04.

<sup>6</sup> In FBiH, jurisdiction is divided between local governments and cantons. See, for example, art. 7-9 of The Communal activities Act of Canton Sarajevo, Official gazette of Canton Sarajevo, No. 14/16.

<sup>7</sup> In FBiH in force is The Principles of Local Government Act in FBiH, Official gazette of FBiH, No. 49/06 and 51/09, and besides, each canton has its own legislation. In Republic of Srpska in 2016 was passed new Local government Act of RS, Official gazette of RS, No. 97/16.

and equipping of public green and recreational areas, maintenance of public traffic routes in settlements, storm and other water drainage from public areas, cleaning of public areas in settlements and other utility services, in accordance with the laws on local government<sup>8</sup>. Namely, the assembly of the local government may also determine other utilities as activities of special public interest, if they are indispensable for life and work of citizens, companies or other organizations. Similar enumeration of municipal activities is contained in the Communal Activities Act of RS<sup>9</sup> under art. 2, with some added activities such as waste disposal from residential and business premises, management of public spaces for car parking, maintenance of public toilets, management of cable ducts for communication cables and systems, marketplace activities, chimney sweep business, public lighting in urban areas and activities related to animal hygiene. The Communal Activities Act of Canton Sarajevo<sup>10</sup> in turn, adds activities of decoration and maintenance of public clocks. Those activities can be divided into activities of individual or collective utility consumption, depending on whether it is possible to charge them separately from each user according to the amount of actually performed utilities.

For the above enumerated purposes, public companies in ownership of cities and municipalities (also they can be founded at the level of several local governments) can be founded or the conduct of activities contracted out to the private business entities on the basis of PPPs, with retention of the right to secure the organization and the manner of their performance, as well as supervision. The Local Government Act of RS under art. 39 (2) gives explicit competence to the assembly of the local government to affirm the price of utilities. This is confirmed by the Communal activities Act of RS in art. 20 (3), but is also emphasized in art. 6. that local government can make a decision to prescribe in detail the possibility for the subsidized price of utilities, categories of beneficiaries and terms of subsidies, and in general the unit of calculation for each type of public utility and the payment method of utility services. In any case, if the public enterprise is not given the approval for the price of the utility service and thus the provision of customer service to customer would be brought into question, the local governments can compensate the difference between existing and economic price of utilities from their budgets. Unlike the RS legislation, laws in the FBiH do not define that the level of utility service price is determined by the service provider, but merely give it the right of making the proposal. Thus, Communal Activities Act of Canton Sarajevo in art. 22 (5) stipulates that the validity of the utility provider's

calculations and final proposal for the price of utility is determined by the independent expert body of the Canton, city or municipality, and the actual price is determined by the Government of the Canton or city/ municipal council. This means that public authority has even power to change the price proposed by the provider of utility service, and not only to give consent.

It should be noted that for the certain services of general economic interest, the criteria for determining the price may be additionally defined by *lex specialis* which regulates those activities, such as, for example, the distribution of electricity<sup>11</sup>. In this area, prices may depend on the status of the customer. In fact, the customers who meet the requirements for obtaining the status of an eligible customer, and have the right to purchase electricity from the supplier by their choice, can negotiate the price with the seller. Such status have, eg., "Birač" Zvornik in RS, or "Aluminium" Mostar in the FBiH (Baltić, 2016). The specifics are also present in regulation relating to the activity of water supply (Zulić, 2015).

Regarding the activities of the joint utility consumption, the determination of utility charges is specifically affected with the level of equipment of settlements with the communal facilities and devices of joint utility consumption, as well as with the quality and standards of communal products and services. Determination of the amount of utility charge is, in any case, under the jurisdiction of the public sector body and it is a joint common solution in the laws on communal activities in BiH.

### The legal nature of public utility companies

Public utility companies which local government units are establishing for the purpose of performing utility activities are, by their legal nature, public companies and, provided that their organizational structure is not regulated by the laws on communal activities, the provisions of the laws on public enterprises are applied. The basic characteristics of public companies are that they perform activities of general interest and that their major shareholder is an entity from the public sector. Thus, according to the Public Enterprises Act of the RS, public company is considered a legal entity established in a form of joint stock company or a limited liability company to perform activities of general interest and in which basic (share) capital RS or some local government have a majority stake, either directly or indirectly<sup>12</sup>. The organizational structure of these companies, however, differs from the general regime of the Companies Act RS<sup>13</sup>, so the obliged bodies are stakeholders meeting,

<sup>8</sup> See art. 18 (2) of the Local Government Act of RS.

<sup>9</sup> Official gazette of RS, No. 124/11.

<sup>10</sup> Official gazette of Canton Sarajevo, No. 14/16. See art. 3. of the stated Act.

<sup>11</sup> In addition to the law at the state level, there are laws at the entities level which establish regulators in which jurisdiction is determination of prices.

<sup>12</sup> See art. 2 (1) of the stated Act, Official gazette of RS, No. 75/04 and 78/11.

<sup>13</sup> Official gazette of RS, No. 127/08, 100/11 and 67/13.

the supervisory board (which the Companies Act RS does not recognize), and management (comprising the director and executive directors). In addition to these bodies, in the context of the implementation of internal procedures the audit committee is also included (Rajčević, 2012). Thus, unlike the general regime which is based on the one-tier system of corporate governance in the domain of public enterprises legislator still stands on the positions of the two-tier system, which once represented the basic solution for all companies (according to the Law on Enterprises RS of 1998, which is no longer in force).

In carrying out their activities the public enterprises are subject to the risk of decreased efficiency due to the absence of competition, as well as corruption, which is particularly manifested through circumvention of procedures provided by the Public Procurement Act (Avramovic, 2010). Even these reasons indicate the need for transformation, as well as harmonization of the legal system with the EU *acquis communautaire*, particularly in the area of PPP, as well as competition law.

Many utility companies are privatized in accordance with the privatization laws enacted on the territory of BiH. Thus, the Privatization of State Capital Act of RS<sup>14</sup> has enabled the privatization of the part of the basic capital in the former purely state owned public enterprises. In some of them private subjects took over the majority share, while the entity (RS) has retained a majority stake only in companies that have been declared companies of strategic importance. The classic example of communal activity which is now in a 100% private property is "Marketplace"<sup>15</sup> Ltd Banja Luka. This company has originally been partially privatized and after that in 2011 a company "MG Mind" from Mrkonjic Grad took over a majority stake. By 2013 "MG Mind" reached 90% of the share capital and benefited from the possibility of squeezing out the remaining shareholders. Finally, "Marketplace" is transformed into a limited liability company<sup>16</sup>. In addition, the "MG Mind", through its subsidiary company "Marketplace" indirectly took over a controlling stake in another former public utility company, which now operates under the name "Cleanliness"<sup>17</sup> municipal service a.d. (joint stock company) Banja Luka and is engaged in activities of street cleaning, removal of home, street and industrial waste, snow cleaning, and the like<sup>18</sup>. Accordingly, this company is, at present, regulated by the Companies Act, and not the Public Enterprises Act.

<sup>14</sup> Official gazette of RS, No. 24/98.

<sup>15</sup> „Tržnica“

<sup>16</sup> [www.trznica-bl.com/struktura-vlasnistva.html](http://www.trznica-bl.com/struktura-vlasnistva.html)

<sup>17</sup> „Čistoća“

<sup>18</sup> "Marketplace" thus has about 51% of the share capital in "Cleanliness", while City of Banja Luka participates with only 30%. See the ownership structure at: <https://www.blberza.com/Pages/issuedata.aspx?code=cist>

<sup>19</sup> [www.ekapija.com/website/bih/company/photoArticle.php?id=684732&path=dozvole\\_160511.jpg](http://www.ekapija.com/website/bih/company/photoArticle.php?id=684732&path=dozvole_160511.jpg)

<sup>20</sup> But there are various solutions in the legislation. Thus, for example, under art. 18. of the PPP Act of RS, Official gazette of RS, No. 59/09 and 63/11, when local government unit or public institution/enterprise founded by the local government unit is a public partner, the consent should be given by the Ministry of finance and the competent ministry, while in other cases the Government of RS gives consent on conclusion of contract.

<sup>21</sup> See determination of public partner under art. 6 (1) of the PPP Act of RS, Official gazette of RS.

<sup>22</sup> In the case if there is any.

There are, however, opposite examples. One of them is the city of Tuzla which has won the annulment of the Decision of the Privatization Agency of Tuzla Canton of 2001. After 14 years the city council in Tuzla unanimously adopted the decision on the protection of public utilities and the need to be declared public good<sup>19</sup>. Thus, privatization of five utility companies: Public Utility Company (PUC) "Water supply and sewage", PUC "Komunalac", PUC "Commemorative Center", "Market-marketplace" and "Central heating", was prevented.

### Public-private partnership

Local governments are often not able to independently solve problems within their scope, including utility services, as well as the activities of public services (Dukić Mijatović and Golic, 2013), so the PPPs may represent a solution. The decision to initiate the procedure for establishing PPPs is brought by assemblies of the concerned local government units, while the agreement on mutual rights, obligations and responsibilities of public partners in the process of establishing a PPP, is concluded by mayors or heads of the concerned local government units, on the basis of prior consent given by assemblies<sup>20</sup>. The role of the public partner may, however, play other public sector entities, such as the state, entities and cantons (or their governments through relevant ministries), public institutions and public companies<sup>21</sup>.

In any case, public partners should draft tender documentation before announcement of public invitation. They should also prepare a study of economic feasibility prior to the private partner selection procedure and apply competitive dialogue in stated selection process. Therefore, it is of great importance to educate participants in procedures of preparation and implementation of PPP projects. The commissions for the PPP in FBiH and District, as well as commissions for concessions, on the state, entities, cantonal and district level have the role to organize specialized programs of education of public partners and other participants. Other competent bodies<sup>22</sup> can cooperate with stated commissions.

### Supervision

The realization of PPPs involves finding a compromise between the two interests. On the one hand, the interest lies in achieving social welfare and quality of life by im-

proving the level and quality of services of public interest, and on the other hand, in realizing the economic benefit of its own activity (Cvetković, 2015; Cvetković, 2014). Therefore, the question of supervision over the implementation of such projects is of great importance. In RS the control is performed by the relevant ministries, the Ministry of Finance, the relevant inspection bodies and the Supreme Service of the Public Sector Audit<sup>23</sup>. The legislative bodies of the FBiH<sup>24</sup> and Brcko District<sup>25</sup> provide the commissions for PPP (founded by the Government of the FBiH Canton or the District), which also have the right to monitor the implementation of PPP projects, but without any special power. They only examine the reports and information on implementation of the PPP projects and then inform the governments (of canton or district) on their findings.

Also, the services of local government are authorized to supervise PPP projects implemented at the local level. In RS, this jurisdiction is stipulated by the Communal Activities Act under art. 32-33, which stipulates that control over the implementation of regulation in the field of utility activities, is performed by the body of the local government responsible for utilities. Administrative control is performed by the Ministry of Spatial Planning, Construction and Environment, while the communal police of the local government unit, as well as other inspections when needed represent inspection authorities. Finally, the regulations governing consumer protection entrust public authorities with the possibility to protect users of public utilities' services which are provided through the PPP, given that it is a service of general economic interest as defined in indicated regulations<sup>26</sup>.

### Contractual forms

Two basic forms of exercising PPP in BiH are contractual and institutional form.

As stated, the Public-Private Partnership Act of Zenica-Doboj Canton regulates only contractual forms of partnerships, and the two models:

- a) basic - where the legal basis is the right of construction and by which the payment of compensation to the private partner is made entirely or mainly from the budget based on the availability of public service according to agreed standards,
- b) special - where the legal basis is concession and by which the payment of compensation to the private

partner, entirely or mainly, is done by the end users of public service.

Art. 6 of this Act emphasizes that the private partner undertakes the obligation from the public partner and the risks associated with financing and construction process, and at least one of the two key risks: the risk of availability of public building or demand risk. The procedure for concluding a contract consists of the identification phase of a PPP project, the PPP project proposal preparation, selection of the private partner and contracting PPP. The public partner submits the final text of the contract for the opinion of the competent Attorney. The Act also contains provisions on anti-corruption<sup>27</sup>. On the other hand, the Public-Private Partnership Act of RS opens the possibility that the public partner may propose other types of contractual form of public-private partnerships<sup>28</sup>. It also emphasizes in art. 6 (5), as well as the Public-Private Partnership Act of Canton Sarajevo in art. 9, that the private partner may, for the purposes of conclusion, i.e., contract enforcement, establish a company with special purpose. This company is involved exclusively in the implementation of the PPP project, which is the reason why it was founded.

Accordingly, the contractual PPPs can be established on the basis of one of the two procedures regulated by special laws, and those are public procurement procedure, regulated by the Public Procurement Act of BiH, or concession procedure, regulated by the Concessions Act of BiH, and separate entities and cantonal laws. Thus, the Concessions Act of BiH provides for the Commission for Concessions of Bosnia and Herzegovina to act as an independent regulatory body, which carries out its competence in the capacity of the Commission for Concessions BiH or in the capacity of the Joint Concession Commission, which performs functions and powers in relation to the grant of concessions which are not exclusively BiH jurisdiction or in the case of issues that arise in connection with the grant of concessions between BiH and / or RS. The entities, in turn, have their own commissions for concessions<sup>29</sup>.

The concession is granted to a bidder who responded to the invitation to tender, who has fulfilled all the criteria set out in the tender, and who has high ranking in relation to other tenderers, i.e. the one who is declared as the most successful. To attract as many quality bidders, the invitations to tender are sent to a large number of addressees and, if the Commission for concessions BiH requested so, it will be sent an international invitation. There is a possibility that a potential bidder sends a self initiated offer to competent Ministry, which then estimates whe-

<sup>23</sup> Art. 24, the PPP Act of RS.

<sup>24</sup> See, eg., art. 23 of the PPP Act, Official gazette of Canton Sarajevo, No. 27/11.

<sup>25</sup> See art. 5 of the PPP Act of Brcko District BiH, Official gazette of Brcko District, No. 2/10.

<sup>26</sup> Thus at the level of BiH is passed the Consumer Protection Act, Official gazette of BiH, No. 25/06, as well as the Act of the same name at the level of RS, Official gazette of RS, No. 6/12 and 63/14.

<sup>27</sup> Art. 30 of the PPP Act of ZDC.

<sup>28</sup> Art. 10 (3) of the stated Act.

<sup>29</sup> Art. 5-6 of the stated Act.



ther there is a public interest and, in the case of a positive attitude and after the authorization from the Commission for Concessions of BiH has been obtained, initiates negotiations with the bidder for the grant of concession<sup>30</sup>. Concluded concession contract assumes also certain status effects compared to the concessionaire in the sense that he cannot transfer, directly or indirectly, more than 15% of voting rights, unless he receives the approval of the Commission. Also, he cannot perform any activity other than that specified in the concession contract.

Concessions Act of RS<sup>32</sup> stipulates under art. 7 the possibility of carrying out concession on the Build-Operate-Transfer (BOT) model, and allows contracting other models for the implementation of concession. Concession agreements are concluded for a period not longer than 50 years, but can be renewed. Supervision over the implementation of this Act is performed by the competent authorities of administration of the RS and inspection is carried out by the Department of Inspection Affairs and competent inspections of local government units.

### Institutional form

Unlike the Public-Private Partnership Act of the Zenica-Doboj Canton, other laws on PPP in BiH regulate the institutional form of PPP, which is based on co-ownership between a public and private partner in a joint company responsible for the implementation of PPP project. The founding of such a business organization is preceded by the conclusion of the contract of partnership, as an unnamed contract of civil law (in current legislation). This, in fact, represents a phase of foundation of the company which is subject to the general company law regime.

### Implementation in practice

It should be noted that in BiH there are examples of implementation of PPP projects. According to its value, in particular, project proposals from the health sector are most successful. As the best example can be mentioned the inclusion of the private health institution "Euromedic International" from the Netherlands during the formation of Dialysis Center at the Clinical Center in Banja Luka. That company has been selected on the basis of the tender announced by the Government of the RS in 2000. Besides the center in Banja Luka, this company has built a modern center for chemo dialysis in Bijeljina, Laktasi and East Sarajevo, too, by which it provides patients the European standard of services. In cooperation with the Dutch company, which is also one of the largest operators of health institutions through PPP, the Centre for radiotherapy within the Clinical Center of Banja Luka is also equipped, as one of the most modern in the region. "Euromedic

International" has invested in the purchase of equipment, and the Health Insurance Fund reimburses radiation therapy to all its insured persons. According to data from the study on economic viability, the Fund should in this way achieve cost savings of at least 6.5% (Vukovic 2014). Apart from the already completed projects, the other project proposals in the health field are also made and waiting for implementation, such as the construction and equipping of the Center for Cardiosurgery in a spa village Slatina in the municipality of Laktaši (Komasar, 2015).

In addition to the health sector, PPP projects have been successfully implemented in other areas, such as transport (in this sector it is just waiting for the realization of a significant project proposal relating to the construction of the highway Doboj-Vukosavlje as a part of the Corridor Vc which passes through RS), parking, street lighting, public garage, as well as tourism and culture. Such is the project of construction of "Kamengrad- Andric's town" in Visegrad, according to the preliminary solution of the celebrated film director Emir Kusturica. For the realization of this project a joint company "Andrićgrad" has been founded, co-owned by a Emir Kusturica's company "Lotika", the Government of the RS and the municipality of Višegrad. The "Lotika" has a majority share of 51% (Vladušić 2012). The town has constructed city hall, theater, museum, library, memorial house of Ivo Andric, and other objects. The project is worth about 15 million EUR.

### Conclusions

Legislation of PPP in BiH is fairly dispersed and positioned at different levels of alignment with the EU acquis. In this sense, there is a need for harmonization, where of great benefit could be the planned adoption of the law on PPP at the level of the FBiH entity.

The need to improve the quality of public services is, in any case, beyond doubt, and the lack of public funds further emphasizes the importance of developing cooperation between public and private sector.

PPPs, on the other hand, carry risks, especially with regards to applying the competition law and the possibility of creating corruptive conduct. Therefore, the competent supervisory authorities should have an enhanced role. Non-punishment of illegal actions causes mistrust towards these forms of investment, which ultimately harm the country's economic development. The regulations alone must clearly emphasize the need to protect the public interest in the conduct and control of implementation of PPP projects.

Finally, the public sector must do more to attract investors.

<sup>30</sup> Concession contract cannot be concluded without previous consent of the Commission, unless it is concluded with the international financial institutions whose member is BiH.

<sup>31</sup> Official gazette of RS, No. 59/13.

It is necessary to pay more attention to the creation of the strategy of developing PPP, especially at the local level. The positive results also come with the realization of a large number of projects of lesser value, not just the big ones.

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