

PUBLIC-PRIVATE SECTOR PARTNERSHIP MODELS IN TURKEY

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1. Advances Concerning the Legal Structure

Although establishing Public-Private Sector Partnerships is a common and long-standing practice in Turkey and there are different types of models applicable, it is still extremely difficult to make a full categorization regarding the relevant laws and legal arrangements that are in effect. As you might clearly see from the following chronological list, the rules and conditions pertaining to the Public-Private Sector Partnership models have been regulated separately for each model at the end of 1980s, however, an attempt has been made at a cohesive legal arrangement of various separate models through Law No. 4046 on Privatization Practices dated 24.11.1994. On the other hand, although Public-Private Sector Partnerships are defined as providing of public sector services with the participation of the private sector, it is not possible to evaluate these models entirely within the framework of privatization. Therefore, regulation of Public-Private Sector Partnerships within the framework of the Privatization Law, in some aspects, prevents these models to be efficiently implemented.

The relevant laws that are in effect have been listed in chronological order below:

- Law No. 576 on Concession of Public Services dated 10.06.1910
- Law No. 3096 on **Authorization** of Enterprises other than the **Turkish Electricity** Institution to Produce, Transmit, Distribute and Trade **Electricity** dated 04.12.1984.
- Law No. 3465 on Commissioning of Entities other than the General Directorate of Highways to Build, Maintain and Operate Access Controlled Motorways (Highways) dated 28.05.1988.
- Law No. 3996 on Commissioning Certain Investments and Services within the Framework of Build-Operate-Transfer Model dated 08.06.1994.
- Law No. 4046 on Privatization Practices dated 24.11.1994
- Law No. 4283 on Establishing and Operating Electric Power Plants and Sale of Energy through the Build-Operate Model dated 16.07.1997

Owing to the need for and increased importance of Public-Private Sector Partnerships, there is an increasing demand to build a generally applicable legal framework.

2. Models

Although there is no cohesive legislation regulating the general rules and framework of Public-Private Sector Partnerships in Turkey, various Public-Private Sector Partnership models have been applied in public service projects since 1980s. The Public-Private Sector Partnership models have been introduced in the system by way of a series of laws. Therefore, it is difficult to make an appropriate categorization among the models, which are in effect under various names. When you are choosing a project to be implemented in relation with a certain investment, the nature of the project and allocation of the anticipated costs, risks and benefits between the public administration and the private sector investor should be taken into consideration.

Primary Public-Private Sector Partnership models are regulated under the Law No. 4046 on Privatization Practices dated 24.11.1994. There are other legislations regulating Public-Private Sector Partnership models as well. Key characteristics of certain models that are currently in use are presented below:

2.1 Concession

Concession agreements find their roots in Law No. 576 on Concession of Public Services dated 10.06.1910. Concession Agreements allow public administrations to transfer the

management of infrastructure or public services to the private sector. While the private sector is operating the public utilities in the name of the public administration, the risk is undertaken by the investor. The service fee to be paid to the public administration is collected by the private sector investor.

Upon expiration/termination of the concession, all assets related with the service in question are directly transferred to the public administration.

This method stipulates a public service to be established and operated by a private legal person, which will do so against the fees payable by the users, profits and losses to be incurred by this private legal person.

The general characteristics of this method are as follows:

- Concession agreement is a bilateral agreement
- The subject matter of the concession is establishing and operating a public service
- The private legal person provides the public service in return for the fees paid by the users benefiting from the public service
- The public service is operated by the concessionaire private legal person, the profits and losses to be incurred by the concessionaire in question.

The concession method stipulates that a public service may only be operated by a private legal person if the service in question is under the monopoly of the administration. When the public service concession agreement expires/terminates, all the assets relating this service are automatically transferred to the administration.

Council of State 10th Administration has resolved as follows in its decision dated 29.04.1993 and numbered .¹

Concession agreements are subject to the assessment of the Council of State. Through Law No. 4446 that came into effect after being promulgated in the Official Gazette dated 14.08.1999, which amended the Constitution, this assessment has been limited to mere expressing of opinion. Disputes arising from these types of agreements shall be subject to the rules of administrative law and shall be settled by the administrative courts, except for those cases where parties have agreed to settle disputes through arbitration.

2.2 Build-Operate-Transfer

Build-Operate-Transfer (BOT) Model has been introduced in the Turkish legal system through Law No. 3996 on Implementing Investments and Services within the Framework of the Build-Operate-Transfer Model dated 08.06.1994. "BOT" is defined as a special finance method where the investment costs (including profits) are paid to the investor in return for the sale of the products and services produced, by the investor. The BOT model is generally applied to projects that require special know-how and generate high costs.

Through legal adjustments recently introduced, Law No. 3996 has acquired a different legal status. Since in article 5 of the Law it has been stipulated that the agreements to be concluded under this law shall be subject to the provisions of private law, it has achieved a partially different status than operation of public services by private legal persons as regulated under laws no. 3096 and 3465. Based on this provision, the administration may, at its sole discretion, specify in concession agreements to be concluded under Law No. 3096

¹ Council of State 10th Adm. E.1991/1-K 1993/172. Council of State Journal, edition: 88, page .463 et seq.

² Constitution article 155/2: (Amended: 14.8.1999—4446/3 art.) The Council of State is responsible for hearing cases, expressing its opinion on draft bills sent by the Prime Minister and the Council of Ministers, concession contracts and agreements relating to public services in two months, as well as reviewing draft regulations, settling administrative disputes and undertaking other responsibilities stipulated in the law.

³ Article 5 that was first rescinded by the decision of the Constitutional Court dated 28.06.1995 and numbered 1994/71 E. 1995/23 K. was later regulated once more through article 2 of Law No. 4493 dated 20.12.1999.

that the agreement shall be subject to private law, and may apply other relevant provisions of Law No. 3996 to the agreement.

There are serious disputes regarding which services would be regulated by which laws and be subject to which regime relating to electricity and highway services, since although Laws No. 3096 and 3465, and Law No. 3966 are headed toward two distinct and opposite directions, there is a close relationship between them when it comes to the services provided under these laws

The issue to be emphasized here is as follows. In Law No. 3996, the build-operate-transfer model is defined as a special finance model. It is without doubt that the Legislator did not use this term accidentally, but is trying to take strategic decisions and indicating where and how the public administration should stand in a competitive environment of a globalizing world. As a matter of fact, the term finance model is an explicit declaration of intent by the legislator that the build-operate-transfer model has a completely different legal and economic status. However, it is also impossible to say, due to the finance model definition that the build-operate-transfer model is different than the models where a public service is operated by private legal persons. At this point it would be reasonable to state that through use of an insensible and chaotic method, the "legislator's intent" was deliberately kept clear of creating transparent models that aim to serve the public in the process during which concession, build-operate-transfer and privatization models are shaped to reach their current status.

As of the date the Law has come into effect, the structure of the Law, which led to disputes, and the process of its evolution can be summarized as follows:

- The Law, even at the time it came into effect in 1994, was stipulating a legal structure unlike the concession method. Therefore, pursuant to the initial regulation of article 5 of the Law, the scope of the law has been defined as "services that do not constitute a public service", where it was stipulated that these services should be subject to private law. The Legislator has thus aimed that the agreements to be concluded on the basis of this Law would be left outside the scope of Council of State assessment. However, through the decision of the Constitutional Court No. 1994/71 E. 1995/23 K. dated 28.06.1995, the relevant sentence of article 5 of the Law has been rescinded on the grounds that it is in breach of the Constitution to subject the agreements that basically have the nature of an administrative agreement to provisions of private law.
- Upon this decision of the Constitutional Court, articles 47 and 125 have been amended through Law No. 4446 dated 13.08.1999.

Article 47/4;

⁴ Article 2: Scope: This Law regulates the principles and procedures regarding commissioning of capital companies or foreign companies within the framework of the build-operate-transfer model on building, operating and transferring of investments and services related with bridges, tunnels, dams, irrigation, drinking and tap water, treatment facilities, sewers, communication, "production, transmission, distribution and trade of electricity", mining and mining facilities, plants and similar premises, investments to prevent environmental pollution, sea and air ports for civilian use of highways, railways, underground and surface parking lots.

⁵ Article 3: Definitions: a) Build-Operate-Transfer Model: This is a special finance model created to be used in realization of projects requiring advanced technology and considerable financial resources, commanding payment of the investment amount (including profits to be acquired) to the capital company or the foreign company upon purchasing of the goods and services produced within the operation period by those who are benefiting the goods or services, or the administration.

"The issue regarding which of the investments and services provided by the State, public economic enterprises and other public legal persons may be commissioned or transferred to real and legal persons through private law agreements shall be established by law."

"It might be stipulated in the concession contracts and agreements related with public services that the disputes arising thereof would be settled through national and international arbitration. International arbitration is only applicable for disputes involving an international element."

- The Legislator has amended article 5 of Law No. 3996 again through Law No. 4493 dated 20.12.1999 following establishment of its Constitutional authorities in the aforementioned manner and has stipulated that the agreements to be concluded pursuant to this law are private law agreements.

"The agreements to be concluded between the administration commissioned by the Supreme Planning Board and a capital company or a foreign company shall be subject to the provisions of private law."

- Through Law No. 4492 dated 18.12.1999, the concession agreements for which an arbitration model has been stipulated in the Council of State Law No. 4577 dated 02.06.2000 and Administrative Jurisdiction Procedures Law have been left outside the jurisdiction of the Council of State and Administrative Courts.
- Law No. 4501 on Principles to be Observed in Settlement of Disputes Arising from Concession Contracts and Agreements Related with Public Services through Arbitration dated 21.01.2000 was promulgated.

"The purpose of this Law is to determine the principles and procedures to be observed by the parties at the time the agreement is executed, if it has been stipulated in the concession contracts and agreements related with public services that any disputes arising thereof shall be settled by way of arbitration."

Under such circumstances, it has been stipulated that "build-operate-transfer" agreements, which are subject to private law and disputes arising thereof would be settled through arbitration, are considered to be drawn up within the framework of Law No. 3996 and executed under Laws No. 3096 and 3465 would be, as a general rule, subject to administrative law; but in cases where the administration deems necessary they shall be subject to private law.

2.3 Build-Operate

This model has an exclusive scope regarding building and operation of power plants owned by investors.

In this model the investors obtain the right to build and operate thermal power plants only. Hydroelectric power plants, geothermal and nuclear power plants, as well as all other power plants running on renewable energy sources are excluded from the scope of this law. Since this model is limited to a certain subject, it has been applied in a limited number of projects in Turkey.

Agreements signed according to this model under Law No. 4283 are regulated through the private law rules and any dispute arising thereof may be settled through international and/or national arbitration.

2.4 Build-Lease-Transfer

The Build-Lease-Transfer Model has been established in our system through an amendment introduced in the Fundamental Law on Health Services in 2005 and is applied in conjunction with only health services. The Ministry of Health allows investors to build health premises on public immovables to be later leased by the Ministry.

All services other than health services are provided by the private sector in relation with the premises in question. Based on the nature of the facilities, if the investor is also providing operating services, then this issue is taken into consideration at determination of the lease value.

Since there is no special regulation regarding applicable law and court of jurisdiction, the agreements discussed within the scope of this model are agreements subject to public law and the administrative courts are the courts of jurisdiction.

2.5 Transfer of Operating Rights

Within the scope of this model, the administration transfers its operating rights to private investors for a certain period and under certain conditions. This model is regulated through Law No. 4046 on Privatization Procedures that introduces general definitions on this method, as well as Law No. 3096 on **Authorization** of Enterprises Other than the **Turkish Electricity** Institution to Produce, Transmit, Distribute and Trade **Electricity** dated 04.12.1984.

In this method the proprietary rights are not transferred, but only the operating rights of a certain service are granted to the private sector.

Pursuant to provisions of Law No. 4046, the Privatization Administration will be free to apply other methods in accordance with the aspects of the public service and requirements of the project.

3 Protecting Investors in Public Service Projects

Public-Private Sector Partnerships may be defined as relations established with the public administrations or the State, based on a private law agreement. Generally, all agreements to be executed with public administrations in relation with providing a public service are called "Administrative Agreements" and therefore the administrative courts are the courts of jurisdiction.

In the Turkish legal system, several adjustments have been introduced after 1999 to make significant changes to the issues of governing law and settlement of disputes to be applicable for Public-Private Sector Partnerships. The most common Public-Private Sector Partnership method, the BOT model is thenceforth evaluated within the framework of private law. Immediately after that the Legislator has introduced adjustments to handle Public-Private Sector Partnerships as a subject of the private law, except for Concession Agreements that are within the scope of public law and under the jurisdiction of Administrative Courts. However, we must point out that the regulation relating to implementation of international arbitration on concession agreements has come into effect through Law No. 4501 dated 21.01.2000. In this respect, if one of the parties to the agreement is foreign, parties may decide to opt for international arbitration for settlement of disputes.

Furthermore, there are multi-lateral and bilateral investment agreements signed by Turkey for protection of investors, first of which is the bilateral Investment Agreement, signed with Germany in 1962. Turkey has also become a member to the International Center for the Settlement of Investment Disputes (ICSID) in 1965. Turkey is currently a party to more than 50 multilateral and bilateral investment agreements. In almost all of these agreements, Turkey has accepted to implement arbitration agreements for investment projects.

In the light of the aforementioned developments, the parties will be free to decide on the provisions of jurisdiction, in line with the relevant legal adjustments, provided that certain conditions are complied with.

4 Deficiencies in the System and Steps to be Taken

As mentioned clearly in the previous sections of this article, Public-Private Sector Partnership procedure is only one of the models enabling the private sector to operate public services. The method to be implemented for operation of a project must be determined based

on facts such as the current circumstances, the nature of the project and primarily, the benefit of the public and characteristics of the public service.

However we should point out to the fact that as the financial burden on the public sector increases, the quality and effectiveness of providing such services decrease. Therefore, although under current circumstances Public-Private Sector Partnership models are considered by both the public sector and the private sector to be appropriate to produce public services and provide them to users within the context of economic development, the current legal infrastructure of our country is far from providing a convenient atmosphere to implement Public-Private Sector Partnership models.

Therefore, establishing a proper legal infrastructure would not only mean a revolution in administrative law, but also the grounds for proper and economical use of resources. The key to the efforts to be carried out at this point would be the **formation of a national strategy. For the scope of the services, which now and then impact national interests and have a strategic importance must be determined within the framework of current political circumstances, and the degree that they allow private sector contribution must be discovered. Subsequently, establishing the method for private sector participation and feasibility thereof shall facilitate implementation of fixed projects. At this point, the liberal economy trends of our day have begun to value the social state principle above short-term policies. The chaos to be experienced by the community from insufficient level of public services, or even their non-existence would lead to ineradicable problems in the long-run that states would be unable to cope with.** Turkey should define and improve main development strategies to provide the services and infrastructure needed by the public at the required conditions as soon as possible.

The infrastructure for the models to be implemented by the contributing private sector companies should be created in line with the strategies to be determined and the relevant legislation should be adapted to the policies determined in the relevant legislation. Otherwise, the decisions to be taken by the administration that are meant just to save the day shall be creating daily practices only, since they would not mature into a development policy.

In general, the most significant problem in countries with developing economies is that as the governments change, the policies and implementations in areas requiring national strategy, such as public services change as well. Naturally, this turns into a puzzle in long-term investments and many investments end up in courts. To put an end to this, it is required to develop models based on state-policy, rather than government-policy. For this purpose, legal adjustments relating to public services should be introduced by taking the opinions of both the ruling party and opposing party, as well as the private investor; a social consensus should be reached. At this point, since the main field of application of models stipulating **private sector participation** is services involving public opinion sensitivity, to be successful these models should act on an axis of political support and protection.

To establish order out of a legislation jumble on Public-Private Sector Partnerships, the regulations introduced through separate laws, each stipulating certain models should be restructured under an **omnibus law** to the extent possible, enabling and facilitating development of a legal infrastructure that would embrace all the past legacies and prevent possible loss of any rights.

Parallel to improvement of the legal infrastructure, improvement of the institutional infrastructure carries critical significance. Usually, practice and legal adjustments seem to evolve in different directions as if they are two distinct things. The reason may be the facts that implementers have not fully comprehended the implications of the legal adjustment or the legislator could not analyze the processes arising from practice. At this point, the models to be built should be implemented by a central authority to the extent possible and the pertaining rules should be grounded on general principles, establishing a standard platform.

Apart from the issues regarding overcoming of legal infrastructure problems, the issue that should be taken into consideration and attended to before implementation of projects by both the private sector and the public sector is the necessity to carry out their own independent feasibility work on the projects. Because as we have mentioned above, the Public-Private Sector Partnership is a model based on fair risk-sharing.

Keeping all these issues in mind and by taking the implementations abroad as basis, a finance model that would be implemented for years to come might be established in our country.

CONCLUSION

Turkey has been trying to gain grounds in categorizing the concepts of "public service" and "private sector" and using these terms together for years. At the point we have reached since 1980s, we can see that we are still trying to set some missing stones in place. The historical mistake of those days--imponderable even by the implementers--was the fact that the models, the scope of which they could not accurately fathom, were introduced in the system without a legal infrastructure. Systems, infrastructures of which are tried to be established through implementation, result in nothing but frustration.

As mentioned in the section relating to the scope of the work, there is currently no unification in the legislation that would meet the requirements of the system for the Public-Private Sector Partnership model. Trying to establish new models on systems that have not gained the recognition of the community and the judicial authorities during their implementation, and impaired by criticisms would prove out to be fruitless and result in only sustaining of the problems and disputes. Therefore, to embark on a new legislative effort by commissioning a single administrative organization with the aim of creating a single legal regulation based on the input provided by the current structure would result in a healthier approach to the economic structure that we desire to attain. Although they are not presented to the Turkish Grand National Assembly yet, there are some legislative efforts carried out by various administrative organizations. It is evident that a legal infrastructure that would be most reasonably meeting the requirements of our country should be built as soon as possible, by taking into consideration the practices around the world, as well as past experiences.

BIBLIOGRAPHY

