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IS PPP (PUBLIC-PRIVATE PARTNERSHIP) COMPATIBLE WITH THE THEORY OF "*CONTRAT ADMINISTRATIF*"?

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I. LEGAL ASPECTS OF PPP

Although the investment tool known as PPP has continuously been a matter at issue for 3 or 4 years as an overall cure, there is no specific act on PPP in Hungary. Nevertheless, the rules applicable to concessions, which are a simple type of PPP, are set forth in a separate act.

- None of the laws of Hungary explicitly provide for PPP.
- The law-maker only refers to PPP or simply circumscribes it.

As you can see, economic needs and practice have preceded the legislation. However, the economic concept of PPP has not become a legal term.

The issue can be raised as follows: Is there a need for a separate legal term of PPP or can PPP be described with the assistance of the joint application of existing legal categories?

For example, factoring, several types of leasing agreements and the transaction known as forfeit have been operating as economic techniques even without being specified in the Civil Code.

In general, a specific type of contract needs to be regulated by law if the economic importance of the applied legal solution, i.e., the frequency of the exchange of goods/production procedure and the value of production affected by the production procedure as well as the specific and distinguished method of the legal solution, generates a need for such regulation.

II. LEGISLATIVE BACKGROUND (1)

The relevant legislative background is set out in the following acts:

Act IV of 1959 on the Civil Code of Hungary (the „**Civil Code**");
Act XXXVIII of 1992 on Public Financing (the „**Public Finance Act**");
Act CXXIX of 2003 on Public Procurements (the „**Public Procurement Act**");

Act LV of 2003 on State Aid Granted in connection with the Construction of the First Section of the fourth Metro Line in Budapest between Budapest Kelenföld Railway Station and Bosnyák Square (the „**Metro Act**");
Act XVI of 1991 on Concessions (the „**Concession Act**");
Annual Acts on the State Budget.

In general, the current regulatory environment is suitable for the implementation of PPP projects. However, the issue of enforceability of obligations undertaken by the municipalities in the course of municipality PPP projects has not been settled in a reassuring way.

In order to set up a regulatory environment for PPP projects, a number of essential changes in law needed to be passed in Hungary in the past few years. The law-makers, instead of passing a separate act on PPP, amended various laws that had previously existed and changed them in a way so as to make the implementation of PPP projects feasible („*amending attitude*").

Essentially, such changes touched upon two key issues:

a) the creation of the conditions of the long-term commitments of the State
- changes in the Public Finance Act
- changes in the Civil Code

b) setting up the rules of public procurement.

ad a) Long-Term Commitments of the State

The creation of the conditions of the long-term obligations of the State became a pressing problem following the so-called *Metro-case*.

- *Statement of Facts in the Metro-case:*

The subject matter of the investment was the construction of the fourth metro line in Budapest (South Buda - Rákospalota). According to the planned investment:

- BKV Ltd (a one-owner company, owned by the Municipality of Budapest) was the investor and the prospective operator of the metro,

- the investment would have been jointly financed by the Municipality of Budapest and the Hungarian State in a way that BKV Ltd would raise a loan and the State would provide so-called 'own resources' necessary for raising the loan by BKV Ltd and for the repayment of the loan,

- the commitments of the State would cover approximately 60 per cent of the costs of the investment.

The government had decided on the subsidy of the investment in its resolution published in the Official Journal of Hungary, following which the relevant agreement was signed by the Minister of Finance on behalf of the Hungarian State. A legal dispute subsequently arose as the State had terminated the agreement and refused to fulfil its payment obligations thereunder.

- *The Most Important Findings of the Metro-decision*:

In the *Metro-case*, the court held that passing a resolution on granting state aid to the municipality fell within the jurisdiction of the Parliament and the preparation of granting such state aid fell within administrative jurisdiction and, furthermore, that making a decision on granting state aid to the municipality lied within the power of the law-maker. Finally, the court concluded that it was legally impossible to provide state aid via the conclusion of a civil law contract entered into by authorities on a civil law basis.

Furthermore, the court held that an act of will related to the performance of administrative, governmental or political activities might not be the subject matter of a civil law contract. In other words, no valid civil law contract may be concluded for the purpose of issuing a decision (whether normative or single).

According to the decision, it is contrary to the rules of law if the government undertakes to provide financial aid to the debit of the state budget without the consent of Parliament. Furthermore, the State may not freely enter into contracts but may only conclude those contracts that are specified in the relevant acts.

The decision is based on the approach, according to which the State is a special legal entity as a consequence of its restricted legal capacity and ability to enter into agreements. Finally, the Supreme Court of Hungary held that the public and private law entity of the State may not be mingled even in the absence of explicit prohibition.

- *Consequences*

  (a) Shaking Investors' Confidence

  It would lead to extreme uncertainty and unpredictability in the economy if the State could, at any time, challenge its own contractual obligations based on the position set out in the decision. This, in other words, would mean that the State has the right to unilaterally cancel its contractual obligations.

  If the State was at liberty to decide, in each Act on the Annual Budget, whether or not it wished to perform its former civil law obligations, this would mean that the State has a unilateral right to amend previous contractual relations to the detriment of the parties that entered into a contract with the State.

  This situation clearly resulted in shaking investors' confidence.

  (b) Framing the Metro Act

  As an attempt to restore investors' confidence, the law-makers passed the Metro Act.

  The Metro Act contains two provisions that are of high importance from the perspective of the implementation of PPP projects, namely,

  • the changes affecting the procedure of project approval (Public Finance Act); and

• the changes affecting the accountability of the State as a legal entity concluding a civil law contract regarding its long-term obligations (Civil Code)

Changes in Public Finance Act

"An agreement, the value of which is of an amount equivalent to or exceeding the net amount of HUF 50 billion, and pursuant to which agreement the state is under an obligation to make payments throughout a period of time that is more than one year, the government is required to obtain, before the conclusion of the agreement, the approval of the Parliament unless provided otherwise by law." (Section 22 Paragraph 1 of the Public Finance Act).

Changes in the Civil Code

"The state is obliged to fulfil its compensation, reimbursement, and restitution obligations as well as contractual obligations towards persons acting in good faith, even if there is no coverage in the budget allocated for such obligations, or if such coverage is not sufficient to cover the entirety of the obligations." (Section 28 Paragraph 2 of the Civil Code).

The above changes underpin the civil law principle according to which the State as a legal entity has the same rights and is under the same obligations under contracts governing pecuniary services as other entities of civil law, and is not superior to them, i.e.,

- the State is not entitled to privileges, and
- the State is liable for damages and the violation of agreements.

Please note that the latter principle has been established only in respect of the liability of the State as a legal entity, however, it has not yet been declared with respect to the long-term obligations of municipalities. This raises the issue of the enforceability of the long-term obligations of municipalities (in other words, there is a risk factor in case of municipal PPP projects).

ad b) Framing the Rules of Public Procurement

Most of the PPP projects qualify as subjects of public procurement. Since the accession of Hungary to the European Union, the relevant directives of the European Union are to be applied to such public procurements, which directives have already been transposed in the Hungarian Public Procurement Act. The Public Procurement Act entered into force on May 1, 2004.

III. LEGISLATIVE BACKGROUND (2)

(1) Provisions of the Public Procurement Act

Pursuant to the Public Procurement Act, every organization that manages public funds or finances its operations out of public funds, or, upon which organization state organs or municipalities have a decisive influence in connection with its decision-making or operations is obliged to conduct a public procurement procedure if the value of the relevant procurement reaches the national or EU value level.

- This is not only about budget organs taken in a narrow sense but about all so-called "organizations of public law".

- The Public Procurement Act enlists all organizations and types of organs that fall within the scope of the act (Section 22 Paragraph 1 of the Public Finance Act).

- Subjects of public procurement: commodity procurement, construction investment, ordering of services, concession for construction, concession for services.

- Taking into account that PPP typically ensures the financing of large investments, the Public Procurement Act is applicable to almost all public procurements.

- However, the Public Procurement Act does not contain any provisions that would be explicitly applicable to PPP.

Rules applicable to concessions for construction and to concessions for services have the purpose of ensuring that PPP projects fall under the scope of the Public Procurement Act. Therefore, the issue whether or not a project falls within the scope of the Public Procurement Act needs to be examined on a case-by-case basis.

In case of PPP projects, one of the basic issues is to decide that the public procurement is to be carried out in accordance with the rules applicable to which of the subjects of public procurement.

Most PPP projects are procurements of complex nature (and, generally, are the combination of commodity procurement, construction investment and the ordering of services).

> *"If an agreement contains more than one subject of public procurement, which subjects are necessarily related to each other, the agreement qualifies in accordance with the subject of determining value."* (Section 28 Paragraph 1 of the Public Procurement Act).

The Public Procurement Act provides, in addition to the three typical subjects of public procurement (commodity procurement, ordering of services, construction investment), for two new subjects of procurement:

- concession for construction

  "The concession for construction is a type of construction investment on the basis of which the consideration to be provided by the person calling for the tender is the concession, for a definite period of time, of the right to utilize the building or the concession of such right along with pecuniary consideration." (Section 26 of the Public Procurement Act).

- concession for services

  "The concession for services is a type of ordering of services based on which the consideration to be provided by the person calling for the tender is the concession, for a definite period of time, of the utilization right related to the provision of services or the concession of such right along with pecuniary consideration." (Section 242 Paragraph 4 of the Public Procurement Act).

Rules applicable to concessions for construction and to concessions for services have the purpose of ensuring that PPP projects fall under the scope of the Public Procurement Act.

(2) The Concession Act

Concession has become one of the types of PPP which the Concession Act provides for. Pursuant to the Concession Act, the effective management of assets owned exclusively by the State, municipalities or associated municipalities, or, the exercise of activities falling within the exclusive jurisdiction of the State or the municipalities may be performed, as one of the possible solutions, in accordance with the provisions of a concession agreement.

The Concession Act lists all activities which specific acts may provide for only within the frame of the Concession Act.

- *national public roads and their structures, canals and regional public utility facilities;*
- *local public roads and their structures forming part of the assets of the municipality, which assets may not be alienated, and the operation of local public utility facilities;*
- *mining research and exploitation as well as all related additional mining activities;*
- *product transportation through pipes and storage;*
- *production and distribution of fissile and radiation materials;*
- *activities regarding the organization and management of gambling;*
- *scheduled transportation of persons by trolley bus on public roads*
  (Section 1 Paragraph 1 of the Concession Act).

The State and the municipality may concede, for a definite period of time, the exercise of the activities enlisted above by way of concluding a concession agreement. During the term of the concession agreement, the company having a concession right is entitled to possess and utilize the assets owned exclusively by the State or the municipality and to enjoy the benefits of such assets.

Relationship between the Concession Act and the Public Procurement Act

> *"If the concession for construction regulated in the Public Procurement Act falls, at the same time, within the scope of the Concession Act, the Concession Act is to be applied with the deviations specified in the Public Procurement Act."* (Section 3/A Paragraph 1 of the Concession Act).
>
> *"If the concession for services regulated in the Public Procurement Act falls, at the same time, within the scope of the Concession Act, the Concession Act is applicable."* (Section 3/A Paragraph 2 of the Concession Act).

Apart from the pure concession form, projects that use the classical structures of PPP projects have not yet been implemented in Hungary. Amongst others, e.g., the M5 freeway project was implemented within the frame of such pure concession form.

(3) Provisions of the Public Finance Act

It is possible, under the Public Finance Act, to undertake a payment obligation that expires after the end of the given year in which such obligation was undertaken. However, to undertake such payment obligation, one condition must be fulfilled, namely, taking into account the circumstances known at the time of undertaking the payment obligation, the State must be able to fulfil such obligation upon the due dates without endangering the ordinary operation of the budget. (Section 12/A of Paragraph 2 of the Public Finance Act).

In case of each improvement project approved by the government, obligations may be undertaken in accordance with the conditions specified by the government. (Section 12/A Paragraph 2 of the Public Finance Act).

This is to ensure that a governmental decision is needed for the implementation of essential projects falling within the jurisdiction of certain ministries.

> *"An agreement the value of which is of an amount equivalent to or exceeding the net amount of HUF 50 billion and pursuant to which agreement the state is under an obligation to make payments throughout a period of time that is more than one year, the government is required to obtain, before the conclusion of the agreement, the approval of the Parliament unless provided otherwise by law."* (Section 22 Paragraph 1 of the Public Finance Act).

In case of every project involving a payment obligation that is essential or pursuant to which the State is obliged to make payments throughout a period of time that is more than one year, governmental approval is needed for implementation. If the aggregate value of the project exceeds HUF 50 billion, the approval of the Parliament is needed.

(4) Provisions of the Civil Code

> *"The state is deemed to be a legal entity when becoming a party to a monetary relationship. Unless provided otherwise by law, the state is represented by the Minister of Finance in a civil law relationship. The Minister of Finance may exercise such rights through state organs or may transfer such rights to another state organ".* (Section 28 Paragraph 1 of the Civil Code).[1]

> *"The state is obliged to fulfil its compensation, reimbursement, and restitution obligations as well as contractual obligations towards persons acting in good faith, even if there is no coverage in the budget allocated for such obligations, or if such coverage is not sufficient to cover the entirety of the obligations."* (Section 28 Paragraph 2 of the Civil Code).

> *"The budgetary organ is also obliged to fulfil its compensation, reimbursement, and restitution obligations as well as contractual obligations towards persons acting in good faith, even if the coverage is not sufficient to cover the entirety of the obligations."* (Section 37 Paragraph 1 of the Civil Code).

[1] Based on the authorization, the Public Finance Act provides for other rules of representation (e.g., assets of the treasury).

IV. THE THEORY OF "*CONTRAT ADMINISTRATIF*" IN HUNGARY

The comprehensive and general institutionalization of administrative contracts has not yet occurred in Hungary. This is about a theoretical and not about an existing legal category.[2]

The Act on the Rules of Administrative Procedure ("Administrative Procedure Act") entered into force in November 2005 actually provides, under the term "authority contract", for one of the types of authority contracts.

- If the law makes it possible, the administrative authority may, instead of making a decision, enter into a contract with its client in order to settle the given case falling within its jurisdiction in a beneficial way from the perspective of both public interest and the client. (Section 76 Paragraph 1 of the Administrative Procedure Act).

- In the event that a new essential fact arises or the circumstances existing at the time of the conclusion of the contract substantially change, any of the contracting parties may initiate the amendment of the contract. If the other party does not approve the amendment or there is a dispute between the parties in respect of the statutory conditions of the amendment, the court ruling in administrative matters may be requested to amend or terminate the contract. (Section 77 Paragraph 1 of the Administrative Procedure Act).

- The provisions of the Civil Code governing the laws of contract are applicable to the authority contract with respect to all issues not regulated in the Administrative Act. (Section 77 Paragraph 4 of the Administrative Procedure Act).

The administrative contract is an institution of administrative law, and is a contract in the legal sense of the word.

Given that it does not come into being as a result of a unilateral declaration, it may be regarded as a specific type of administrative action.

Characteristics of Administrative Contracts:

- at least one of the parties entering into the contract is an authority;

- the purpose of the contract is to manage administrative tasks (serving public purposes and public interest);

- administrative contracts contain provisions that cannot be regarded as civil law provisions. The characteristic that distinguishes such contracts from civil law contracts is that an authority has certain privileges, i.e., the parties are not in an equal position (e.g., the authority may terminate the contract by way of extraordinary termination or may unilaterally amend the contract);

- administrative contracts are under permanent supervision from the perspective of legality.

[2] Following the political changes of 1989, the law-makers - presumably not knowingly - established several types of contracts that qualify as administrative contracts given that they contain elements of public and also of private law nature.

Main Types of Administrative Contracts:

- association of local municipalities as provided for by law (association of authorities, institutional association, operating a joint board);

- contracts on financing entered into by the National Health Insurance Fund (determined by law);

- contracts entered into by local municipalities and the police;

- contracts the purpose of which is the transfer of public services (contracts for public education, contracts for waste management, contracts for the transportation of persons by rail, contracts for the scheduled transportation of persons in Hungary) (determined by law);

- contracts concluded between an authority and its client (authority contract) (determined by law, i.e., is not only theory).

Under the legal literature on administrative law, there are two debated additional types of contracts that belong to the main types of administrative contracts:

Concession Contracts

Such contracts are regarded by the relevant legal literature as contracts containing administrative obligations.

Public Procurement Contracts

The legal literature is not unanimous as far as the classification of public procurement contracts is concerned. Some scholars are of the view that such contracts qualify as administrative contracts, whereas others regard the public procurement contract as a civil law contract containing elements of administrative law.

The question is as follows: To what extent can we deem the classification of certain contracts and the debate around it theoretical? The public or private law characteristics of a contract decisively influence the rights of the State in a given contractual relationship. Therefore, it does have an importance whether we examine a given contract from the perspective of civil or administrative law.

Whether the law-makers, upon regulating a given contract, wished to regulate the contract on the basis of administrative or civil law is an essential issue. Several answers can be given to such issue depending upon whether the characteristics of the legal relationship - i.e., the protection by the State of the interests of consumers and of public interest - intended to be regulated may or may not be governed by private law.

The answers to the above issues were developed in Europe based on the following theories:

(1) Theories of Administrative Actions

The bottom line of the theory based on a relationship between the parties where one of them is superior to the other is that any legal relationship that is entered into by the

State and a private individual and that affects public interest may only be regulated by administrative actions.

(2) Contractual Theories

- The Monistic Approach

This theory is based on the equality of the contracting parties, however, the State is not regarded as a pure civil law entity but as a public law entity with some privileges.

- The Civil Law Approach

Under this theory, the State is a pure civil law entity when contracting with a private individual. The contracting parties are equal.

(3) Mixed Theories

The legal relationship of the parties is examined from one element to another. The theory distinguishes the *"additional rights"* of the private individual that must be complied with also by the State (the rules of civil law are applicable to such rights) from administrative actions (the rules of civil law are not applicable to such actions).

The issue is whether Hungarian law has given an answer to the above question in case of concession and public procurement contracts incorporating PPP projects and, if yes, what kind of an answer?

V. DO PPP CONTRACTS QUALIFY AS ADMINISTRATIVE CONTRACTS?

(1) Concession

As far as the legal nature of concession contracts is concerned, no generally accepted theory has been developed. The debate surrounding concession contracts can be "tracked down" in the legal literature and is reflected in the nature of applicable laws. The issue is whether concession contracts qualify as civil law contracts or as administrative contracts.

- Arguments in favour of qualification as civil law contracts

"Any legal dispute arising out of a concession contract must be settled by the court having a general jurisdiction and competence." (Section 16 Paragraph 1 of the Concession Act).

"Unless the present act provides otherwise, provisions of the Civil Code are applicable to the concession contract." (Section 19 Paragraph 1 of the Concession Act).

"The state and the municipality conclude the concession contract as civil law entities and waive their privileges and exemptions." (see the ministerial reasoning attached to Section 16 of the Concession Act).

Based on the above, it can be ascertained that the law-makers regulated the concession contract primarily as a civil law contract in Hungary. However, the law-makers:

- attached some elements to such contracts that flow from the nature of the concession contract and that deviate from the general contractual rules, and

- made the rights of administrative nature of the State appear as if they were civil law rights. Such rights are incorporated, as compulsory provisions, in the call for tender and, as a result, in the concession contract ("take it or leave it").

It is worth examining those rights of an administrative nature that are vested, in other countries of Western Europe, upon the State as an entity granting concessions. The solution applied by such countries varies from one country to another.

Special rights of the State granting concession:

1 power of the State to control and supervise

2 the so-called protection rights[3]

3 right to unilaterally amend a contract

4 right to apply sanctions

5 right to unilaterally interpret a contract

The characteristics described above are incorporated in Hungarian law as follows:

- <u>Special rights of the State granting concessions in the Concession Act:</u>

  Ad 1
  "The call for tender must contain…information on the rights of the state (municipality), on the basis of which rights the state (municipality) has the power to control the compliance with the provisions of the concession contract." (Section 8 Paragraph 2 Point f of the Concession Act).

  Ad 2 Section 25 of the Concession Act

  Ad 3 Section 14 of the Concession Act (see in separate point below)

  Ad 4 In the event that the contract is violated, only the legal consequences specified in the Civil Code are applicable. This is supplemented with certain reasons for termination that are set forth in the Concession Act (Section 12 Paragraph 3 of the Concession Act).

  Ad 5 The right to unilaterally interpret a contract is not provided for under Hungarian law.

[3] This means that the performance of certain actions carried out during the term of the concession contract is subject to the approval of the entity granting the concession.

- Amendment of the Concession Contract

  Pursuant to a concession contract, the entity granting the concession is obliged to hand over the assets owned exclusively by the State (municipality), to concede the exercise of activities falling within the exclusive jurisdiction of the State and, furthermore, to ensure exclusivity.

  The concession contract grants monopoly to the entrepreneur, i.e., the entrepreneur, as a result of the conclusion of the contract, has certain privileges.

  "The state or the municipality may only alter the position of pecuniary value of the other contracting party, the consideration for which position of pecuniary value has been paid in the form of a concession fee or in any other form (exclusivity), without the approval and to the detriment of such contracting party, during the term of the concession contract and in respect of the geological-administrative territory specified therein if the parties have agreed on such alteration in the concession contract." (Section 14 of the Concession Act).

  It must be meant by exclusivity that, during the term of the contract and within the geological-administrative territory specified therein, the State (municipality) may only found, subsequently and without the approval of the other contracting party, an organization for the carrying out of the activities that must be carried out under the concession contract, and may only publish a new call for tender if a respective preliminary notice was incorporated in the call for tender and the contracting parties so agreed.

  As a conclusion, under the Concession Act, a concession contract may not be amended in a way that is detrimental to the contracting party to whom the concession was granted without the approval of such contracting party.

The provision cited above leads to difficulties of interpretation as:

- the meaning of *"position of pecuniary value"* is not straightforward and, furthermore, it is an issue whether the word *"exclusivity"* put in brackets is an example only or it should be regarded as a full explanation,

- there is some debate with respect to how extensively the *"prohibition of amendment"* is to be interpreted.

- Prohibition of amendment

  The ministerial reasoning attached to the Concession Act provides that "*the above provision excludes the amendment of the concession contract with retrospective effect (Section 226 Paragraph 2 of the Civil Code) if such amendment would have a detrimental impact upon the position of pecuniary value of the contracting party, and there was no previous agreement between the contractual parties on the possible application and extent of such amendment."*

  There is a continuous dispute in the legal literature, whether the law-makers intended to restrict the permissibility of the amendment of civil law contracts by means of

passing a new act as set forth in Section 226 Paragraph 2 of the Civil Code. Pursuant to the prevalent opinion in the legal literature, the State, as a contractual party in private law relationships, may not waive some of its law-making privileges. Consequently, the State as a party to the concession contract cannot violate the contract even if amends the substance of the contract by way of passing a new act.

The amendment of civil law contracts by way of passing a new act can also be examined from the perspective of constitutional law. As held by the Constitutional Court in respect of traditional civil law contracts, the amendment of a contract by way of passing a new act is in line with the constitution only if the contract violates, as a result of a circumstance occurring after the conclusion of such contract, an essential interest and such circumstance constitutes a change exceeding ordinary risks and the intervention (i.e., the amendment) satisfies a social demand. It is, however, questionable whether this test also applies to concession contracts. Taking the legislative practice into account, it can happen that a change in the law affects the economic position of former parties to a concession contract.

- Possibilities to Compensate the Amendments in the Concession Relationship:

• *Case study: following the entering into force of the consolidated Telecommunications Act, the activities falling within the scope of the act may be pursued by a wider range of entities, i.e., no market player has exclusivity.*

• The Telecommunications Act affects the position of pecuniary value of the holder of the former concession by terminating its exclusive rights and inducing competition in the respective sector of the economy.

• The changes offend the interests of companies having concession rights, which companies paid a concession fee in order to have exclusivity during the term of the concession contract.

Some possible solutions for the rectification of such violation of interests:

• Framing the new Telecommunications Act is considered to be an administrative act, which establishes neither a civil law nor an indemnification relationship between the State and the company having a concession right. Thus, no compensation may be claimed for the losses. However, the offended party may request the court to either amend the contract or proportionately reduce the consideration paid for exclusivity.

• In the legal action, when pinpointing the legal basis for the action, one must refer to Section 226 Paragraph 2 instead of Section 241 of the Civil Code since the judicial practice does not consider Section 241 of the Civil Code applicable in such cases when a circumstance affecting all contracts that belong to the same type of contract causes a violation of the interest on the side of a contracting party. There is no need to mention that the amendment of a contract by way of passing a new act is different from the judicial amendment of a contract.

Hungarian law seems to be more favourable than the European practice, since a private individual may negotiate with the State as an equal party to the contract and does not have to be afraid that during the term of the contract, the State intervenes in the contractual relationship by taking advantage of its powers.

According to the legal literature, Hungarian law takes no care of the demand for the protection by the State of consumers' and public interest. However, there are some endeavours to make the State explicitly undertake obligations in this regard.

The issue is to what extent general conclusions can be drawn from the legal regulation of concessions and from relevant opinions in the legal literature with respect of all kinds of PPP contracts.

(2) Public Procurement

The other type of contract serving as legal background for PPP projects is the public procurement contract. The relevant legal literature provides even fewer guidelines on this respect.

> *"Procurements and procurement procedures are regularly supervised by the competent supervisory bodies defined in specific laws in accordance with their competence. In the event of any violation, such bodies initiate the necessary proceedings."* (Section 308 Paragraph 1 of the Public Procurement Act).*"*
>
> *"The Public Procurement Council oversees the performance and amendments of the contracts concluded on the basis of a public procurement procedure."* (Section 379 Paragraph 1 Point k of the Public Procurement Act).*"*
>
> *"Legal disputes arising out of a contract concluded on the basis of a public procurement procedure - except for the legal disputes in connection with any amendment of the contract that violates Section 303 of the Public Procurement Act or in connection with any performance of the contract that violates Section 306 Paragraph 2 of the Public Procurement Act - and the settlement of any civil law claims in connection with the public procurement procedure fall within the jurisdiction of the court."* (Section 316 Paragraph 2 of the Public Procurement Act).*"*
>
> *"The proceedings initiated in connection with the violation of the laws regarding public procurement and public procurement procedures fall within the jurisdiction of the Public Procurement Arbitration Board.*" (Section 318 Paragraph 1 of the Public Procurement Act).*"*
>
> *"The procedure initiated in connection with the amendment or performance of a contract concluded during a public procurement procedure on the basis that the amendment or performance of such contract is contrary to the present act, falls within the jurisdiction of the Public Procurement Arbitration Board."* (Section 318 Paragraph 2 of the Public Procurement Act).*"*
>
> *"The parties may only amend such part of the contract that is specified in the call for tender, the terms and conditions of the tender documents and that is determined on the basis of the contents of the tender if the contract, as a result of a circumstance arising following the conclusion of the contract - which circumstance could not be foreseen at the time of the conclusion of the contract - offends any substantial and lawful interest of one of the parties."* (Section 303 Paragraph 3 of the Public Procurement Act).*"*

VI. SUMMARY

- The concept of PPP does not exist as a legal term

- There is no specific act on PPP in Hungary (although, there are some efforts to replace the *"amending approach"* with a separate act on PPP)

- Basically, PPP projects may be implemented in two ways

  Concession
  Public Procurement

- It is to be decided on a case-by-case basis whether the given PPP project falls within the scope of

  - the Concession Act
  - the Public Procurement Act
  - both Acts

- The State and the other contracting party are equal parties and the contract is governed by the basic principles of civil law.

- The "administrative contract" is a theoretical category only and not an existing one; neither the Concession Act nor the Public Procurement Act provides for such contract, however, the contracts concluded under the Concession Act or the Public Procurement Act actually qualify as special types of administrative contracts.

- There are some efforts to regulate such legal relationship on the basis of administrative (public) law and to make the State explicitly undertake an obligation to protect consumers' and public interests.

- Notwithstanding the above, in case of municipal PPP projects, one must take into account that there is a risk that the municipality fails to fulfil its contractual obligations.

The contents of this article are intended to provide only a general overview of the subject matter. Specialist advice should be sought for specific matters. Queries relating to the article should be addressed to the author at:

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