

**Public-private partnership
in rental housing
PPP project implementation roadmap
for public entities**

Glossary:

- **Beneficiary** – direct recipient of public services.
- **Homes for rent** – homes whose rental is of public service character, i.e. the accessibility level is adequate to the economic, social and physical possibilities of the tenants.
- **Debt funding** – using foreign, returnable sources of finance.
- **Project stakeholder** – in project management the person not directly involved in the project, but on whom the project's results have significant influence, thus is keenly interested in positive or negative completion of the project. Therefore project stakeholders (and their opinions) must be considered by both the project's manager and its sponsor. Another – broader – definition encompasses all persons, entities or institutions interested in positive or negative outcome of the project – future tenants, other residents of the city.
- **Temporary accommodation** – a flat in the same town where the former accommodation is situated which offering decent conditions, at least such as those of the former flat.
- **Commune-owned housing resources** – housing units constituting property of an administrative district, a local government legal person or commercial companies formed with participation of an administrative district or being at the administrative district's disposal based on a long-term civil-law contract.
- **Social homes** – flats suitable for inhabitation on account of fittings and technical condition, whose room surface per member of the household of the tenant can be no less than 5 m², and in case of one-person household no less than 10 m², while the flats can be of lowered housing standard. The rental agreement of a social home can be concluded with a person who has no legal title to the flat and whose income of the household do not exceed the amount defined in the resolution of the council of the administrative district, and the amount of rent cannot exceed 50% of the lowest rent in effect in the commune-owned housing resources.
- **Private partner** – according to the Act on PPP it is a domestic entrepreneur who acts in the role of private partner as defined by the provisions of freedom of business activity, or a foreign entity provided it is an entrepreneur as defined in the country of registration and fulfils conditions required to conduct business activity in the Republic of Poland.

- **Public entity** – according to the Act on PPP it may be: a) public administration authority, including a governmental administration body (district, poviat, city with county rights, budget entity, budgetary enterprise or auxiliary enterprise of budget entity), b) a legal person established for the special purpose of satisfying the needs of common nature that are not of industrial or commercial character, if entities of the public sector finance it in over 50%, or possess over a half of shares or stocks, or perform supervision over the managing body, or have the right to appoint over a half of the membership of the supervising or managing body, c) unions of these entities.
- **SPV (Special Purpose Vehicle)** – a separate legal entity appointed for the special purpose of realisation of the project.
- **Asset** – real property, a component of a real property, enterprise according to the provisions of art. 55 of the Act of 23rd April 1964 – Civil Code (J.L. No. 16, item 93, as amended), mobile object or property right.

INTRODUCTION

Legal regulations

Selected essential legal instruments concerning the specificity of the subject of the project:

- Act on public finance of 30th June 2005 (J.L. from 2005, No. 249, item 204);
- Acts on local government:
 - Act on voivodship local government of 5th June 1998 (J.L. from 1998, No.91, item 576);
 - Act on district local government of 8th March 1990 (J.L. from 1990, No.16, item 95);
 - Act on poviat local government of 5th June 1998 (J.L. from 1998, No.91, item 578).
- Act on public-private partnership of 19th December 2008 (J.L. from 2009, No. 19, item 100);
- Act on concessions for construction work or services of 9th January 2009 (J.L. from 2009, No. 19, item 101);
- Act on public procurement of 10th June 1994 (J.L. from 1994, No. 76, item 334);
- Act on protection of tenant rights of 21st June 2001 (J.L. from 2001, No. 71, item 773);
- Act on principles of policy of development of 6th December 2006 (J.L. from 2006, No. 227, item 1658);
- Act on freedom of business activity of 2nd July 2004 (J.L. from 2004, No. 173, item 1807).

Residential housing as a subject of PPP

Public-private partnership is a form of executing public services based on dividing the law and responsibilities between the public and private partners: we **privatise business activity** related to rendering of public services, yet **responsibility for the accessibility level to these services**, as defined by the provisions of the law, **remains still the domain of the public authorities**. The responsibility of the public authorities in respect of accessibility to a flat can be understood narrowly – as concerning the provisions of the law directly indicating the responsibility of public authorities for the level of satisfying the housing needs and housing standards, or

broadly – as concerning the provisions on other types of responsibility (e.g. public security, social development, demographic development, economic development, cultural development, etc.) whose fulfilment requires a public intervention in the sphere of satisfying housing needs.

In Poland – both in legal regulations and in practice – both types of fulfilling the responsibility for accessibility to flats exist: imposed directly onto local governments and accepted by local government authorities – most often in form of governmental programmes/policies concerning housing or renovation (modernisation). These matters stand alike in other European countries.

Basically, two models of satisfying housing needs function: achieving ownership over the flat (purchase), or attaining “roof over one’s head” (rental).

In both models state intervention is possible, that is taking over the responsibility to facilitating accessibility to ownership and (or) rental. In poorer countries, characterised in addition by great deficiency in terms of housing, this responsibility concerns above all increasing the resources of rental housing and establishing rent in an amount allowing large groups of people to rent flats; in wealthier countries – maintaining accessibility to rental for specified groups, but also improving conditions of purchase for more affluent groups.

Deficiency of flats in Poland is very high, highest among countries of the EU (327 flats/houses per 1000 residents; in EU on average – 466). Moreover, the number of new flats completed on yearly basis (per 1000 residents) places Poland on one of the last positions in Europe (2,6 flats per 1000 residents; in Europe on average – ca. 5 flats per 1000 residents).

Poland is an impecunious country, the GDP per capita amounts to ca. 50% of the average EU level. However, the structure of privately-owned flats in Poland is similar to structure thereof of some of the wealthiest European countries – 20% flats

for rent and 80% private property. In most European countries the number of flats for rent is higher than in Poland.

In Poland less tenement houses are built (in comparison to the population) than presently in other countries such as the Netherlands, France, Finland, Sweden, United Kingdom, Germany or Austria.

High deficiency of flats and their ownership structure – pathological in a country relatively not wealthy – are two of fundamental reasons behind low mobility of workforce in Poland. It directly impairs the adaptation processes on the labour market, impairs the efficiency of processes economic restructuring and hinders economic growth. Without significant increase in constructing new, relatively accessible flats, the efficiency will still be low and the difference of levels of unemployment and social exclusion in particular regions will strengthen.

In developed market economies, where high social mobility is present, a significantly larger share of rental homes, both public and private, exists. And in these countries, in recent years, an opinion has been resurfacing more and more often that local government have far too limited public funds to fulfil the tasks resulting from social needs, and especially cannot on their own solve the “housing issue” of their communities. In search of efficient solutions local governments began to pay more attention to financial resources possessed by private investors and entrepreneurs. And private investors were looking for opportunities that would allow them to utilize their capacities, and to allocate financial surpluses in undertakings that would ensure safe investments in real estate with risk lower than in typical commercial ventures.

Private entrepreneurs possess the skill to identify and measure risk, divide it onto participants of the investment process, manage it and to divide the profits gained. Private investors calculate their profits differently than public entities, their activity is guided by indices of cost-effectiveness and financial analysis, they monitor the costs, are able to combine own and foreign capital, to a lower extent invest their own resources, skilfully utilising available debt funding possibilities. Furthermore, broadly implement modern and optimal technical and technological solutions. Such actions are considerably more rarely undertaken by public entities.

Whereas public entities, with limited earnings flows, are still rich in estates, in particular they possess unadapted lands for investments.

To solve the housing problems of the Polish significant resources are necessary, both in order to build new, lacking flats and to manage (especially renovations and modernisation) existing resources. In this respect the public-private partnership formula may be very useful. It is means which can significantly support the administrative districts in mitigating the existing housing deficit.

The aim of implementation of public-private partnership in local housing programmes is to increase accessibility of homes for rent through effective combining private funds of executive and managerial potential into realisation of public tasks of administrative districts¹. The easiest application of PPP is building tenement houses available for districts to inhabit, but managed still by an operator (an example of this solution in Warrington in the United Kingdom). A more complex solution is building tenement houses connected with assuming by the private investor other council resources for revitalisation, expansion and management (an example of this solution is Sheffield in the United Kingdom² and Murowana Goślina near Poznań in Poland³).

A solution quite often found is a revitalisation agreement assuming that in exchange for modernising the existing council resources and constructing e.g. additional homes for rent or objects for the good of the local community, the private entity can construct a certain number of homes for sale on the municipal territory in order to gain profits.

Successful realisation of PPP depends above all on good preparation of the project, based on correct understanding of mutual benefits of the public entity and the private investor in the phase of designing of the undertaking.

¹ It can be imagined to utilise PPP for constructing resources of ownership status, for instance, aimed at a specific group of recipients (e.g. young families buying their first home).

² In the United Kingdom PPP projects of local governments are funded from the central budget. All projects submitted for such funding must have a so-called Business Case drawn up, and after being accepted for funding a so-called final Business Case.

³ Murowana Goślina district realised jointly with a private partner a project of a building with council homes based on the Act on public procurement. Management over housing resource by the private partner and revitalisation of part of the district's housing resources were also included in the project. Another project of the district – slightly bigger – includes construction of homes for rent based on the Act on concession of construction work and services.

Choice of the PPP formula when constructing homes for rent for moderate rent conditions (accessible) should be determined by higher profitability – for public interest – of using this formula than the traditional formula. To achieve this the public entity should analyse the financial conditions and economic and social benefits, as well as risk related to them. It is necessary also so that while negotiating with the private partner the reference point is visible and boundary conditions are known, whose overstepping would indicate that it would be justifiable to realise the project in the traditional formula.

So understood analysis should concern:

- Profitability – understood as possibilities to fulfil new, socially justified challenges;
- Effectiveness – understood as fulfilment of need despite the lack of resources in public budgets;
- Efficiency – understood as lower costs of operation than in the traditional formula of realisation of public tasks.

The task of the private investor is to agree with the public entity on the optimal scope of the project, standards of living that the project should fulfil, analysing the cost-effectiveness (profitability, financial results) and types of risk which – from its point of view – are connected with the project and must be undertaken.

It must be clearly noted: realisation of an undertaking consisting in constructing of tenement houses with the PPP formula is not as a rule/automatically cheaper or easier. It has many advantages though – apart from providing in conditions of dearth of public budget financial resources for realisation of the undertaking – the most important is the possibility to include a private partner with its know-how and capital for execution of tasks being responsibility of the public entities. It allows to increase efficiency of the undertaking (throughout the whole period), even though the costs of gaining by the private partner for funding the investment can be higher.

Act on public-private partnership

According to the Act on PPP – the subject of PPP is mutual realisation (by public and private entities) of an undertaking – a public task, in this case a residential project, based on an established by agreement division of tasks and risks for established remuneration. PPP is realised when it generates profits for public interest exceeding the profits resulting from other models of realisation. An additional profits for public interest is, in particular, decreasing expenses of the public entity, increasing the standard of services rendered or decreasing tiresomeness for the environment. The private partner incurs the total or part of expenses for the realisation of the enterprise.

By the term public-private partnership investment-exploitation projects realised on basis of a long-term agreement are defined, mutually – by public authorities and entities from the private sector whose aim is to create necessary material, financial and organisational infrastructure facilitating rendering of public services. What is essential in this definition is that this union of actions of the public and private sectors is created so that the partners through joint action can well fulfil the goals for which they exist. The **public partner** is obliged by law to provide public services, the aim of the **private partner** is to conduct business activity and gaining profits from it. In this long-standing cooperation of the public entity with the private partner, the public entity utilises: capital, experience and the know-how of the private entity, and the private entity gains a stable, reliable partner ensuring steady, regular revenue.

The public party gains access to private capital what in conditions of huge, insatiable housing needs, with limited housing resources and insufficient own resources, facilitates an increase of tenement housing resources fulfilling contemporary standards of living. Because in realisation of tasks in the PPP formula technology and organisational and specialist experience of the private partner are utilised, this solutions should be cheaper than the traditional way of realising public investments – it is estimated that it facilitates savings up to 15-17%. PPP projects are conducted faster and more effectively than investment tasks realised through traditional methods (e.g. public procurement) as this way only 30% of investments is completed on time.

Benefits for the public sector:

- ✓ Quicker implementation of projects;
- ✓ Dynamizing the process of fulfilling housing needs;
- ✓ Higher quality of services rendered and improvement of standards of living;
- ✓ Increase of innovation in providing of services;
- ✓ Higher operational effectiveness;
- ✓ Considering in the economic calculation the whole lifetime of assets;
- ✓ Better understanding of mutual influence of total costs concerning the phases of investment and exploitation;
- ✓ Possibility to optimise the total costs of the project and to utilise public funds more effectively;
- ✓ Possibility to realise tasks in conditions of lacking public resources without increasing financial obligations.

Benefits for the private sector:

- ✓ Stable, long-term contract;
- ✓ Independence from a yearly public sector budget;
- ✓ Flexibility in establishing specifications of the end-product or service;
- ✓ Incentive to getting good results and providing high quality services;
- ✓ Possibility to generate additional revenue from third parties (e.g. rental of usable floor space in case of property management);
- ✓ Opportunity for commercial utilisation of innovation.

The aim of this document is to present a model preparation process of a project of executing an investment in rental housing in the public-private partnership formula.

PPP project realisation roadmap for public entities

1. Identification by the public sector of needs and possibilities to realise and undertaking in the public-private partnership (PPP) formula in the broadly understood housing sector (estimated time: 2-4 months)

- a. Appointing an implementation team responsible for project realisation – dividing competences and duties, developing internal procedures, creating a preliminary agenda for the team.
- b. Identifying purposes of project realisation and collecting data crucial for future analyses.
- c. Preliminary analyses of possibilities and methods of fulfilling housing needs; diagnosis of needs of the local community and tasks resulting from it for the public entity, analysis of possibility of fulfilling them, including the possibility to finance the project from European Union and budgetary subsidies (commentary 1). Preliminary diagnosis of compliance of this solution with the Act on public finance and preliminary appointing of the location of the undertaking. If the public entity owns a piece of real estate proper for project realisation, the evaluation of the legislative status of this estate (e.g. if a zoning plan for the terrain, where the housing estate is or will be located, exists) shall be conducted.
- d. Choosing an advisor who shall assist in performing some of the analyses, provided that at the preliminary stage the public entity would not be able to perform the analyses (optional).
- e. Preliminary defining of the potential scope of the project, establishing the scale of the undertaking (material, financial, temporal, organisational, human resources scope; institutional constrictions – programmes, strategies, plans, guidelines, etc.).
- f. Evaluating project compliance with the strategy of the public entity, including the housing policy of the administrative district.
- g. Evaluating the possibility to enlist a private partner.

- h. Internal training for all participants of the project realisation process.
- i. If preliminary analyses indicate that the project can be realised within the PPP formula – a comparative preliminary analysis of the profitability of the project shall be carried out: the traditional path and the PPP formula.
- j. Social consultations, preliminary evaluation of conditions concerning obtaining social approval for the project realisation. Promotion of the project. Adequate communication with the stakeholders.
- k. Creating a works schedule for the project preparation.

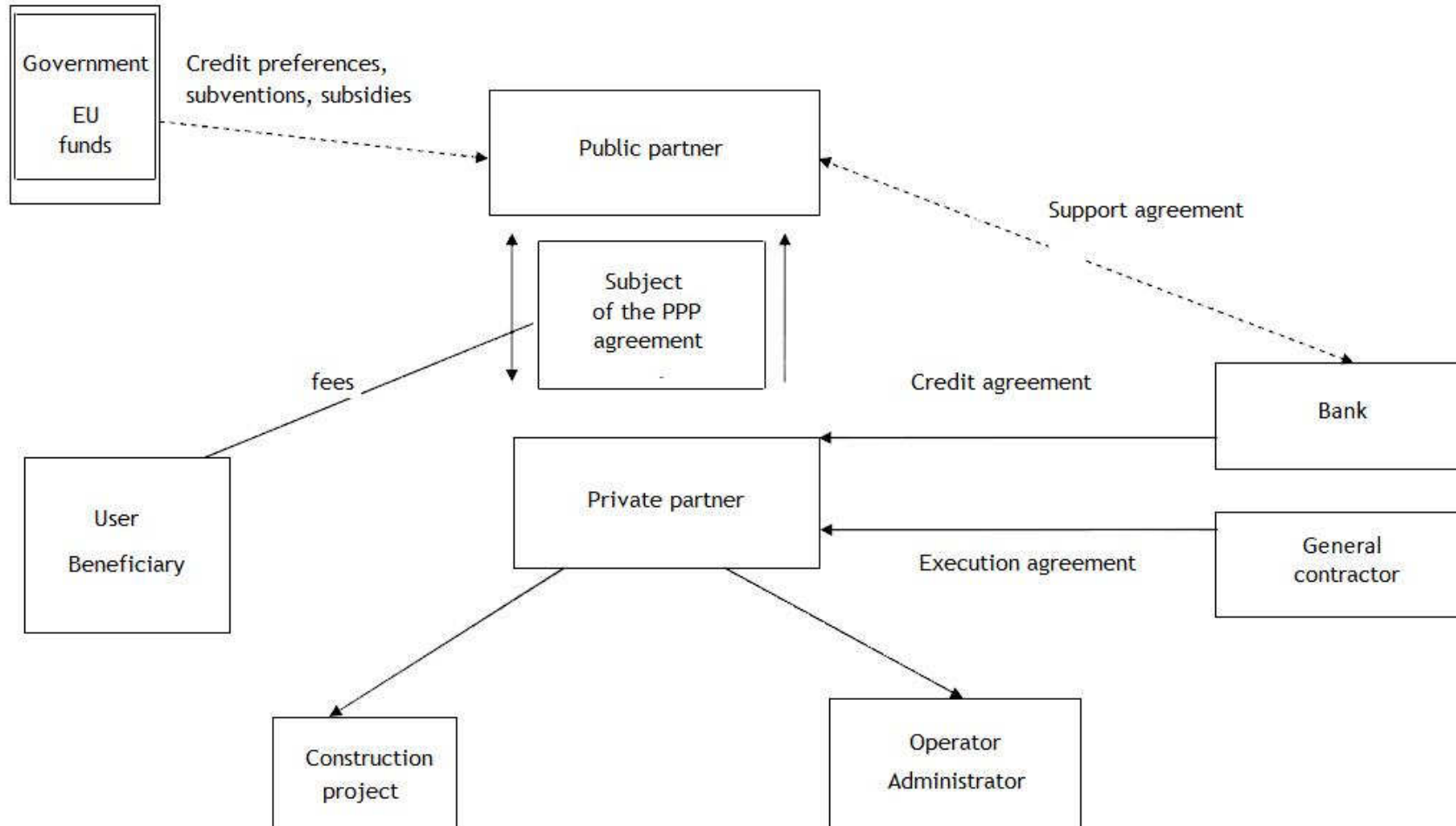
Comment 1

European Union subsidies – presently there is no programme which directly supports residential housing, however, there are possibilities of obtaining funds for technical infrastructure objects which facilitate preparation of grounds for residential housing.

Budgetary subsidies – particularly determined in art. 7 of the Act of 8th December 2006 on financial support for creation of council flats, protected flats, night shelters and houses for the homeless (J.L. No. 251, item 1844), and concluded in executive acts⁴, own revenue, governmental and voivodship programmes.

⁴ Minister of Infrastructure Regulation of 29th July 2009 concerning financial support of creating council flats, protected flats and non-council flats being part of commune-owned housing resources (J.L. No 120, item 1001). The provisions of the new regulation came into effect on 1st August 2009. The regulations largely bases on solutions being in effect until the end of July 2009 of the Minister of Construction Regulation of 15th March 2007 concerning financial support of creating council flats and protected flats (J.L. No.52, item 346, as amended) while adjusting the regulations contained in it to changes made through the amendment of the act on financial support of creating council flats, protected flats, night shelters and houses for the homeless. The changes are related above all to the possibility of creating with financial support of non-council flats being part of commune-owned housing resources as well, increase up to 30-50% of all indices of maximal financial support and also introduction of the possibility of purchasing residential buildings. Annexes to the regulation were corrected, above all the annexe determining the scope of information which should be included in the motion for financial support.

Typical PPP project structure of funding



2. Choosing an advisor – optional (estimated time: 1-3 months)

- a. Defining the scale of advisory needs – what kind of advisors do we need and what do we need them for? What should be expected from them? Advisors: technical, legal and financial.
- b. Defining the method of choosing advisors – according to the Public Procurement Law.
- c. Criteria for choosing legal, financial, technical and other advisors (according to the Public Procurement Law):
 - capability to realise the commission;
 - experience in realisation of similar projects, especially in the residential housing sector (council flats construction consultancy, project consultancy for social housing associations, consultancy for developers in constructing homes for sale or rental);
 - declaration to abide by the Advisor's Code of Good Practice.
- d. Running the process of choosing, and signing an agreement with the advisor/advisors. If the price becomes the only evaluation criterion in the public procurement procedure, one shall define the conditions of participation in the procedure concerning advisor's experience and knowledge as well as persons able to realise the commission, and on such basis decide about the possibility to make a price quotation.

Arguments speaking for the choice of consortium of advisors:

- there is no need to dedicate time for verification of the previous stages by the new advisors and for discussions with the Ordering party (lower price);
- there is no risk that the previous stages of works are not in conformity with standards of work of the new advisors, are invalid (lower evaluation is risk not present);
- there is no need to coordinate the works of particular teams by the Ordering party – the consortium provides and is responsible for the entirety of works;
- experience in cooperation, knowledge of strengths and weaknesses facilitates a better selection of advisory partners.

What speaks for the choice of advisors at each stage of the project is that the choice of an expert knowledgeable about realisation and funding of

residential investments by administrative districts might translate into higher quality of consultancy on a given matter.

3. Performing analyses in order to choose the best possible form of project realisation (estimated time: 2-6 months)

a. Market research for prospective investors and developers:

- defining the initial interest of private entities;
- analysis concerning methods of realisation and financing of similar investments in Poland and abroad;
- initial contact with the chosen representatives from the private sector (developers) in order to evaluate their prospective interest in participation in the project;
- initial contact with financial institutions (banks, investment and real estate funds) in order to define prospective possibilities of financing the given project being realised by a private entity.

b. Defining boundary conditions for investor's participation.

c. Defining the desired key efficiency indices.

d. Verifying initial project assumptions (market, financial, organisational, and legal).

e. Preparing technical assumptions (estimation of capital costs, operational costs and preparation of the project realisation schedule in the PPP formula and the traditional method).

f. Comparative analysis of project realisation methods: **PPP vs. the traditional method**. Public Sector Comparator. Research in the range of the following suggestions concerning comparative fields (economic-financial advisor conducts analyses basing on information prepared and submitted by public entity and technical advisor):

- expected schedules of both procedures;
- evaluation of total costs planned (schedules, investment and exploitation costs over time);
- identification, allocation and evaluation of risks concerning the proposed solutions (including e.g. defining tax implications);
- impact of the defined and divided risks on financial costs of the project;
- calculation of current net value of two analysed options;

- evaluation of the impact of the given undertaking on the current and future budget situation of public entity;
- evaluation of quality aspects (availability, service quality, surplus value – Value for Money);
- complex evaluation of both solutions based on the above-mentioned elements.

g. Choosing the legal form for project realisation:

- institutionalised PPP – public-private cooperation within separate legal entity (SPV);
- contractual PPP – cooperation based on contractual relations, as a commission being a public procurement or a concession.

h. Defining reporting standards for the project (informational requirements).

i. Defining informational policy assumptions for the project and the range of cooperation with stakeholders.

Commentary

In PPP projects different types of risks can be found: building, demand, legislative, financial, political, force majeure, bureaucracy, etc. Parties of the partner agreement should make such a divisions that a partner being able to better manage the risk is burdened with it.

Example: Assumptions for risk map in a residential project in the PPP formula.

Risks	Less probable	More probable
Ruining	Risks with potentially severe influence on failure of the project, but little probable in defined conditions and (preceded with analysis) location (force majeure: earthquake, flood, terrorism).	Risks statistically more probable and with severe consequences (a construction disaster, bureaucratic obstacles, limited demand).
Less severe	Safe risks (low level of risk) (network and equipment malfunctions).	Risks of mass character, everyday and less essential, but significant through accumulation of events (risks connected with deadlines, underestimation of realisation and exploitation costs, vandalism, breaking and entering, theft, rent indebtedness).

There are many possible forms and variants of applying the PPP formula for purposes of tenement housing. The choice of forms and variants concerns in particular:

- a. **the right to control ground** – e.g. different ways of handing over or making ground available to a private partner realising a project (concerns also handing over of possible buildings and network or infrastructural facilities present on this ground);
- b. **the connections in formal and legal terms of the public entity with private partner(s)** – e.g. establishing a special purpose vehicle;
- c. **forms and deadlines of taking over the flats** by the administrative district;
- d. **management and administering of the resource** – including charging and accounting for the rent;
- e. **formula of project closing** – i.e. taking over of assets (flats, buildings, grounds) by determined entities;
- f. **solutions of undertaking funding** – funding through developer's own means, debt funding, "capital assembly" utilising available instruments and methods of winning capital. It is possible, for instance, to transfer rights from the agreement or the district's obligations to the developer or bank or another financial institution. Indebted capital is an indispensable element of project realisation. It is not excluded, however, that the developer funds the entire investments from its own resources. The developer gets the loan and pays it back. The collateral is in form of the PPP venture, or more precisely the long-term agreement of the developer and the administrative district;
- g. **guarantees** granted by the public entity – the administrative district does not have to grant any guarantees or warranties, yet it is possible that they may appear⁵.

Example – MODEL VARIANT – *concluding a long-term agreement between the administrative district and the developer covering construction of tenement houses and then managing them throughout a set period of time – optimum over 20 years.*

⁵ While the contents of the agreement and conditions resulting from the situation on the capital markets are essential – currently there are aims to obtain such guarantees/warranties in order to lower the weight of risk of such funding.

Tasks of the administrative district:

- ✓ Securing of grounds for construction of tenement houses (contribution or another form), or of existing building for purposes of adaptation/revitalisation. The developer could use the distinguished part of the grounds handed over by the district to construct homes for sale or market-value rent.
- ✓ Appointing of lessees and settlement of flats.
- ✓ Providing payments by virtue of determined by the agreement rents for the private partner (considering rent from the lessees (basically on a lower level) which are accounted for by the entity determined by the agreement).
- ✓ Potential preparation of project-technical documentation.
- ✓ Potential presenting of a motion for subsidising the undertaking from budgetary resources.

Tasks of the developer:

- ✓ Organising the construction process.
- ✓ Securing construction funding with own contribution or loan (in this case by collateral required by the creditor) or other financial streams, accepting responsibility for payback of obligations resulting.
- ✓ Obtaining a permit for use and handing over the buildings for settlement.

Depending on the solution accepted the homes built in the PPP formula during the agreement period can be property of: a) the developer, b) special purpose vehicle, or c) the administrative district.

In the model solution it is assumed that the homes constructed are property of the developer or the operator (the district can take them over earlier along with the debt).

There also might be commercial floor space in the realised investment (commerce, services, garages, entertainment, offices) for rent or sale.

In case when the flats are property of the developer or SPV, the district rents the constructed flats and for the whole rented space pays contractual rent. Calculating of this rent considers: handling of the funding (credit costs: debt payback, interest, bank fees, etc.), exploitation costs of the resources covered by the agreement, depreciation, renovation fund and contractual profits.

The district settles lessees in flats and charges them with rent in an amount determined by itself. This way throughout the whole agreement period, the district can yearly pay back from the budget the difference between the rent paid by the lessees and the rent due for the private partner (it covers the expenses of empty flats as well). A solution is possible in which the amount of rent paid by the lessees of flats constructed in a PPP project is higher than in other resources of the district. It is also possible that contractual rent paid to the private partner is lower than market-value rent in a given district, on account of lower realisation costs of the project or additional revenue resulting from the agreement (e.g. resulting from taking over management of other resources of the district, utilising part of the grounds for construction of commercial objects and spaces).

After the end of the contract period, the private partner hands over to the district the grounds along with the buildings. The district can prolong the agreement onto subsequent years, entrust managing to another private company or offer the lessees purchase of flats on preferential conditions, etc.

To realise PPP undertakings solving at least partly the housing problems of district, a local initiative and skilful choice of private partners are necessary. Governmental support programmes are not indispensable, albeit desired.

4. If economic analyses (point 3.e) and legal analyses (point 3.f) point PPP as the best form of project realisation – choosing of the private partner takes place.

a. Forms of choosing a private partner:

- based on the provisions of the Public Procurement Law⁶ – choosing the proper procedure (e.g. competitive dialogue described in details in point 5);
- based on the Act on concessions for construction work or services as of 9th January 2009 (procedure described in details in point 5).

b. Basing on the chosen form of project realisation, advisors prepare tender documentation and create criteria for choosing the private partner.

⁶ On 29th January 2010 another changes to the Act on public procurement law came into effect, implemented by the Act of 2nd December 2009 on changing of the act on public procurement law and some other acts.

Commentary:

The amount of remuneration paid directly by the public partner to the private partner is the deciding factor in choosing the form of project realisation (act on PPP or act on concessions on construction work). If the bigger part of the remuneration (at least 51%) comes from the public partner (and not from providing services, e.g. rent) PPP is applied; if the operator gets the majority of the revenue (51% - art. 4 of the act on PPP) from the project (rent, flats for sale, services) the act on concessions is applied.

5. Choosing the private partner (estimated time depends on the procedure chosen: ca. 4-6 months)

EXAMPLE 1 – COMPETITIVE DIALOGUE

1. PREPARATION TO CARRY OUT COMPETITIVE DIALOGUE

- Appointing Tender Committee (of Competitive Dialogue);
- Preparing description of needs and requirements of functional-utility program;
- Collecting documentation crucial for carrying out dialogue and preparing proposals by private partners (including a proposal related to the real estate);
- Preparing a project risk allocation proposal;
- Preparing dialogue documents, i.e. dialogue regulations, draft PPP agreement;
- Preparing a commission announcement and its publication;
- Providing private partners with essential information about the project;
- Verifying fulfilment of dialogue participation conditions by the tender committee and choosing dialogue participants;
- Creating the list of dialogue participants.

2. COMPETITIVE DIALOGUE

- Sending an invitation to participate in the dialogue to private partners qualified for the dialogue;
- Carrying out the dialogue separately with all private partners: opening meeting, presenting general assumptions of the partnership in all its ranges

by the private partner: legal, financial and technical, visiting the area of planned investment, discussing general partnership assumptions, presenting constructors of the preliminary general proposal by the private partner, discussing the preliminary general proposal of private partners, submitting possible reservations and suggestions by the administrative district, presenting the preliminary detailed proposal by the private partner, discussing the preliminary detailed proposal;

- Informing partners about dialogue completion, providing private partners with criteria of offer evaluation possibly changed during the dialogue.

3. SIGNING THE AGREEMENT

- Sending an invitation for submitting offers with SIWZ (terms of reference) to constructors;
- Choosing the most beneficial offer;
- Announcing the choice of private partners who submitted offers;
- Final settlement of possible disputes;
- Signing the agreement;
- Announcing granting the procurement.

EXAMPLE 2 – ACT ON CONCESSIONS FOR CONSTRUCTION WORK OR SERVICES

Rules and procedure of signing the concession agreement

- a) Concession provider (public entity) – initiates the procedure by publishing an announcement about the concession;
- b) Interested private entity – submits a motion for signing the concession agreement (applying for participation);
- c) Concession provider – invites the candidates who submitted motions in compliance with the requirements specified in the Act on concessions for construction work or services to participate in negotiations;
- d) Negotiations may concern all aspects of the concession (technical, legal, and financial). The protocol of the course of negotiations is public;
- e) Concession provider – invites candidates who participated in negotiations to submit their offers and provides them with a description of the concession conditions;

- f) Concession provider – chooses the most beneficial offer on the basis of criteria defined in the concession conditions; the criteria may include the following: period of concession, grade of co-financing, costs of using the subject of the concession, quality of works completed, technical value, aesthetic and functional properties, environmental aspects, profitability, date of completing the concession;
- g) Concession provider – informs bidding parties about the winning offer;
- h) Concession provider – signs the agreement with the chosen bidding party which becomes the concessionaire.

6. Closing of the financial part of the project

- a. Confirmation of the public party's financial commitments as to the agreement.
- b. Monitoring of the private partner's talks with financial institutions.
- c. Verifying the conditions of funding acquired.
- d. Updating the financial model.

7. Project realisation – preparing and realisation of the investment (estimated time: determined by the agreement, optimum ca. 24 months)

- a. Monitoring and control of the public entity over project realisation: meeting deadlines, costs and quality of the works completed.
- b. Evaluation of project success measured according to key efficiency indices.
- c. Formal acceptance of works.

8. Project realisation – exploitation (estimated time: determined by the agreement, optimum over 20 years)

- a. Controlling by the public entity: keeping quality parameters and standards of housing services set by the agreement, verifying the set financial and economic efficiency indices.
- b. Payment monitoring – making payments for private partner by the public party and possibly verification of payment calculation for the private partner in relation to the specified rules within the payment mechanism.
- c. Verification of payment calculation for the private partner in relation to the specified rules within the payment mechanism. Managing changes.

- d. Controlling the public entity in the exploitation phase of the undertaking: keeping set parameters, abiding by the set quality parameters for performing services, verifying the set financial and economic efficiency indices.
 - e. Project promotion. Proper communication with stakeholders.
 - f. Possible renegotiation of the agreement in case of circumstances impossible to predict at the time of signing the agreement.
- 9. Completing the realisation of the undertaking (estimated time – according to the agreement)**
- a. Managing the results.
 - b. Clearance of the undertaking.
 - c. Inventorying of the assets.
 - d. Controlling the public entity in the exploitation phase of the undertaking: keeping set parameters, abiding by the set quality parameters for performing services, verifying the set financial and economic efficiency indices. Taking over by the public entity from the private partner the asset element of the undertaking.

PPP DOCUMENTS:

Among the most important documents being an integral part of the PPP agreement or accompanying them are:

A. The PPP Agreement (project agreement – essential clauses).

The PPP Agreement should define:

- the subject of the agreement – description of the undertaking including its purpose (term of the agreement, conditions and procedure of agreement termination),
- obligations and rights of the parties, including provisions concerning parties' contributions,
- the private partner's remuneration amount and method,
- consequences of inappropriate completion and failure to complete the obligation (contractual penalties, diminishing the private partner's or company's remuneration),

- rules and detailed procedure of public control over the realisation of the undertaking,
- provisions concerning establishing of a company if the parties decide to establish a company which will execute the PPP agreement.

And also:

- provisions concerning the state of the asset used for the realisation of the undertaking in which it will be returned to the public entity,
- provisions concerning the deadline for the private partner to use the pre-emptive right on real estate, being its own contribution,
- undertaking schedule,
- total value of resources allocated for the whole undertaking, being the subject of the agreement, independent of their source's provenance,
- term of the agreement,
- dividing risks related to the realisation of the undertaking,
- quality standards, requirements and standards applied in the course of the realisation of the undertaking,
- rules and range of the insurance of the undertaking, as well as additional warranties, agreements and the parties' obligations in this range,
- procedure and rules of settling disputes stemming from the agreement,
- conditions and method of the terminating the agreement.

B. The Concession Agreement

The Concession Agreement shall define (requirements specified in Art. 22 of the Act on concessions on construction work or services):

- the subject of the concession,
- the completion date of the concession's subject,
- the term of the concession agreement,
- the method of the concessionaire's remuneration,
- the concession provider's payment for the concessionaire,
- recognising and dividing risks between the concession provider and concessionaire related to the realisation of the subject of the concession,
- quality standards, requirements and standards applied in the course of the realisation of the undertaking,

- concession provider's rights in range of control over the realisation of the concession by the concessionaire,
- conditions of extending or shortening the term of the concession agreement,
- conditions and method of terminating the concession agreement,
- conditions and range of the parties' responsibility concerning inappropriate completion or failure to complete the concession agreement,
- conditions and range of the insurance for the realisation of the concession subject,
- list of documents which the parties of the concession agreement are required to receive or provide in order to fulfil the agreement indicating the deadlines when this should occur,
- procedure and rules of settling disputes relating to the realisation of the concession agreement.

If it results from the subject of the concession, the agreement may in particular include resolutions concerning:

- conditions and method of providing the concessionaire with assets essential for the realisation of the concession's subject,
- charges, or method of setting them, which are taken by the concessionaire from third parties for using the subject of the concession,
- conditions of admitting subcontractors.

Indicative undertaking schedule

1. Procedures

- Resolution of the District Council concerning the commencement of works on the programme, strategy (2 months)
- Procedures of preparing documentation (3 months)
- Promotional campaign (2 months)
- Resolution of the Council accepting the Programme (2 months)
- Preparing an offer and choice of contractor (3 months)
- Drawing up and concluding the agreement (2 months)
- Drawing up a motion for funding (1 months)

2. Preparation concerning the substance

- Spatial location (2 months)
- Drawing up the scale and assumptions (2 months)
- Works plan, establishing a hierarchy of tasks (1 month)
- Financial plan, drawing up a budget (2 months)