PUBLIC PRIVATE PARTNERSHIP OPTIONS FOR THE SECOND GENERATION OF MOTORWAY DEVELOPMENTS IN POLAND

FINAL REPORT
Public Private Partnership Options for the Second Generation of Motorway Developments in Poland

Final Report

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Project team:

Team Leader: Antonio Lopez Corral
Economist (National Accountancy Specialist): Antonio Sanchez Soliño
Financial Specialist: Carlos Bonnelly Ginebra
Institutional reinforcement and project evaluation specialist: Samuel Carpintero
Legal Specialist: Alberto Ruiz Ojeda
Local Specialist: Jakub Nalazek
Local Specialist: Victoriano Sanz Losada

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<th>Description</th>
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<tr>
<td>ABiEA</td>
<td>Agency for Motorway Construction and Operation (Agencja Budowy i Eksploatacji Autostrad)</td>
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<tr>
<td>ADT</td>
<td>Average Daily Traffic</td>
</tr>
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<td>AWSA</td>
<td>Autostrada Wielkopolska S.A.</td>
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<td>BFO</td>
<td>Best and Final Offer</td>
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<tr>
<td>BGK</td>
<td>Bank of National Economy (Bank Gospodarstwa Krajowego)</td>
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<td>CAPEX</td>
<td>Capital Expenditures</td>
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<td>CF</td>
<td>Cohesion Fund</td>
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<td>CIT</td>
<td>Corporate Income Tax</td>
</tr>
<tr>
<td>CPP</td>
<td>Council for Public Procurement (Rada Zamówień Publicznych)</td>
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<tr>
<td>EBIT</td>
<td>Earnings Before Interests and Taxes</td>
</tr>
<tr>
<td>EIA</td>
<td>Environmental Impact Assessment</td>
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<tr>
<td>EIB</td>
<td>European Investment Bank</td>
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<tr>
<td>EMU</td>
<td>Economic and Monetary Union</td>
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<td>ERDF</td>
<td>European Regional Development Fund</td>
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<tr>
<td>ESA95</td>
<td>European System of Accounts 95</td>
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<tr>
<td>ETC</td>
<td>Electronic Toll Collection</td>
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<td>EU</td>
<td>European Union</td>
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<td>GDDKiA</td>
<td>General Directorate for National Roads and Motorways (Generalna Dyrekcja Dróg Krajowych i Autostrad)</td>
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<td>GDDP</td>
<td>General Directorate of Public Roads (Generalna Dyrekcja Dróg Publicznych)</td>
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<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>IFI</td>
<td>International Financing Institutions</td>
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<td>IROP</td>
<td>Integrated Regional Operational Programme</td>
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<td>IRR</td>
<td>Internal Rate of Return</td>
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<td>ISPA</td>
<td>Instrument for Structural Policies for pre-Accession</td>
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<td>KFD</td>
<td>National Road Fund (Krajowy Fundusz Drogowy)</td>
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<td>KOPI</td>
<td>Commission for Investment Project Assessment (Komisja Oceny Projektów Inwestycyjnych)</td>
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<tr>
<td>MF</td>
<td>Ministry of Finance</td>
</tr>
<tr>
<td>MI</td>
<td>Ministry of Infrastructure</td>
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<tr>
<td>MTiB</td>
<td>Ministry of Transport and Construction (Ministerstwo Transportu i Budownictwa)</td>
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<td>NGO</td>
<td>Non-governmental organization</td>
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Public Private Partnership Options for the Second Generation of Motorway Developments in Poland

Final Report

NIB Nordic Investment Bank
NIK Supreme Chamber of Control (Najwyższa Izba Kontroli)
NPV Net Present Value
O&M Operation & Maintenance
OFE Open Pension Fund (Otwarty Fundusz Emerytalny)
PHARE Poland Hungary Aid for Reconstruction of the Economy
PPC Public Private Comparator
PPO President of the Public Procurement Office (Prezes Urzędu Zamówień Publicznych)
PPP Public-Private Partnership
PPS PPP Potential Scan
PSC Public Sector Comparator
PSL Polish Peasant Party (Polskie Stronnictwo Ludowe)
SLD Democratic Left Alliance (Sojusz Lewicy Demokratycznej)
SOPT Sectorial Operational Programme Transport
SWK Scott Wilson Kirkpatrick
TEN-T Trans-European Transport Network
UP Labour Union (Unia Pracy)
VAT Value Added Tax
WACC Weighted Average Cost of Capital
INTRODUCTION
The concession and other formulae of Public-Private Partnership (PPP) make up a part of the Infrastructure Provision System in many EU countries. The revitalisation of these formulae enriched the traditional system of infrastructure provision by the financial and managerial capacity and the entrepreneurial and innovative spirit of the private initiative.

However, there are problems in some countries like Poland that impede that the concession system takes roots, even if an appropriate regulative framework exists. In this sense, The World Bank took on the assistance of INECO in its Economic and Sector Work in Poland concerning a second generation of Public-Private Partnership solutions for motorway and expressway development.

The new PPP framework and particular solutions proposed in the present Study should make the infrastructure sector more attractive for the private sector and permit its larger participation and at the same time enable a maximum use of EU structural and cohesion funds.

The Study has been structured in two parts with different objectives:

(i) to review and analyse past experience with PPP projects in Poland and previous studies on PPP projects undertaken during the past few years,

(ii) to recommend to the World Bank a PPP strategy which would be most suitable for the Polish road sector including suggestions concerning most suitable financial, legal and institutional structures for road concessions; create a limited number of PPP mechanisms for use on future concession schemes and to identify three pilot projects from the Government’s approved Substantive and Financial Program of the National Road Fund’s Road Development Plan, 2005-2006¹ (and the draft Program for the next planning period 2007-2013), that could be implemented using the recommended PPP strategy, as well as EU funds and the World Bank’s co-financing and technical assistance.

First stage of the study reflects the diagnosis of the current situation and has been a basis for recommendations on a new PPP strategy for Poland and three pilot projects in which this new strategy could be implemented.

The review and analysis of past is based on existing studies and documentation dealing with PPP projects in the road sector in Poland (including the ongoing projects and those currently being implemented and/or negotiated), as well as the Polish legal framework for PPP projects.

Additionally, the review of European Union regulations and guidelines on tolling and use of EU funds on tolled roads has been also considered in the study. However, EU funds require co-financing and pre-financing, since EU structural funds require a previous payment by the Member State and are refunded in a latter stage.

In light of this situation, the Polish Government should try to get the maximum benefit from this additional financial muscle and one of the tools could be the Public Private Partnership. The private resources could help the Polish budget in fulfilling the conditions imposed by the Treaty of Maastricht for the Economic and Monetary Union regarding the maximum budget deficit.

Furthermore, in order to detect if the relative failure of the previous concessions and other PPP formulae are a consequence of the lack of preparation of the authorities to apply these formulae, questionnaires were prepared for the different Polish organizations which took part in the development of the existing PPP projects.

The questionnaires have focused partially on the bidding process in order to check if it assures the selection of the operator, which would be capable of meeting all requirements established by the awarding authority.

During the execution of the first part of the study, the INECO-Team has sensed among Polish officials a deep mistrust of the possibilities of successful use of private participation in motorways development. The same disbelief in the private provision of infrastructure has been recently clearly perceptible from the highest political level. This may be the result of unsatisfactory past and present experiences with application of the concession system in the motorway sector. Nevertheless, it does not seem reasonable to give up the possibility of learning from past mistakes, easily negate the applicability of PPP in Poland and in consequence indirectly limit the potential development of the country. In fact, all countries that opted for some form of private participation in infrastructure development had to face some difficulties, especially at the initial stage. This is natural, given the grade of complexity and sophistication of concession contracts. One of those difficulties that has to be overcome at the very beginning is the creation of the genuine “PPP culture” that can prepare the administration and coordinate its efforts in the process of preparation, bidding, evaluation of proposals and award of such contracts.

In spite of these initial difficulties, there is no doubt that a well designed and well procured Public Private Partnership contracts allow achieving both macro-level and micro-level objectives.

Taking into account the micro-level, the main advantage of PPP consists in the introduction of market criteria in the provision and operation of infrastructure and public services, which finally
results in the increase of efficiency. It can be achieved under certain circumstances as a result of the private partners’ necessity to optimise his financial results combined with his expertise and innovation capacity.

On the other hand, at the macro-level the PPP give the possibility of creating more public infrastructure and of providing more public services to the citizens at a given budgetary constraint. If PPP projects are funded with user charges, free budgetary resources may be used for execution of other projects within the sector or diverted to other important purposes of the government. If not, i.e. even if the State budget is the final origin of the private partner’s remuneration (e.g. in the case PPP mechanisms with shadow tolls payments), private financing permits execution of socially and economically important projects in advance in relation to the traditional, only public funding model. It is clear that such acceleration of execution of projects can produce significant economic and social benefits. Nevertheless, user charging expands the government’s investment capacity without charging future budgets.

Apart from expanding the investment potential of the government, PPP contracts can facilitate achieving equilibrium in the public finances sector. This factor will be especially important for Poland given the necessity to stabilize the fiscal policy for reasons of macroeconomic stability and possible intention to access the Economic and Monetary Union. This report contains solutions that permit achieving micro- as well as macro-objectives of PPP.

In order to achieve micro-objectives, measures must be taken not as much at the PPP structure definition stage, but rather at the bidding and awarding stage. Motorways are normally natural monopolies. Monopolies naturally tend to market equilibrium that neither ensures cost efficiency nor high quality of services. This is why competitive mechanisms must be introduced and the only moment to do so is the bidding stage. After the concession award a motorway will stay a monopoly until the end of the contract. Therefore, it is essential to use a bidding mechanism that takes advantage of competitive tension to fix the essential economic and financial terms of the contract. Such procurement model is presented in the first chapter of this report.

The strategy of launching PPP projects, proposed in the second part of the study, is designed to ensure sufficient competition for projects. It also includes contract execution monitoring measures whose objective is to ensure conformity of the services provided by the private partner with the contracted parameters. The strategy of implementing the proposed mechanisms through a competitive procedure together with its institutional requirements is presented in the second part of report.
As far as specific PPP mechanisms are concerned, given the necessity of new infrastructure and the scarcity of public funds as well as public debt constraints related to the envisaged Poland’s accession to the Economic and Monetary Union, the proposed solutions were mainly based on PPP mechanisms that include user charging. The reason is that they are the best method to achieve the macro-objectives, i.e. the expansion of the investment potential without charging the national budget. Nevertheless, in justified cases shadow-tolls based solutions are proposed as well. Regardless of the financing formulae that the proposed mechanisms are based on, it was our intention to suggest solutions that not only enable boosting the total volume of new or upgraded infrastructure, but also enable favourable treatment of new infrastructure assets in the national accounting according to the Eurostat criteria. The PPP mechanisms proposed by the INECO-Team are presented in the third chapter of the second part of the report. The fourth chapter includes a brief description of three potential projects that can be implemented using the recommended strategy and mechanisms.

Regarding the combination of EU Funds with private participation in the proposed mechanisms, some general recommendations on the approach that allows making the best use of both financing sources are made in the fifth chapter of the second part. It provides also a brief outlook on the perspectives for using EU funds in PPP projects in the upcoming 2007-2013 Financial Perspective is also given.

Nevertheless, the success of the Public Private Partnership not only depends on the financing structure and bidding mechanisms applied or the institutional framework created for the contract award and enforcement. There is a series of essential requirements that often are exogenous to the model applied and to the main actors that are involved in the process. In spite of that, those requirements must be met in order to ensure the successful implementation of Public Private Partnership projects. The sixth chapter of the second part includes a brief overview of the above-mentioned requirements.

We hope that the present document will contribute to the recovery of trust in private participation in motorway development among Polish officials and policy-makers. We strongly believe that the implementation of the included recommendations it contains will be the first step to creation of a workable and efficient Polish PPP model.
I. REVIEW AND ANALYSIS OF PAST EXPERIENCE
I.1. ROAD NETWORK PLANNING, PROJECT PROGRAMMING AND PREPARATION

The first chapter of the report covers general issues regarding road network planning, project programming and preparation. The first item refers to the way the road network is defined. Project programming stands for the way the different projects that form a network are scheduled for implementation. As both concepts are closely related they will be commented on jointly. Project preparation is the process that covers all actions taken by the Administration from starting the project to its final procurement.

This chapter intends to cover the way these concepts are being dealt in Poland. An initial section I.1.1 describes the basic framework, including road division and institutions involved, while section I.1.2 takes a view at network planning and project programming as well as most recent road plans in Poland, while section I.1.3 takes a look at the influence of the EU in this aspect. Finally, section I.1.4 discusses the efficiency of project preparation. This issue is strongly conditioned by capacity of the Administration, especially when applications for EU funds or EIB loans are involved.

I.1.1. BASIC LEGAL AND INSTITUTIONAL FRAMEWORK

Road Categories

The management and the ownership of Public Roads are highly decentralized in Poland. According to the Polish Law, roads are divided into four categories\(^2\) that correspond to the administrative division of the country\(^3\):

- National Roads;
- Voivodship Roads;
- Powiat Roads;
- Gmina Roads.

\(^2\) Art. 2 of the Act on Public Roads (Ustawa z dnia 21 marca 1985 r. o drogach publicznych, Dz.U. 1985 Nr 14 poz. 60).

\(^3\) Since Jan 1st 1999, Poland is divided into 16 regions (voivodships), which are divided into 373 districts (powiats) and those into 2489 municipalities (gminas).
The global length of all public roads is 371,700 km. 67% of them are roads with hard pavement and the rest have soil pavement only. National roads have a total length of 18,100 km and represent 4.9% of all public roads in Poland. Among others, all motorways⁴ and expressways⁵, roads lying in the corridors of future motorways and expressways until they are constructed, roads alternative to toll motorways and bypass roads for major municipal agglomerations belong to National Roads category⁶. There are 543 km of motorways in operation in Poland and they make up 3% of the National Roads network. All National Roads belong to the State Treasury⁷.

**Institutions involved**

Although it is possible to say that the responsibility for the public road infrastructure policy in Poland resides in the Ministry of Infrastructure, it is necessary to introduce some nuances. This is basically due to the confluence of different public entities with competencies that are frequently not clearly separated and distributed.

Institutions that are sharing responsibilities for National Roads planning, programming and project preparation are:

- Council of Ministers (the Government).

As far as planning, programming and preparation stages of road procurement process are concerned the role of the Council of Ministers is rather limited. The Government has competences related to the funding and financing of National Roads (preparation of the national budget, assignment of funds to the development of road network, issuance of guaranties for lenders). Nevertheless it has some competences in the motorway and

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⁴ According to the Art. 4 Clause 11 motorways are roads that are destined for motor vehicle traffic only which:
- have at least two permanently separated, one-way carriageways,
- have grade-separated intersections with all crossing overland and water inland roads,
- are equipped with service installations for passengers, vehicles and parcels destined to be used by motorway users only.

⁵ According to the Art. 4 Clause 10 expressways are roads that are destined for motor vehicle traffic only which:
- have a single or double carriageway,
- have grade-separated intersections with all crossing overland and water inland roads, or – exceptionally – non-separated intersections with public roads,
- are equipped with service installations for passengers, vehicles and parcels destined to be used by expressway users only.

⁶ Art. 5 of the Act on Public Roads (Ustawa z dnia 21 marca 1985 r. o drogach publicznych, Dz.U. 1985 Nr 14 poz. 60).

⁷ Art. 2a of the Act on Public Roads (Ustawa z dnia 21 marca 1985 r. o drogach publicznych, Dz.U. 1985 Nr 14 poz. 60).
expressway network definition and appoints the General Director of National Roads and Motorways.

- Ministry of Infrastructure.

The Minister of Infrastructure is the highest authority responsible for the entire Public Roads network. He may issue executive acts (Decrees) in respect to the Public Roads network. He supervises the GDDKiA and sets up the infrastructure policy and strategic guidelines.

- General Director of National Roads and Motorways who is managing the General Directorate of National Roads and Motorways (GDDKiA) and its 16 Regional Offices.

The General Directorate of National Roads and Motorways was created through a merger of the Agency for Motorway Construction and Operation (ABiEA) with the General Directorate of Public Roads (GDDP) in 2002. The GDDKiA is responsible for day-to-day management of National Roads network and implementation of programmes. Particularly it is responsible for the management of most of National Roads, execution of the national budget in respect to National Road network (including construction and maintenance), as well as preparation and coordination of toll motorways construction. Apart from that, the Directorate has to prepare draft Substantive and Financial Programme for the road investments that are to be financed by the National Road Fund. The GDDKiA has 16 regional offices. In contrast to the ABiEA, the GDDKiA lacks its proper legal personality.

- Proxy of the Government for the construction of National Roads and Motorways.

Additionally, there is another public office that represents the Government and is relevant for motorway construction. It is the Proxy of the Government for the construction of National Roads and Motorways. This office was established in 2003 by a Decree on setting the Proxy of the Government for the construction of National Roads and Motorways. The

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8 A state-owned legal person.
9 A central entity of the governmental administration.
10 GDDKiA manages about 16,600 km (92%) of National Roads. The rest are roads situated in urban areas and managed by municipalities.
11 Although the GDDKiA has not its own legal personality, its legal status seems to be at least formally stronger than in the case of the ABiEA. Whereas the ABiEA was only of the Government agencies, the GDDKiA was established by the Public Roads Act as a “central national authority relevant to national roads”. Also, the scope of its competencies is wider. It manages all national roads in Poland and not only motorways.
12 Rozporządzenie Rady Ministrów z dnia 1 lipca 2003 r. w sprawie ustanowienia Pełnomocnika Rządu do Spraw Dróg Krajowych i Autostrad, Dz.U. 2003 nr 118 poz. 1109.
The text of the Decree clearly suggests that the initial idea was to create a link between all institutions engaged in road development. His tasks would consist mainly in coordination of National Administration Activities regarding investment project preparation, acceleration of investment execution and actions aimed at attraction of funds for acceleration of investments. This way the Government could also have more political control over the General Directorate, which being somewhat more distant from the Government, could tend to assume more autonomy than desired.

Initially, the Proxy of the Government, was supposed to merge in the rank of Secretary or Undersecretary of State in the Ministry of Infrastructure and the General Director of National Roads and Motorways in the same person. Nevertheless, one year later the offices of the Proxy and the General Director were separated by the Decree changing the previous Decree on setting the Proxy of the Government for the construction of National Roads and Motorways. In this situation, the role of the Proxy in the current institutional configuration seems not easy to be clearly defined.

In the INECO Team’s opinion, it was a good solution to appoint the MI Secretary or Undersecretary of State (in the person of the Proxy) to the post of the General Director of National Roads and Motorways. Combining the supervision of the GDDKiA and the part of the MI that is responsible for national roads could bring more coherence to the strategic management of national roads. However, for the time being maintaining the Proxy as an additional entity in the institutional configuration of the road sector administration with no clear connection to the GDDKiA and the KFD seems not to be justified and complicates the institutional framework.

- National Road Fund.

The Fund is also involved in programming of National Road Network, but his participation in the process is only limited to the approval of draft Substantive and Financial Programme for the Road Investments that are to be financed by the Fund. The draft Programme is prepared by the GDDKiA.

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14 For more information on the National Road Fund see section I.2.2.
I.1.2. ROAD PLANNING AND PROGRAMMING

General approach to planning and programming

Identification of the entity that is responsible for strategic planning of Public or National Roads network is not an easy task.

According to the Art. 17 Act on Public Roads\(^{15}\), establishing of the development lines for the road network belongs to the scope of tasks of the Minister responsible for the transport affairs, i.e. Minister of Infrastructure. On the other hand, development of road network plans is one of the road manager’s tasks according to the Art. 20 of the same Act. For National Roads this function is performed by the General Director of National Roads and Motorways\(^{16}\) – the central entity of the governmental administration in charge of National Roads affairs. The conflict comes when identifying what is precisely the establishment of the development lines (i.e. the strategy), and what is the development itself. Additionally, at least as far as the motorway and expressway network is concerned, its definition lies within the responsibilities of the Council of Ministers as stipulated in the Art. 4a of the already cited Act.

In the INECO Team’s opinion, the division of duties should be based on a clear distribution of responsibilities. The GDDKiA, being an operative branch of the Ministry of Infrastructure, should assume the task of initiating the national road plans and programmes preparation and be responsible for it to the Ministry. The Ministry, as the entity that is responsible for the infrastructure policy, should respond for this task to the Council of Ministers, which next is responsible to the public for all the governmental policies and their implementation.

Road plans and programmes

The President of the Council of Ministers has fulfilled the obligation concerning the definition of motorway and expressway network on 15 May 2004, passing the Decree on the motorway and expressway network\(^{17}\). The following figure presents the Motorway and Expressway Network defined in this Decree.

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\(^{15}\) Ustawa z dnia 21 marca 1985 r. o drogach publicznych, Dz.U. 1985 Nr 14 poz. 60.

\(^{16}\) Art. 19.2.

\(^{17}\) Rozporządzenie Rady Ministrów z dnia 15 maja 2004 r. w sprawie sieci autostrad i dróg ekspresowych, Dz.U. 2004 nr 128 poz. 1334.
Although, this network plan comes from the most recent Decree, the network arrangement is based on studies that were carried out prior to 2004. The Decree itself was preceded by a series of other Decrees\(^\text{18}\) that introduced some modifications to the network arrangement defined by the first Decree on Toll Motorways\(^\text{19}\) from 1995 and a Decree on the motorway and expressway network\(^\text{20}\) from 1996, but the general layout of the corridors has not changed much, except for the A3\(^\text{21}\) and A8\(^\text{22}\) motorways being initially added to the original 1993 Motorway Construction Programme to be finally reduced to expressways. This means that the present motorway and expressway network

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\(^{18}\) Decree on Toll Motorways (Rozporządzenie Rady Ministrów z dnia 16 lipca 2002 r. w sprawie autostrad płatnych, Dz.U. 2002 nr 121 poz. 1034); Decree on the network of motorways, expressways and roads of a high importance for military reasons (Rozporządzenie Rady Ministrów z dnia 29 września 2001 r. w sprawie ustalenia sieci autostrad, dróg ekspresowych oraz dróg o znaczeniu obronnym, Dz.U. 2001 nr 120 poz. 1283); Decree changing the Decree on the network of motorways, expressways and roads of a high importance for military reasons (Rozporządzenie Rady Ministrów z dnia 26 sierpnia 2003 r. zmieniające rozporządzenie w sprawie ustalenia sieci autostrad, dróg ekspresowych oraz dróg o znaczeniu obronnym, Dz.U. 2003 nr 174 poz. 1683).

\(^{19}\) Rozporządzenie Rady Ministrów z dnia 14 kwietnia 1995 r. w sprawie autostrad płatnych, Dz.U. 1995 nr 43 poz. 222.

\(^{20}\) Rozporządzenie Rady Ministrów z dnia 23 stycznia 1996 r. w sprawie ustalenia sieci autostrad i dróg ekspresowych, Dz.U. 1996 nr 12 poz. 63.

\(^{21}\) Szczecin – Zielona Góra – Legnica – Lubawka – granica państwa (Praha)

\(^{22}\) Łódź - Wrocław
The Motorway and Expressway network plan provides for three main motorways:

- **A1** connecting the ports of Gdańsk-Sopot-Gdynia agglomeration with the region of Silesia and the southern border of the country (Gorzyczki) via Toruń, Łódź and Częstochowa.

- **A2** connecting the Poland’s western border with the urban areas of Poznań, Łódź and Warsaw and the eastern border with Belarus in Terespol.

- **A4/A18** connecting the Poland’s western border in Olszyna (traffics from Berlin) and Jędrzychowice (traffics from Dresden) with Wrocław and Opole in Lower Silesia, industrial conurbation in Upper Silesia, Kraków, Tarnów and the eastern border with Ukraine in Medyka.

If completely executed, the whole motorway networks’ length would be approximately 2000 km, 11% of the current and about 8% of the planned total length of the National Roads network. It is also planned to build approximately 5200 km of expressways.

**Unfortunately, this planning concerns expressways and motorways only, while the rest of national roads lack long-term plans. A lack of long term planning and programming is one of the weaknesses of the Polish road sector.**

The GDDKiA never introduced long and mid-term investment and maintenance planning procedures. However, some criteria (e.g. internal return rate, EU requirement regarding maximum axle loads, local community needs) are applied. Priority setting based on economic financial analysis is not practiced in GDDKiA even though cost benefit analysis is one of the common procedures required at the initial project preparation stage.

**All in all, what lacks is a systematic approach to project programming and the way of choosing project for implementation is quite chaotic.**

It may be also excessively influenced by the interests of the regional offices. In fact, according to the opinion presented in the NIK report from 2003, all efforts of the Administration amounted to

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23 Information on results of control of motorway construction in Poland, Supreme Chamber of Control, 2003 (Informacja o wynikach kontroli budowy autostrad w Polsce, Najwyższa Izba Kontroli, 2003).
preparation of many programmes based mainly on needs rather than real abilities. However the creation of the National Road Fund\textsuperscript{24} and its substantial and financial expenditure programme has been a clear progress in this respect.

The latest programme available was prepared by the GDDKiA assisted by Scott Wilson Kirkpatrick and the University of Birmingham. It consists in a six-year work-programme and a 12-year cash flow based on the EMME/2 network model and HDM-4 programme. The six-year work-programme includes new investments in motorways, expressways, bypasses, pavement strengthening, maintenance works including routine maintenance, periodic maintenance and rehabilitation, winter maintenance of roads, routine and periodic maintenance of bridges as well as other expenditures for different purposes such as traffic management and road safety, project preparation and small projects on secondary roads. It assumes a gradual growth of investment expenditures from 4.274 million PLN in 2004 to 8.391 million PLN in 2009. The maintenance expenditures are expected to remain stable amounting 600 to 800 million PLN in the period 2005-2009 after a peak of 3.555 million PLN in 2004. No increase of funds for project preparation is foreseen which is quite surprising if we consider the necessities of improvements in this area, new requirements imposed by the new Environmental Protection Law regarding the necessity to prepare some documentation for alternative routes for one designed road section and last but not least the necessity of new projects in quantity and of a good quality.

\textsuperscript{24} For more information on the National Road Fund see section I.2.2.
Currently programming of new green-field investments as well as upgrade and reconstruction works is carried out through the Substantive and financial programme for the road investments financed by means of the National Road Fund. It includes a list of all projects planned to be implemented in a given period with indication of sources of funding for each project, including budgetary funds, KFD funds, EU funds, IFI loans and self-government contributions.26

The last problem that should be mentioned is the apparent lack of coordination between the GDDKiA head office and its regional offices. Meetings of head office and regional offices representatives are held twice a year, but the regional offices seem to work independently without being obliged to execute any standardised programmes imposed by the head office. In fact, rather GDDKiA plans seem to be a sum of projects of regional offices. The collaboration between the head offices and regional branches seems to be arranged on case-by-case basis.

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25 1 PLN = 0.24 EUR (14 July 2005)
26 For more information on National Road Fund, see section I.2.2
I.1.3. EUROPEAN UNION INCIDENCE IN ROAD PLANNING AND PROGRAMMING

It seems that the most important factor that can stimulate the Administration to a more systematic approach in the programming and preparation process is the recent EU accession of Poland with all advantages it can bring to the road sector. EU accession can bring other positive elements to the road planning and programming than the mere financial support. Provided that EU funds assignation and expenditures are conditioned by many factors and thoroughly controlled, the Administration has to put an effort into assuring a more systematic programming approach.

In the EU grants context, Structural Funds (i.e. ERDF) finance specific programmes of a Member State. A way to achieve an agreement about a programme between the Commission and a Member State is to pass an individual programme. For this reason, a single project individually considered (not included in a programme) cannot be co-funded by the ERDF. The same would happen if the beneficiary of the project is not the one mentioned in the SOPT, for instance a concessionaire (public or private) for a project that in the current SOPT was meant to be executed by the GDDKiA.

For the funds allocation in the transport sector, the MI has launched the Sectorial Operational Programme Transport for years 2004-2006 (SOPT) and is now working to submit the SOPT for 2007-2013 shortly (scheduled for June 2005). In such document only TEN-T and ERDF financing are treated. Its core objective is “to increase transport cohesion of Poland and improve spatial accessibility of Polish cities, areas and regions within EU […]”.

A SOPT document should details its core goals that have to be compatible with the EU transport policy. For instance, in the current SOPT the priorities established that can justify the execution individual projects are:

1. Balanced development of different transport modes;

2. Safer road infrastructure;

3. Technical Assistance for SOPT.

The second priority is relevant for national road construction and reconstruction. Measure 2.1 includes construction of motorways, expressway and reconstruction of national roads and Measure 2.2 construction of town bypasses and roads through powiat towns.
Within the MI any EU Funds activity is organized through the Infrastructure Finance Department, which is in charge of the Sectorial Operational Program Transport and transport part of Cohesion Fund.

The SOPT is not the only programme that serves as a framework for Structural Funds activities in the transport sector. The Integrated Regional Operational Programme (IROP) – just like the SOPT - is one of seven operational programmes to be used in implementing the 2004-2006 National Development Plan. The programme develops NDP goals by setting out priorities, trends and amounts of funds for implementing the State’s regional development policy. One of the priorities is Priority 1: Development and modernisation of the infrastructure to enhance the competitiveness of regions. It has been assigned almost 60% of the entire funding. Road projects may be co-financed under this priority Measure 1.1: Modernisation and Development of the Regional Transport System and also under Measure 3.2 Areas undergoing restructuring (Priority 3: Local Development). Nevertheless due to the character of the IROP and its priorities the EU support under this Programme may be destined mainly to smaller projects of regional and local importance.

The IROP – unlike the SOPT - was prepared by the Ministry of the Economy in close cooperation with regional self-government in all voivodships. At the implementation stage, IROP is managed nationally by ME, but most implementation tasks are carried out by regional entities, i.e. regional self-government - Marshal Offices, and regional state administration - Voivodship Offices. Additionally, unlike the SOPT, the IROP does not include a predefined list of projects for implementation during the programming period.

As far as the Cohesion Fund is concerned a Framework Reference / Strategy Document for Cohesion Fund was developed. It specifies main directions for the implementation of the Cohesion Fund in Poland in 2004-2006 and Cohesion Fund priorities in the areas of transport infrastructures and environmental protection. Also indicative lists of projects to be supported in the programming period by the Cohesion Fund are provided within this document. For road infrastructure this list includes motorways and expressways only.

One of the requirements that a EU Member State has to fulfil to become eligible is to create an ad hoc organization of the Public Administration in accordance with the established rules about planning, documentation required, management, programme implementation or audit and control. In this sense the SOPT contributes to creation of an organizational structure. Responsibilities are shared between different entities (authorities, committees, etc) which belong basically to the Ministry of Infrastructure and the Ministry of Finance, i.e. the SOPT Managing Authority (MI), the Steering Committee (MI), the Paying Authority (MF).
I.1.4. ROAD PROJECTS PREPARATION: ADMINISTRATIVE CAPACITY

General framework for projects preparation

According to the Art. 18 of the Act on Public Roads execution of works related to the preparation and coordination of construction and operation or only operation of motorways is the task of the General Director's of National Roads and Motorways. In particular, according to the Act these works include:

- Studies on toll motorways and preparation of documentation required for the environmental impact assessment;
- Acquisition of real estate needed for motorway construction on behalf and in favour of the State Treasury as well as its management;
- Preparation of proposal evaluation criteria for motorway contract (concession) tendering and carrying out the tendering;
- Agreeing the construction project of the motorway as far as the scope of its conformity with technical and construction regulations for toll motorways is concerned;
- Control of the conformity of construction and operation of motorways with the conditions stipulated in the contact for construction and operation or only operation of the motorway; etc.

The whole project preparation process - regardless whether the project will be implemented with or without private participation - consists of a sequence of activities that are required by the Polish legislation:

- Performance of a Technical and Economic Study by a design office chosen in a tender,
- Performance of the Investment Feasibility Study (usually performed by an external consultant simultaneously with the Technical and Economic Study) carried out to estimate the level of financial means required for the accomplishment of the project.
- Acceptance of the results of the study by the GDDKiA Commission for Investment Project Assessment (KOPI),
- Completion of a Preliminary Design,
• Completion of documentation for the localization decision, including the project’s numerical map (for the geodesy resources) and Environmental Impact Assessment report, according to the procedure established in the *Act on special principles of preparation and implementation of investment projects related to national roads*.

After the Localization Decision is issued by the voivod and becomes legally valid following activities, which are normally carried out by external consultants selected in tenders, may be started simultaneously:

• Real estate acquisition by the GDDKiA,

• Preparation of the Construction Design of the investment,

• Archaeological research (if need be).

All these steps must be concluded and the related documentation including the Environmental Impact Assessment report must be submitted to the voivod in order to obtain:

• A Decision on the Construction Permit.

After obtaining a valid Construction Permit the GDDKiA may move on to:

• Preparation of the detailed Design Documentation (if appropriate) and Construction/Concession Tender Documentation.

The whole project preparation process takes in Poland normally up to 7-8 years. In theory under the condition that everything went smoothly with no problems and delays the process would last about 5,5 years. The main reasons for the delays are appeals and claims that are lodged by interested parties at the stages that require administrative decisions (Localization Decision and Construction Permit) and the necessity of their examination by appropriate bodies.

Another problem is the impact of the instability of motorway network plan on the project preparation.
Although in the section I.1.2 it is stated that the motorway network plan and the general layout of the motorways has not changed much since the early nineties in the section I.4.2 you will find some information about exclusion of two motorways from the programme. For instance in the case of the A3 Motorway the project preparation works were quite advanced when it was decided that an expressway S3 would be built instead. As a significant part of the documentation had to be prepared starting from scratch again it can be claimed that some part of the Road Administration resources was wasted.

**Unclear and very unstable law, which is also very difficult to interpret, poses an additional obstacle in the project preparation process.**

In order to tackle a series of problems, such as lengthy procedures related to issue of construction permits, land purchase, etc. an Act on special principles of preparation and implementation of investment projects related to national roads was passed in 2003\(^{27}\). The main goal of this law was to accelerate the project preparation and implementation process by shortening of deadlines for public authorities for taking decisions and limitation of red tape. These goals were achieved to some extent by limiting the number of public authorities involved in administrative procedures that precede the construction, introducing new more restrictive deadlines for decisions to be taken by public authorities, improving the enforcement procedures in expropriation of real property, exempting investments from some public duties (e.g. fees for change of land designation) etc. The Act also provides for new safeguards for investors such as exclusion of a possibility of invalidation of a construction permit. The Act has a temporary character and will be in force till the end of 2007 only.

The project preparation process is being modified currently due to the tightened requirements regarding the Environmental Impact Assessment that have been introduced recently by the new Environmental Protection Law amendment\(^{28}\). According to these requirements, in the stage of technical and economic study also environmental aspects of the investment will have to be taken into consideration and documentation for 3-4 alternative routes will have to be prepared. At this stage the Environmental Impact Assessment will be carried out and the documentation for the Decision on Environmental Conditions of the Investment prepared. The Environmental Impact Report will be approved with consideration of all proposals and comments submitted by the public and environmental NGOs. The GDDKiA Commission for Investment Project Assessment (KOPI)

\(^{27}\) Ustawa z dnia 10 kwietnia 2003 r. o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg krajowych, Dz.U. 2003 nr 80 poz. 721.

\(^{28}\) Ustawa z dnia 18 maja 2005 r. o zmianie ustawy - Prawo ochrony środowiska oraz niektórych innych ustaw, Dz.U. z 2005 r. Nr 113, poz. 954.
will recommend one of the variants but the final decision will be up to the Minister of the Environment.

It is expected that the modification of the project preparation procedure caused by the requirements established in the new Environmental Protection Law will lengthen significantly the whole process.

Although all environmental issues will be shifted to an earlier stage the cumulative length of all administrative procedures will be longer than hitherto due to additional tasks to be performed and additional documentation to be prepared by the GDDKiA and inclusion of another institution (namely the Ministry of Environment) in the process.

There is a real threat that this extension of the duration of the whole process will cause delays in preparation of all projects. It is estimated in the GDDKiA that as a result of the lack of mature projects Poland may be not able to absorb EU funds assigned to the road sector in the financial perspective 2007-2013.

Another important problem arises at the very end of project preparation process, i.e. in tendering for execution of works.

According to GDDKiA officials, the Public Procurement Law is too restrictive, admitting appeals in different stages of the procedure.

First, there are usually questions and appeals regarding Terms of Reference. After a contract is awarded bidders often use their right to appeal against award decisions. The last issue is worrying as it escalates year by year. Whereas in the first half of 2002 there were only 706 appeals, in the corresponding periods of the years 2003, 2004 and 2005 the number of appeals rose to 880, 965 and 1531 respectively.

Administrative capacity

The process of road project preparation requires individual analysis of each project. In the case of national Roads this analysis is carried out by their manager, i.e. the General Directorate of National Roads and Motorways.

29 In all public tenders, not only in road sector.
From the analysis of previous reports and interviews with civil servants a conclusion may be drawn that many different obstacles are encountered in the project preparation process.

**The first and fundamental problem is that staff employed in GDDKiA is insufficient for the scope and complexity of tasks it has to face.**

The number of personnel was reduced at the occasion of merger of GDDP with ABiEA. Whereas the total of staff working in the ABiEA was of about 70 – 100 persons, the department responsible for concessions in the GDDKiA has 8 employees and the project documentation department 6 employees only. The shortage of workforce may become even more dangerous if the reduction plans are executed also in the case of the GDDKiA. According to GDDKiA, many well-qualified employees left due to lack of sufficient number of posts in the new organisation and too low salaries. The GDDKiA units are constantly overwhelmed with administrative tasks due to complicated procedures and lack of staff.

**Generally, GDDKiA staff is well qualified, but due to relatively low salaries it is very difficult to employ new personnel.**

Additionally, young employees after having gained some experience usually leave GDDKiA in order to take up better-paid jobs in the private sector. High rotation of the management personnel is also an important issue that is not conducive to continuity in the management processes.

**In the process itself problems arise already in the road location process. It comes often to disagreements between different levels of administration and appeals. Then it often comes to delays in the land acquisition process because of reluctance of individual landowners to sell their property, unclear property ownership status and sometimes also due to lack of funds for compensations.**

The last problem that has to be commented on is the communication deficiencies, both within the organization and with the rest of the stakeholders, including the Polish society.

**First, the communication between all institutions involved in the project programming and preparation processes is insufficient.**

This was already commented on in connection with the collaboration between GDDKiA and its regional offices whose contacts amount to routine meetings held twice a year. The consequence is the insufficient coordination between projects undertaken by different offices. But the problem
concerns the communication between all institutions involved, especially the Ministry of Infrastructure and the GDDKiA.

**Second, there is a lack of active public relations policy in GDDKiA.**

That is why the institution is not positively associated among the general public including road users. This problem has been described in detail by PBS in the study *Public attitude towards the need of bearing costs for using the road infrastructure in Poland by the individual users analysis*. According to this document, the GDDKiA is associated with improper fund management, improper supervision of road repairs and construction, excessive bureaucracy, political dependence and corruption in tendering. Surely, this kind of perception of the GDDKiA by the society affects negatively the Directorates reputation.

Because of the economic and social impact of road projects (job creation, citizen motion, environment, etc.) feasibility studies gain crucial importance. Normally it is the GDDKiA who hires local consultants to carry out feasibility studies. The common opinion at the public bodies is that these studies are often not enough developed and may be sometimes influenced by investors’ interests. Only when EU Funds are used for the studies the requirements are higher and the results of the studies are more independent.

**Nevertheless, according to some information from international financing institutions, project preparation standards in Poland often still do not meet standards needed both for EU funding and IFI financing as well as for application of PPP/concession system.**

Before opting for private participation, improvement in this area should be done. Good quality cost-benefit analysis, informative studies, environmental impact assessments and economic and financial feasibility studies are indispensable for all projects. Polish Road Administration requires significant reinforcement in order to be able to provide enough projects of a good quality for EU funding as well as for financing with private participation. This is especially important due to the increase of funds to be spent on roads and procedures that get more and more complicated.
I.2. ROAD PROJECT FUNDING AND FINANCING

This chapter covers most of the problems that are related to funding and financing of projects in Poland. Funding refers to mechanisms of paying for the infrastructure provision/service delivery including national taxation and user charges, whereas financing - to raising capital needed from International Financing Institutions and commercial banks. Section I.2.1 is devoted to legal and institutional framework with the new funding and financing instrument (the KFD) being analysed in section I.2.2. In section I.2.3 different sources on funding are described. Section I.2.4 takes a look at the financing. Finally, section I.2.5 covers the problem of compatibility of Polish tolling policy with EU rules and I.2.6 the possibility of combining EU funds with private financing.

I.2.1. LEGAL AND INSTITUTIONAL FRAMEWORK

The legal acts that are relevant for road infrastructure funding are:

- *Act on Public Roads*\(^{30}\);

- *Act on Public Roads Financing*\(^{31}\);

- *Act on Road Transport*\(^{32}\);

- *Act on Toll Motorways*\(^{33}\)

The first one covers the general aspects of road development, while the other three are related with different elements of their funding.

The *Act on Public Roads* - as indicated in the section I.1.1 – mainly provides for the basic rules in respect to all public roads, their division into categories and rules of administration of the roads, but it also includes some rules regarding special charges for parking, charges on non-standard vehicles, use of tunnels, bridges and ferries. However, these charges are not the main funding sources for National Roads.

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\(^{30}\) Ustawa z dnia 21 marca 1985 r. o drogach publicznych, Dz.U. 1985 Nr 14 poz. 60.

\(^{31}\) Ustawa z dnia 29 sierpnia 1997 r. o finansowaniu dróg publicznych, Dz.U. 1997 nr 123 poz. 780.

\(^{32}\) Ustawa z dnia 6 września 2001 r. o transporcie drogowym, Dz.U. 2001 Nr 125 poz. 1371.

The Act on Public Roads Financing is much more relevant in this respect as it determines the basic rules for public roads funding. It assigns the responsibilities of funding the tasks of road construction, reconstruction, overhaul, maintenance, protection and management to different entities depending on the road category. In the case of National Roads these task belongs to the minister in charge of transport affairs (the Minister of Infrastructure) who is supposed to carry it out by means of the General Director of National Roads and Motorways. One of the most important rulings introduced by this Act is the earmarking of excise fuel tax revenues for National Roads purposes which is commented on in the section I.2.3. The legal Act on Public Roads Financing does not apply to toll motorways built as concessions though, which has a separate dedicated Act.

The Act on Road Transport basically does not relate directly to road infrastructure and its funding. It is rather a legal framework for provision of transportation services. Nevertheless, it includes some rulings that are relevant for infrastructure funding. Art. 42-47 impose the obligation to pay a special charge for the use of National Road infrastructure, so called vignette on all heavy goods vehicles. The vignette is commented on in the section I.2.3 along with other funding instruments. Additionally, certain problems related to its compatibility with other payments in the light of the EU legislation are discussed in the section I.2.5.

Finally, the Act on Toll Motorways and National Road Fund sets up an important part of the legal framework for motorway funding from direct charges for their use (tolls). Additionally, the 2003 Act on amendment of the Act on Toll Motorways and specific other acts\textsuperscript{34} introduced a new instrument of road funding - the fuel surcharge and set a new institution – the National Road Fund – which was designed for channelling mainly the fuel surcharge as well as some other funds destined for road infrastructure. The KFD deserves a more exhaustive analysis, which is performed in section I.2.2.

This legal framework will be completed very soon by a new Act on Public-Private Partnership.

This framework establishes the rules in which road infrastructure development takes place in Poland. However, it is crucial to understand that what really matters is public management skills. A well-fashioned normative structure, according to the traditional European-continental codification beliefs, might be useless to achieve a successful conclusion for road projects funding when governmental organizations empowered to lead the process are unable to understand in practical terms its subtle interactions.

\textsuperscript{34} Ustawa z dnia 14 listopada 2003 r. o zmianie ustawy o autostradach płatnych oraz niektórych ustaw, Dz.U. 2003 nr 217 poz. 2124.
The main institutions that are conferred by the Law competences for the financing of tasks of National Roads construction, reconstruction, overhaul, maintenance, protection and management are the Minister in charge of transport affairs (the Minister of Infrastructure) and the General Director of National Roads and Motorways. The Law does not delimit precisely the division of these competences saying only that the General Director of National Roads and Motorways is the minister’s agent for the execution of funding tasks.

The role of the rest of the Council of Ministers and especially of the Minister of Finance may not be passed over in silence. It prepares the national budget each year, assigning funds to the development of road network. The execution of the annual budget for infrastructure is within the responsibility of the Ministry of Infrastructure, which responds about it to the MF and the MF ultimately to the Parliament. No multiyear budgets are prepared in Poland.

In two cases the MI has to agree specific projects with other Ministries: if EU Funds are involved and if the State has to issue guarantees for a Concessionaire. In the first case, the MI is responsible to the Ministry of Economy and to the Council of Ministers. In the case of private infrastructure financing where the Government has to issue guaranties for lenders, the Ministry of Finance is responsible for negotiating them. A project without guarantees is only subject to decision of the Ministry of Infrastructure.

I.2.2. NATIONAL ROAD FUND

A relatively new institution created in 2004 for the road funding purposes is the National Road Fund (KFD).

The National Road Fund (KFD\textsuperscript{35}) was created as a unit and a special account in the Bank of National Economy (BGK\textsuperscript{36}) on 1 of January 2004 on the basis of the Act on amendment of the Act on Toll Motorways and specific other acts\textsuperscript{37}. The amendment introduced 3 new chapters to the Act on Toll Motorways\textsuperscript{38}. One of them (Chapter 6) refers to the National Road Fund, the second one

\textsuperscript{35} Krajowy Fundusz Drogowy
\textsuperscript{36} Bank Gospodarstwa Krajowego
\textsuperscript{37} Ustawa z dnia 14 listopada 2003 r. o zmianie ustawy o autostradach płatnych oraz niektórych ustaw, Dz.U. 2003 nr 217 poz. 2124.
\textsuperscript{38} Ustawa z dnia 27 października 1994 r. o autostradach płatnych, Dz.U. 1994 nr 127 poz. 627.
(Chapter 5b) to the fuel surcharge, which is the main source of incomes of the KFD, and the third (Chapter 5a) to tolls.

The Bank of National Economy manages the National Road Fund, which has not its own legal personality. The Bank acts on its behalf. However neither the Fund nor the Bank has any competencies in project selection and preparation, tasks that belong to the GDDKiA and MI.

The fuel surcharge is levied on manufacturing, importation and intracommunity acquisition of motor fuels and gas used for propulsion of motor vehicles. The revenues from it are the main source of the KFD’s incomes.

Other sources of funds of the National Road Fund are39:

- Vignette revenues,
- Minor sources that make up the so called “GDDKiA special mean” (e.g. fines for axle load excess),
- Fees paid by concessionaires in pursuance to the provisions of concession agreements, including payments previously due to the General Directorate for National Roads and Motorways;
- Revenues on tolls for the use of motorways collected by the General Director for National Roads and Motorways;
- Revenues collected by the General Directorate for National Roads and Motorways on account of making the land acquired for motorway construction purposes available to the concessionaires;
- Grant financing received from international donor institutions;
- Loans or credits taken by the Bank of the National Economy for the benefit of the Fund;
- Revenues on bonds issued by the Bank of the National Economy for the benefit of the Fund;
- Interest accrued on deposits of the revenues on the Fund account and interest accrued on bank deposit of unused means of the Fund;

- Revenues on sale of shares or stock in the companies, transferred to the minister competent for transport by the State Treasury with view to capitalise the Fund;
- Revenues on the shares and stock referred to above;
- Donations and bequests;
- Revenues on other public means;
- Revenues on other titles.

One of the planned future sources of incomes of the fund would consist of shares in concessionaires’ profits. Although not all concession agreements include profit sharing formulae, it is the Administration’s intention to introduce them to all Concession Agreements on the occasion of future renegotiations of Concession Agreements (see section I.2.5). For instance, according to the profit sharing formula included in the A2 concession operated by Autostrada Wielkopolska S.A., starting from the profitability of 10% the State’s share in profits will reach 20% and grow to 50% starting from the profitability of 15%.

In the INECO Team’s opinion, the profit sharing mechanism may be useful if it is combined with minimum income guarantee, but it also introduces a risk of increase of the overall cost of the concession (covered mainly by the user) when obtaining profits by the KFD becomes its main objective. In order to prevent this adverse effect it is necessary that the Administration thoroughly analyses each concession (feasibility study) before evaluating its financial participation and introducing profit sharing formulae.

In 2005 the overall allocation of funds to the KFD reached the amount of about 1,125 million EUR. For 2006 it is planned to grow to about 1,445 million EUR.

The funds accumulated in the KFD may be destined for:
- Co-financing of land acquisition for national road purposes, preparation, construction, reconstruction, overhaul, maintenance and protection of road investments undertaken by the GDDKiA;

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- Payments to concessionaires for fulfilment of obligations established in the contract for construction and maintenance or only maintenance of motorway, including in particular:

  o Payments related to assurance of the availability of the motorway and maintenance of its passability (availability payments),

  o Variable amounts dependent on the concessionaire meeting specific requirements set in a contract for construction and maintenance or only maintenance of motorways (performance payments),

  o Subsidies for concessionaires destined to cover an entire or a part or of the temporary deficit in revenues from operation of a motorway, granted in order to maintain liquidity of current expenditures and service and repayment of credits or loans taken or bonds issued for financing of the motorway construction

- Repayment of loans, credits and bonds guaranteed by the State Treasury in case of their default,

- Commission payments for the Bank of National Economy.

Spending of KFD funds is based on the substantive and financial programmes whose drafts are prepared by the GDDKiA. They can be established for periods of one to six years. The draft programme is prepared by the GDDKiA based on the guidelines set by the Ministry of Infrastructure. Then it is submitted for consultation regarding financial aspects to the Bank of National Economy. Next it is submitted to interministerial consultations and finally to the Council of Ministers. The programme is passed then by the Council of Ministers by a decree. The current Decree on the substantive and financial program for the road investments financed by means of the National Road Fund\(^\text{41}\) covers all projects planned to be co-financed by KFD in 2005 and 2006. The following table presents a summary of funds, including the KFD funds that are to be spent on different types of projects in this period.

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\(^{41}\) Rozporządzenie Rady Ministrów z dnia 4 stycznia 2005 r. w sprawie ustalenia Programu rzeczowo-finansowego dla inwestycji drogowych realizowanych z wykorzystaniem środków Krajowego Funduszu Drogowego, Dz.U. 2005 nr 8 poz. 57.
Table I.2.1. Financing of road infrastructure projects in 2005 according to The substantive and financial program for the road investments financed by means of the National Road Fund [in million PLN42]

<table>
<thead>
<tr>
<th>Number of projects</th>
<th>EU Funds</th>
<th>National Road Fund</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PHARE</td>
<td>ISPA Cohesion Fund</td>
</tr>
<tr>
<td>Motorway construction</td>
<td>15</td>
<td>0,0</td>
</tr>
<tr>
<td>Expressway construction</td>
<td>12</td>
<td>28,0</td>
</tr>
<tr>
<td>Bypass construction</td>
<td>23</td>
<td>13,0</td>
</tr>
<tr>
<td>Reinforcement and reconstruction</td>
<td>30</td>
<td>47,7</td>
</tr>
<tr>
<td>Preparatory works for new projects</td>
<td>-</td>
<td>0,0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>-</td>
<td>88,7</td>
</tr>
</tbody>
</table>

Table I.2.2. Financing of road infrastructure projects in 2006 according to The substantive and financial program for the road investments financed by means of the National Road Fund [in million PLN43]

<table>
<thead>
<tr>
<th>Number of projects</th>
<th>EU Funds</th>
<th>National Road Fund</th>
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<tr>
<td></td>
<td>PHARE</td>
<td>ISPA Cohesion Fund</td>
</tr>
<tr>
<td>Motorway construction</td>
<td>14</td>
<td>0,0</td>
</tr>
<tr>
<td>Expressway construction</td>
<td>11</td>
<td>0,0</td>
</tr>
<tr>
<td>Bypass construction</td>
<td>17</td>
<td>0,0</td>
</tr>
<tr>
<td>Reinforcement and reconstruction</td>
<td>19</td>
<td>6,0</td>
</tr>
<tr>
<td>Preparatory works for new projects</td>
<td>-</td>
<td>0,0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>-</td>
<td>6,0</td>
</tr>
</tbody>
</table>

The National Road Fund is supposed to be a mechanism that facilitates the multi-annual off-budget financing of road investments44. Having a foreseeable and stable annual level of incomes that is not put to the vote in the Parliament each year it enables long-term programming of projects. It is also used to pre-finance all investment expenditures that will be co-financed by EU funds within the confines of the Sectorial Operational Programme-Transport in the financial perspective 2007-2013.

42 1 PLN = 0,24 EUR (14 July 2005)
43 idem
44 However if the state has to issue guarantees for the payments of the KFD as in the case of the A1, it is no longer a pure off-budget instrument.
According to the Act on Toll Motorways and the National Road Fund\textsuperscript{45} the programme of investments in road infrastructure have to be established by a Government's decree. It means that all decisions on which projects will be executed has to be authorized by the Council of Ministers. Formerly all decisions on the annual expenditures on road investments fell inside the Ministry’s of Infrastructure jurisdiction. The execution of a project that has not been included in the list may turn out to be very difficult or even impossible because of the necessity of issuing a new Decree amending the Decree of 4\textsuperscript{th} of January 2005. It may also happen that some other project is delayed for some reasons and in fact the project execution deadlines established in the programme are to optimistic. It is also quite common in the construction industry that the overall construction costs sometimes turn out to be higher than initially planned. However, in the KFD case it is completely opposite. The tender prices assumptions turned out to be too conservative and the actual sums paid to contractors are lower than it was foreseen in the Programme. In these cases the funds of the National Road Fund cannot be reassigned between projects until a new Decree is issued. It means that the execution of some projects and spending of the KFD funds may be potentially blocked due to the lack of a Government’s Decree.

According to the MI a second Amendment of the Decree is being currently prepared. It will address some above-mentioned issues through a reduction of sums destined for some projects and addition of some other projects to be funded from the remaining resources.

On the other hand it may be not overlooked that the rigidity, which may pose some operative problems, was in a sense intentional. One of the objectives of the Government was to reinforce the control over the GDDKiA expenditures and impose it an operative short and mid-term investment programme. In this sense, bearing in mind the weakness in the field of investment programming, which has been commented on in the chapter 1, paradoxically this rigidity of the Fund’s expenditures programme may be seen as an important achievement.

The Fund in its current shape is deemed by the MI to be an instrument that is more effective than previous system based on one-year expenditure programmes that lay in hands of the GDDKiA.

\textsuperscript{45} Ustawa z dnia 27 października 1994 r. o autostradach płatnych i o Krajowym Funduszu Drogowym, Dz.U. 1994 nr 127 poz. 627.
One of the objectives of the National Road Fund creation was to achieve off-balance sheet treatment of the Fund’s debts and expenditures. However it seems that this goal has been not achieved which is the main disadvantage of the KFD. There is a threat that its liabilities may consolidate with the Public Administrations accounts.

At first glance, this threat seems not to exist. The Fund is managed by the Bank of National Economy that although State-owned does not belong to the general government sector. According to this interpretation, all liabilities of the Fund would be in fact the Bank’s liabilities and remain off-budget.

Nevertheless, the current common practice of the Eurostat is to take a closer look at the actual economic nature of the entity and its financial flows while evaluating whether it can be regarded off or on-balance. If the Eurostat examines the KFD, it may find out first that it is not an institutional unit with an autonomy of decision in respect of its principal functions like taking economic decisions and engaging in economic activities (all decisions on the Funds expenditures are taken externally by the Council of Ministers). Finally, it may be also considered that the Fund is used without a real economic goal and serves only to channel funds that come from Public Administration.

Even if measures for assuring the institutional independence of the Fund were taken (e.g. converting it to an independent entity with its own Board of Directors equipped with more decision competences regarding the Funds activities) it would be extremely difficult to classify the Fund as a corporate unit and not a general government sector unit. Due to the economic nature of its revenues it would be practically impossible to prove that 50% of production costs are covered by sales incomes. In the case of the National Road Fund only it would be even more difficult to prove that it is supplied mostly from commercial sources. First of all, according to the 30-year cash-flow projection of the Fund that has been prepared by the BGK, a vast majority of the Fund’s revenues will come from the fuel surcharge. Although it does not pass through the budget and is not called a tax in the Polish legislation it can be seen as such due to its genuine characteristics. In such case the Fund or the Bank might be seen as a financial institution that acts as tax collector on behalf of the State. The incomes from shares in concessionaires’ profits are expected in more remote future, but their appearance and volume are not certain. Besides if the profit-sharing mechanism is not linked with a prior contribution of the Fund to the project - so that both elements form a sort of “participative loan” granted to the concessionaire on market conditions - also these revenues may be considered as a form of taxation. Finally the revenues from vignette are relatively more related

46 The fuel surcharge is collected by customs offices and transferred directly into the KFD account.
to the service used by the vignette-payer than it is in the case of the fuel surcharge, but still they have clear tax characteristics.

To sum up, it seems that - in spite of current consideration of the National Road Fund as an off-budget instrument - there is much room for unfavourable treatment of the National Road Fund by the Eurostat. In such case, any operation of debt of the KFD would have repercussion on public debt, and all investments made by the Fund would have effects on the public deficit.

To avoid these undesirable effects it would be necessary:

- First, to assure institutional and fiscal independence of the Fund from the general government sector. This would mean creation of an independent entity and transferring to it competences regarding expenditures on road investments. If we consider that one of the objectives of the Government was also to reinforce the control over the GDDKiA expenditures and impose it an operative short and mid-term investment programme this solution would not be desired by the Government. Also if we consider that the collaboration between existing institutions is not flawless introducing additional entity might deteriorate the efficiency of the whole institutional system. For these reasons this step would probably require a complete redesign of the institutional infrastructure provision system.

- Second, in order to meet the 50% criterion\(^{47}\), it would be necessary to completely redefine the Funds revenues in order to assure that at least 50% of its costs are covered by the "sales incomes". Tolls are the only kind of incomes in the road sector that meet this definition, but it is unlikely that the sums raised from toll collection would be sufficient taking into consideration the entire scope of investments funded or co-funded by means of the Fund (not only tolled motorways but also non-tolled national roads).

For the above mentioned reasons it is extremely difficult to transform the KFD into an off-balance sheet instrument for road development financing. The methodology applied nowadays by the Eurostat for the assessment of the nature of such entities is based mainly on an analysis of the economic flows of the entity. Therefore a Fund, which was designed to channel public expenditures, will be most probably treated as government sector entity regardless of its legal form.

\(^{47}\) for more information see section I.3.5
Apart from the destinations of the KFD funds that were initially planned two additional ones have arisen recently. First, there will be some payments to the A1 concessionaire according to the financial agreement signed with the Government. Second, the A2 and A4 concessionaires will have to be compensated for the lost incomes due to the exemption of heavy goods vehicles from tolls.48

Additionally, although the fuel surcharge and the National Road Fund were designed only as additional instruments for road infrastructure development, and were presented to the general public as such, a new destination of the fuel surcharge revenues has been introduced recently. According to the MI proposal 20% of them will be allocated to a new Fund for railway infrastructure development. The proposal has been already accepted by the Council of Ministers Committee and will be probably accepted by the Parliament together with the budgetary law for the year 2006.

Although the Ministry’s willingness to improve the rail sector situation is praiseworthy it makes absolutely no sense to damage the efficiency of well functioning devices designed for the implementation of the transport infrastructure policy in one transport mode to improve the situation in another mode only a little. The adopted solution will deteriorate the KFD finances. The credibility of the Fund as a borrower will definitely suffer if we consider that the overall volume of funds accumulated in the KFD and available for its main destinations will decrease significantly due to three factors:

- Significant payments to the A1 concessionaire according to the recently signed financial agreement and potentially analogous payments to new concessionaires if the Government decides to extend the application of the A1-formula,

- Compensations to be paid to the A2 and A4 concessionaires due to the exemption of heavy goods vehicles from tolls,

- Earmarking of 20% of fuel surcharge revenues to the “Railway Fund”.

The whole situation is a good example of lack of a coherent infrastructure financing policy and the prove that the Administration activities are based on ad hoc measures that not only are not well coordinated but actually may be contradictory. It also proves that cooperation may fail not only between different governmental institutions, but also within one Ministry.

48 For more information on this issue see section I.2.5.
Before deciding whether Public Private Partnerships will be used as an element of the infrastructure provision system, the Government must have a clear conception of the basics of its infrastructure policy and of the instruments of its implementation. Otherwise, guided by good intentions the Administration may take a lot of ad hoc measures that altogether turn out to be ineffective. Improvement in this area is a must irrespective whether the Government opts for Public Private Partnerships or not.

I.2.3. SOURCES OF FUNDS

One of the main problems of the Polish road sector is insufficient funding which impedes development of new green-field projects like motorways, which are indispensable to improve the competitiveness of the economy, but also does not allow making up for the deterioration of existing roads that has taken place in the last fifteen years.

Altogether, all expenditures on transport infrastructure in the years 1991-2003 totalled 10,673 million EUR (3,743 million EUR from the State Budget, 2,851 million EUR from the EU Funds and 4,079 million EUR from International Financial Institutions).

The total expenditure on National Roads was especially low in the early nineties. Later on the situation improved and the budget for National Roads reached the present level of 0.5% of GDP. The total expenditures on National Roads in 2004 amounted about 1,4 billion EUR, which is a significant improvement, but still seems insufficient for Poland’s needs. About 550 million EUR came from the State Budget, 231 million EUR from the National Road Fund, 133 million EUR from Special GDDKiA resources, 187 million EUR from EU funds. The rest came from EIB and World Bank loans (142 million EUR and 146 million EUR respectively).
This year almost 550 million EUR have been allocated for motorway construction and about 160 million EUR for expressways. This means an increase of 79% and 29% respectively with relation to 2004.

This section deals with the main funding instruments, i.e. mechanisms of payments for the infrastructure provision/service delivery including national taxation and user charges. In the following section also some most relevant financing instruments that are used for raising of capital from the International Financing Institutions and commercial financing institutions are commented on.

**Excise Fuel Tax**

The current road funding system is based mainly on incomes from the excise fuel tax. Although the total sum it brings annually to the national budget is substantial (about 3.750 million EUR), only 30% of this sum is destined to expenditures on roads and only 12% of the total, i.e. 40% of the amount earmarked for roads (about 450 million EUR), to expenditures on national roads. This percentage was established in 1997 by the Act on Public Roads Financing as a minimum of excise fuel tax revenues that were to be destined for the sector, but due to budgetary constraints it turned out to be practically the exact allocation. About 40% of funds received from the excise fuel tax are spent by the GDDKiA on new investments, 50% on rehabilitation and maintenance and the rest are its operational costs.
Vignette

The vignette for heavy goods vehicles was introduced on 1 January 2002.

From the beginning the vignette system fell short of the Governments’ expectations. The incomes from the vignette in the first year of its implementation slightly outstripped half of the planned amount of about 125 million EUR, reaching 68 million EUR. It is estimated that the vignette will bring incomes of about 125 million EUR this year.

An important part of the Infrastructure - a key to development programme of the former SLD-PSL-UP Government was the idea of extending the vignette onto all vehicles including also private cars. The scheme was expected to bring in about 3,75 billion EUR by 2005. This measure was not very popular within the general public and the project of the legal Act on construction and operation of national roads that was going to introduce it was finally rejected by the Parliament. The vignette for heavy goods vehicles has been maintained.

Although the new financing scheme was supposed to bring significant income to the State for the motorway construction its weaknesses were broadly commented on.

First of all, the vignette has more characteristics of a tax than of payment for service and is perceived as such by road users. It removes any contractual relation between users and concessionaires and thereby removes market incentives for both parties. Additionally, a lump sum paid for vignette is not related to real usage of infrastructure. In this way it favours frequent users at the expense of those who travel less. In this sense, the excise fuel tax functions better relating the amount paid by user to vehicles weight and distance travelled (wear of roads) as well as fuel consumption (environmental pollution). Finally, this kind of charge requires creation of a completely new charge collection and enforcement system whose costs are significant.

It should be also mentioned that revenues planned to be gained with the extension of vignette on all vehicles in 2002 could be also obtained – according to some studies – by increase of the excise fuel tax by 0,1 PLN (i.e. about 2% - 2,5% of current petrol price for final users), a magnitude of growth which does not justify creation of another duty.

Due to the exemption from tolls of heavy goods vehicles that starts from the 1 September 2005, according to the amendment to the Act on Public Roads and the Act on Toll
Motorways and the National Road Fund\textsuperscript{49}, the concessionaires will have to be recompensed by the State for lost revenues from heavy goods vehicles tolls. The solution that has been adopted recently is to refund these tolls from National Road Fund (KFD). According to the estimations done by the Ministry of Infrastructure the amount to be paid to the concessionaires in 2005 (for the period August\textsuperscript{50}-December 2005) will reach 52,5 million EUR. In 2006 the payment will have to cover the whole year and will reach 125 million EUR. Although the vignette incomes are not earmarked for these refunds by the Law and they constitute one of a series of revenue sources that are pooled in the Fund, it is interpreted by the GDDKiA that the refunds will come from the vignette revenues pool\textsuperscript{51}. With the estimated vignette incomes of the KFD of 160 million EUR only about 35 million EUR will remain in 2006 available for other purposes of the Fund. As soon as the operation of new motorways starts the total shadow toll payments will have to be increased.

Most probably sooner or later these payments will start to consume amounts of money that will be higher than the vignette incomes. This way the economic rationale of the vignette will be lost: all vignette buyers will contribute to the motorway construction and operation regardless whether they use them or not.

For more information on this solution and its background see section I.2.5.

Fuel surcharge

As it has been already mentioned in the section I.2.2, the fuel surcharge is levied on manufacturing, importation and intracommunity acquisition of motor fuels and gas used for propulsion of motor vehicles. The revenues from the fuel surcharge are estimated to reach about 240-250 million EUR annually. They are the main source of the National Road Fund’s (KFD) incomes\textsuperscript{52}.

\textsuperscript{49} Act on amendment of the Act on Toll Motorways and the Act on Road Transport (Ustawa z dnia 28 lipca 2005 r. o zmianie ustawy o autostradach płatnych oraz o Krajowym Funduszu Drogowym, Dz.U. 2005 r. Nr 155, poz. 1297)

\textsuperscript{50} It was estimated at that time that the amendment would come into effect in August.

\textsuperscript{51} According to the news article published on the GDDKiA web page, entitled “Od 1 września ciężarówki nie płacą za autostrady”.

\textsuperscript{52} For more information on the National Road Fund (KFD) see section I.2.2.
Tolls

The basic legal base for collection of tolls is set in the Section 5a of the Act on Toll Motorways and the National Road Fund. According to this Act, tolls may be charged for the use of motorways.

The concessionaires are responsible for toll collection and tolls constitute their revenues. Toll rates are defined and collected in accordance with the provisions of the Decree of the Minister of the Infrastructure on charging for the use of a motorway. The Decree sets among other things five vehicle categories for toll differentiation and condition of toll changes. The initial rates and the way of their revision should be defined in Concession Agreements.

There is also a possibility that the General Director of National Roads and Motorways charges for the use of motorways that are not subject to any Concession Agreement. In that case tolls would be set by the Minister of Infrastructure within limits (price caps) set in annex of the Act on Toll Motorways and the National Road Fund (see table I.2.3). These price caps will be updated by the Consumer Price Index (three first quarters) starting from 2005. Tolls charged by GDDKiA would constitute a revenue of the National Road Fund. It has been not opted for this possibility up to now and it is rather not planned to charge tolls directly without concession probably due to the intention of tendering concessions for operation and maintenance of motorway sections that were built in a traditional way.

Table I.2.3. Maximum tolls allowed by the Act on Toll Motorways and National Road Fund to be charged by GDDKiA on non-concession motorway sections (in PLN)

<table>
<thead>
<tr>
<th>Category</th>
<th>Maximum toll per km</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category 1</td>
<td>0.22</td>
</tr>
<tr>
<td>Category 2</td>
<td>0.33</td>
</tr>
<tr>
<td>Category 3</td>
<td>0.47</td>
</tr>
<tr>
<td>Category 4</td>
<td>0.75</td>
</tr>
<tr>
<td>Category 5</td>
<td>2.20</td>
</tr>
</tbody>
</table>

Tolls are charged on 210 km of a total of 543 km of motorways that are in operation. This means that only 39% of the motorway network is tolled in spite of all motorway network in Poland being

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53 The following five categories were established by the Decree of the Minister of the Infrastructure on charging for the use of a motorway (Rozporządzenie Ministra Infrastruktury z dnia 29 kwietnia 2004 r. w sprawie opłat za przejazd autostradą, Dz.U. 2004 nr 102 poz. 1075):
Category 1: Motorcycles and two-axle motor vehicles.
Category 2: Two-axle motor vehicles with double wheels at at least one axle and two-axle motor vehicles with a trailer.
Category 3: Three-axle motor vehicles and two-axle motor vehicles with double wheels at at least one axle and with a trailer.
Category 4: More than three-axle motor vehicles, three-axle motor vehicles with trailers and more than three-axle motor vehicles with trailers.
Category 5: Vehicles not covered by categories 1-4 and Vehicles whose dimensions, axle-load or weight exceed limits established by law.
declared toll motorways by the Law. This is mainly due to lack of concessionaire and toll collection facilities in the 144 km A4 section Wrocław-Katowice which has been built with a traditional system and whose operation is being tendered currently. No tolls are collected on the oldest A4 sections in the southwestern part of Poland, on A6 near Szczecin and on the only open short section of A1 in the vicinity of Piotrków Trybunalski (18 km).

Although the base for the tolling system seems to be quite coherent, in practice there are some issues that have to be mentioned. First, there are differences between tolls charged on A2 and A4 Katowice-Kraków. Second, low acceptability of tolls among road users presents serious difficulties. Third, there is certain tendency to abandon the principle of tolls being revenues of concessionaires.

Table I.2.4. Tolls charged on A2, A4 between Katowice and Kraków and tolls accepted by users (in PLN)

<table>
<thead>
<tr>
<th>Motorway</th>
<th>Section</th>
<th>Toll collection points</th>
<th>Category 1</th>
<th>Category 2</th>
<th>Category 3</th>
<th>Category 4</th>
<th>Category 5</th>
<th>Category 4</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Kilometers</td>
<td>per km</td>
<td>per km</td>
<td>per km</td>
<td>per km</td>
<td>per km</td>
<td>per km</td>
</tr>
<tr>
<td>A2</td>
<td>Konin - Września</td>
<td>48,0</td>
<td>11</td>
<td>0,23</td>
<td>18</td>
<td>0,38</td>
<td>27</td>
<td>0,56</td>
</tr>
<tr>
<td></td>
<td>Września - Poznań *</td>
<td>50,5</td>
<td>11</td>
<td>0,22</td>
<td>18</td>
<td>0,36</td>
<td>27</td>
<td>0,54</td>
</tr>
<tr>
<td></td>
<td>Poznań - Nowy Tomyśl</td>
<td>50,0</td>
<td>11</td>
<td>0,22</td>
<td>18</td>
<td>0,36</td>
<td>27</td>
<td>0,54</td>
</tr>
<tr>
<td>A4</td>
<td>Katowice - Kraków</td>
<td>61,0</td>
<td>11</td>
<td>0,18</td>
<td>25</td>
<td>0,41</td>
<td>25</td>
<td>0,41</td>
</tr>
</tbody>
</table>

* including Poznań bypass
** according to the PBS study

Regarding toll differences, table I.2.4 presents tolls charged for driving three A2 sections and A4 between Katowice and Kraków. There are different toll rates for each of five categories on A2 whereas on A4 categories 2, 3, 4 and 5 have been combined and one rate is charged for all types of vehicles covered by these categories. Generally speaking, tolls charged on A2 are higher than those charged on A4. For category 2 tolls per km on A4 are 19% higher than on A2 and for categories 3, 4 and 5 – 25%, 52% and 82% lower respectively. The only category that is charged higher (13%) tolls on A4 is the category 2. This difference may be due to different costs that have to be covered by both concessionaires. Whereas almost all of Katowice-Kraków section was built
by the State and the concessionaire Stalexport S.A. (currently Stalexport Autostrada Małopolska S.A.) had to adapt it for toll collection, upgrade some parts and execute repair works only, two out of three sections of A2 (Poznań-Września and Nowy Tomyśl-Poznań excluding Poznań bypass) were built by the concessionaire. It is also worth mentioning that according to the PBS study entitled *Public attitude towards the need of bearing costs for using the road infrastructure in Poland by the individual users analysis*, A2 is perceived by users as more expensive than the Katowice-Kraków A4 section, but on the other hand also as a better one.

The second issue is related to the low acceptance of tolls among motorway users in Poland. It is commonly known that in countries with no experience with tolls the problem of their acceptance may arise. This is the case of Poland where historically many utilities and public services (e.g. public roads) were provided and funded by the State with no direct user charging. This is why infrastructure provision is seen in Poland as one of the State duties and direct payments for its use are generally rejected. The effect may be amplified by more acquaintance of many users in Poland with non-tolled, high-quality motorways in Northern Europe, mostly in Germany, rather than with toll motorways in France, Spain and Italy. Other factors may be: a general perception of a multitude of taxes that are supposed to finance road infrastructure development causing high fiscal pressure, and low confidence in road financing system. All this combined with a perception of tolls as another additional source of road funding produces a relative strong effect of tolls rejection.

The lack of so-called tolling culture has twofold consequences. First, a threat of lower traffic than estimated arises. Lower traffic may affect negatively the concessionaires' incomes and their capacity of debt repayment. The traffic risk is relatively high what makes financing more expensive. Second, users try to avoid toll payments and tend to choose non-tolled alternatives. The second phenomenon is especially intense in the case of heavy goods vehicles and the A2 motorway. However this problem will be resolved through cancelling tolls for heavy goods vehicles. This is not surprising if we consider the cost of motorway for this type of vehicles especially in the context of analogous cost on A4 and the cost declared as more acceptable by users (see chart I.2.2).

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54 *see e.g. Standard&Poors paper Traffic Risk in Start-Up Toll Facilities*

55 *For more information see section I.2.5.*
As seen on the chart I.2.2, according to the PBS study entitled *Public attitude towards the need of bearing costs for using the road infrastructure in Poland by the individual users analysis*, most users would be ready to pay for the use of motorway a price of 0.10 PLN in the case of passenger cars and 0.20 PLN in the case of trucks. With that price almost 71% of potential motorway users would be willing to choose a motorway rather than an alternative non-toll lower quality road. With a price of 0.17 PLN (similar to A4 tolls) and 0.23 PLN (similar to A2 tolls) only 55% and 43% of users respectively are willing to choose a motorway. It is worth mentioning that the price-elasticity of demand of motorways increases significantly below toll levels that are currently applied in Poland. Nevertheless, a possible increase of traffic caused by a decrease of tolls would not compensate a drop in incomes. The demand at prices above current levels seems to be more rigid.

A positive sign is that although tolls are considered to be additional burden and generally are not welcome by road users, it is perceived that the tolls collection will not only remain but their application will spread up\(^56\). Together with perception that they form a part of road funding system

\(^{56}\) The respondents expect a change for worse as far as tolls are concerned in the next five years.
and that the total length of motorways will increase it may indicate that in spite of being rejected at the moment with a gradual extension of motorway network and growth of disposable income there would be potential for toll acceptance in the long term in Poland. It could be amplified by a consequent toll policy of the Government combined with a broad information campaign.

Unfortunately, the issue of abandoning the principle of tolls being revenues of concessionaires not only a sign of lack of consequence of Polish Administration as far as application of tolls is concerned, but may be also not very favourable solution for the Government. According to the Law and common practice tolls in the case of concession system are concessionaire's revenues. The solution that is going to be adopted on A1 motorway will consist in channelling all cash flows from tolls set by the Administration to the National Road Fund and then in remunerating the concessionaire based on criteria other than traffic volume. This solution frees the private partner from traffic risk that is taken over by the Fund. The good news is the Government's intention to make the tolls more accessible for the road users and participate in the motorway development funding.

**But the adopted solution that guarantees to the concessionaire a minimum profit reduces the risks of the concessionaire to the extent that makes questionable the reasonableness of the application of concession model in this case.** Apart from that, it may lead to the situation that all current incomes of the concessionaire will be treated as general government sector incomes and subsequently as its expenditures. Due to this issue an important feature of the concession system, namely the financial management of the incomes, may be lost. And the toll rates may be regulated by the contract, which is the most common and much simpler solution.

Finally, the determination to implement tolls has been brought into question by the decision to exempt all heavy goods vehicles from tolls due the incompatibility of double charging for the use of infrastructure with EU legislation. This issue has been analysed in section I.2.5.

**In consequence, a hybrid system has been created. It is not a result of any strategy, but rather a fruit of a series of occurrences and ad hoc solutions. This system may be even more difficult to understand for the users and undermine the confidence in the durability of toll system in Poland and in the need of tolls at all.**
European Union Funds

European Funds are an important source of funding for the Polish road infrastructure sector. Before accession to EU Poland received a significant financial aid for transport infrastructure development from Phare and ISPA pre-accession funds which totalled 2,851 million EUR.

According to the National Development Plan for the years 2004-2006, 4.5 billion EUR will be spent on transport sector. 1,163 million EUR of this sum will come from the European Regional Development Fund (about 22% of a total of 5,259 million EUR allocated to Poland from ERDF), 2,110 million EUR from the Cohesion Fund (50% of all CF allocation for Poland) and 1,240 million EUR from national sources.

About 57% of funds from the Cohesion Fund are destined for roads and the rest for railways. 904 million EUR will support the construction of motorways and 301 million EUR the construction of expressways. It is worth mentioning that all these funds assigned for road infrastructure projects have been already allocated to five big road projects.

As far as the ERDF is concerned, according to GDDKiA information, allocation for road projects included in SPOT for the years 2004-2006 amounts 375 million EUR and national matching funds–170 million EUR.

All Funds from the programming period 2004-2006 may be used until the end of 2008.

It is estimated that in the period 2007-2013 Poland will receive 17.3 billion EUR of European Structural and Cohesion Funds for infrastructure projects. It is planned to have two separate Sectorial Programmes, one for road infrastructure and the other for railway infrastructure. In this case allocation for road infrastructure would reach 11,157 million EUR from the Cohesion Fund and 1,856 million EUR from the ERDF. Additionally, there will be a possibility to co-finance projects covered by the Trans-European Network – Transport from the TEN-programme budget.

57 under Sectorial Operational Programme Transport for the years 2004-2006.
58 These projects are:

- construction of the Konin-Emilia section of the A2 motorway (380 million EUR);
- construction of the Radzymin-Wyszków section of the S8 expressway together with Wyszków bypass (169 million EUR);
- construction of the Sosnica–Gorzyczki section of the A1 motorway (233 million EUR);
- construction of the Zgorzelec-Krzyżowia section of the A4 motorway (307 million EUR);
- reconstruction of the Siedlce-Terespol section of the National Road 2 (75 million EUR).
59 At the time of finishing this report, INECO Team did not have the final information whether the SOPT would be divided into two but it seemed most likely according to the interviews performed.
The new financial perspective implies a significant increase of EU funds destined for road infrastructure both in absolute and relative terms. On one hand an average annual allocation for transport infrastructure will grow about 65% from 1.5 billion to 2.47 billion EUR. On the other hand, the share of road infrastructure in the use of EU Funds will grow substantially. In the case of the Cohesion Fund there will be growth from 57% to 73%.

The infrastructure policy is a key element to absorb the European Funds. Although in the current perspective the totality of Cohesion Funds has been allocated, the absorption level of Structural Funds is considered low. This will gain much importance especially if we bear in mind the expected growth of EU Funds destined for road infrastructure in Poland in the new financial perspective. This is why it is indispensable for Poland to have a project pipeline capable of supplying projects that are mature enough.

### I.2.4. SOURCES OF FINANCING

**Loans from international financial institutions**

Three international financing institutions have been actively involved in the financing of Polish road infrastructure:

- European Investment Bank
- World Bank (International Bank for Reconstruction and Development)
- European Bank for Reconstruction and Development

The total amount of EIB approved loans exceeds 2.1 billion EUR. It is the largest amount of loans among all three institutions. This is a result of a series of attractive features of EIB loans that makes them the borrowers’ favourite choice. The EIB loans’ characteristics are: longer grace periods reaching 5-7 years, maturities up to 20 years (up to 25 for special projects), low spread over market interests, up to 75% participation in total costs of projects and possibility of loans in local currency. The main drawback of EIB financing is that it is more interested in financial aspects of projects. The necessity of sovereign guarantees of the Polish Government has become a rule.

The European Investment Bank’s current involvement in the Polish road sector includes sections of A2 and A4 and A1 motorways.
For A2, which is being built and operated by Autostrada Wielkopolska S.A., it provided a 275 million EUR bullet loan that covers 31% of the project costs. The loan is fully guaranteed by the State Treasury which the EIB’s usual requirement. According to the information published by Autostrada Wielkopolska S.A., the concessionaire estimates that there is no risk of a State Treasury guarantee execution due to the fact that revenues obtained up to now slightly outstrip financial model assumptions. The EIB is currently discussing possibilities to participate in the financing of the A2 missing link between Nowy Tomyśl and the German border.

The EIB financed also construction of Wrocław-Katowice section of A4 motorway. Currently it is also involved in financing of the section Zgorzelec-Krzyżowa.

In the case of the first stage of A1 motorway construction (Gdańsk – Nowe Marzy section) the EIB will provide a 500 million EUR loan - approx. 75% of the total financing. The rest of debt financing (140 million EUR) will be provided by the Nordic Investment Bank. Initially, the Bank required a State Treasury guarantee for the loan. Nevertheless, the Act on Toll motorways and National Road Fund permits currently only to guarantee payments from the KFD to the concessionaire agreed on in the Concession Agreement. According to the Act, the KFD payment for the concessionaire may be destined for availability payments, variable sums depending on fulfilment of conditions stipulated in the Concession Agreement and/or payments granted to the concessionaire to cover totally or partially operation income shortages in order to assure coverage of expenditures related to debt servicing and repayments. In the case of the A1 Concession Agreement, the KFD availability payments consist of following elements:

- Construction and operation costs
- Rehabilitation costs
- Toll expansion costs
- Debt service
- Shareholders’ return.

The Polish Government opted for guaranteeing the payments of the debt service element of the KFD availability payments to the A1 concessionaire. As the EIB was willing to accept a sovereign guarantee of the Republic of Poland or an irrevocable debt service obligation of the KFD or other public funds directly towards the EIB with the State covering any payment shortfall, the indirect guarantee arrangement required a series of additional security arrangements. Finally, the upper
limit of the guarantees - according to the special Council of Ministers Decree that had to be issued\textsuperscript{60} - amounts to 600 million EUR for the EIB loan and 168 million EUR for the NIB loan. The guarantee will expire by the end of 2040.

\textbf{It means that the Government created a solution that is quite complicated and does not offer any reasonable advantages. The guaranteed sum is equal to the sum that would have had to be guaranteed if a sovereign guarantee had been issued. A contingent liability that arises has impact on the public debt calculation the same way as a sovereign guarantee would have had. Instead the solution that has been adopted may be seen as too complicated by the lenders and undermine their confidence. And in fact the financial close negotiations with the EIB were prolonged and difficult.}

\textbf{If guaranties are granted it is advisable to keep the relations between the guarantor and the guarantee as simple as possible. Involving additional agents and introducing multiple agreements makes the relation less transparent and may increase its overall cost\textsuperscript{61}.}

It is also worth mentioning that the EIB is interested in promoting a new approach to road development financing in Poland based on a network-based approach rather than on project-by-project basis. The EIB’s support in this model would consist in supplying the National Road Fund.

The World Bank’s has been involved in a wider scope of projects that included not only infrastructure development but also institutional restructuring, privatisation, road safety projects and trainings. The loan conditions have not been as favourable as in the case of the EIB. They included additional fees, shorter maturities (10 years), relatively higher interests and no possibility of loans in local currency.

The European Bank for Reconstruction and Development had relatively low involvement in Poland. Nevertheless, a 45 million EUR EBRD loan was used to finance the works on the Kraków-Katowice section of the A4 motorway in the early nineties.

\textsuperscript{60} Decree changing the Decree on the substantive and financial program for the road investments financed by means of the National Road Fund (Rozporządzenie Rady Ministrów zmieniające rozporządzenie w sprawie ustalenia Programu rządzowo-finansowego dla inwestycji drogowych realizowanych z wykorzystaniem środków Krajowego Funduszu Drogowego, Dz. U. 2005 nr 140 poz. 1175)

\textsuperscript{61} For more remarks on guarantees see section I.3.6.
Private loans

Current formulae for private infrastructure management and financing are normally based on project finance techniques. With this type of financing, sponsors cannot or will not take on all the risks associated with the project and prefer to design and arrange financing which will affect their solvency or balance sheet as little as possible. When this kind of financing is achieved it is also used to be called off-balance sheet financing.

This means that it is the project itself that has to generate sufficient resources to meet financial commitments with a margin wide enough to cover possible incidents and achieve a satisfactory return. However, due to the possibility of serious disagreements between the sponsors and the lenders certain specific guarantees and/or assistance from third parties considered as beneficiaries and sponsors (e.g. Administration) of the project may turn out to be indispensable. Such guarantees may be an important element that can enable financing to be structured, closed and the required return achieved.

Private loans have been important financing tools in the cases of A2 and A4 motorways in Poland.

In the case of A2, difficulties with financial close hampered the start of construction works at the beginning. Due to some defects in the initial Concession Agreement financial institutions refused to finance the project. Afterwards financing was negotiated with Commerzbank, Credit Lyonnais and finally a loan was issued by a consortium of 20 private international banks covering 26% of the total project cost of 875 million EUR62.

In the case of Katowice-Kraków section of A4 the private loan financing is relatively larger than in the case of A2. Commercial bank loans cover 57% of the total cost of the project (102 million EUR).

There are different opinions on current ability of Polish banks and other national lending and financial institutions to finance such large long-term infrastructure projects like motorways. On one hand it is claimed that some part of the funds must be raised in international capital markets. On the other, there are analysts who consider that Polish financial market is already mature and profound enough to provide financing for motorways.

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62 This does not include the 48 km Września-Konin section, which was finished by the State by the end of eighties and the 13 km bypass of Poznań finished in a traditional way with PHARE financing and transferred for operation to the concessionaire in 2003.
Nevertheless, financial close of motorway projects never has been easy in Poland. Concessionaires and lenders usually require various forms of guarantees mainly due to high traffic and revenue risks in the first 8-12 years of operation. Sovereign guarantees of the State and special reserve credit lines from international financing institutions are common requirement. Polish Administration as well as some financing institutions place their faith in the National Road Fund as a source of revenue guarantee for the first years of operation in change for share in the concessionaires’ future profits.

### 1.2.5. CONSISTENCY OF THE TOLLING POLICY PREPARED BY THE MINISTRY OF INFRASTRUCTURE WITH THE EU RULES AND WITH THE EU GRANTS ELIGIBILITY CRITERIA

The Motorway Construction Programme from 1993 and the Act on Toll Motorways passed by the Parliament in 1994 initiated the possibility of a direct charging for the use of road infrastructure in Poland. Although tolls on two motorways have been introduced since that moment and the construction or upgrade of new toll motorway sections is being planned it would be difficult to indicate a clear, coherent and stable tolling policy of the Polish Government.

The first turn away from tolls was the programme Infrastructure – a key to development a part of the economic Strategy of the SLD – UP – PSL Government Entrepreneurship – Development – Labour that was adopted by the Council of Ministers on 29 January 2002. According to that document, collection of tolls for the use of motorways should have been replaced by a “vignette toll system” and the tolls that were already collected by concessionaires - replaced by shadow tolls. The main idea was to obtain significant revenues for a quick motorway construction by means of securitization of future vignette incomes, to eliminate the “necessity of subordination of the national road network to motorway concessionaires’ interests”, and to eliminate the negative influence of tolls on the condition of alternative non-toll national roads. In January 2002 a vignette for heavy goods vehicles was introduced. According to the Article 42.1 of the Act on Road Transport it is obligatory for all entrepreneurs that carry out commercial road transport as well as road transport for their own needs by vehicles that have a maximum permissible gross laden weight of more than 3,5 tonnes to pay a charge (vignette) for the use of national roads, except for toll motorways. The Government plan formulated in the Infrastructure – a key to development programme was to extend it to include all vehicles that use national roads. Finally the draft Law on construction and operation of national roads was rejected by the Parliament and the idea of introducing vignette for all vehicles using national roads network was abandoned.
The reasonableness of the vignette from the economic point of view will not be discussed in this section as it has been already done in the section I.2.3. The consistency of this solution first with the EU legislation and second, with the EU transport policy will be analysed.

According to the Article 7.3 of the Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures, in the case of goods vehicles that have a maximum permissible gross laden weight of not less than 12 tonnes, tolls and user charges may not both be imposed at the same time for the use of a single road section. This means that toll charging and vignette charging are mutually exclusive at least in the case of heavy goods vehicles. The issue of incompatibility of tolls with vignettes in the light of EU legislation, which could begin to pose a problem starting from the Poland’s EU accession, was indicated in some studies\(^\text{63}\) and by some experts.

It was initially planned to replace tolls collected by the concessionaires by shadow tolls, which required renegotiations of concession contracts. This meant additional complications and a significant reduction of public resources destined for roads as an important part of them should have been destined for shadow tolls refunding. The alternative way of tackling the issue of “double charging” was introduced to the draft Law on construction and operation of national roads submitted to the Parliament in 2002. It consisted in the exemption of tolled A2 and A4 sections from the vignette system by allowing using them by users that did not have vignette. Finally, the draft Law on construction and operation of national roads was rejected by the Parliament, the vignette system has not been extended to all vehicles but it has been maintained for heavy goods vehicles. The “double charging” issue remained unsolved as according to the legislation which is currently in force all heavy vehicles have to pay tolls if they want to use a motorway even though they also needed a vignette to circulate on the rest of the national roads network.

In May 2005 the Government adopted a draft amendment of the Act on Road Transport and Act on Toll Motorways and the National Road Fund. It was passed by the Parliament with some modifications on 28 of July and came into effect on 1 of September\(^\text{64}\). The idea of the amendment is to suppress the exception of motorways from the scope of road network whose users are covered by the obligation to buy a vignette and to exempt all vehicles that have a vignette from toll payments on motorways. Tolls for these vehicles would be replaced by shadow tolls to be paid to concessionaires from the National Road Fund (KFD). As a result all concession contracts will have

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\(^{63}\) including the study “Financing Roads in poland - Present Status and Future Options” by prof. Suchorzewski

\(^{64}\) Act on amendment of the Act on Toll Motorways and the Act on Road Transport (Ustawa z dnia 28 lipca 2005 r. o zmianie ustawy o autostradach płatnych oraz o Krajowym Funduszu Drogowym oraz ustawy o transporcie drogowym, Dz.U. 2005 r. Nr 155, poz. 1297)
to be renegotiated in order to set the shadow tolls. However, according to modification introduced to the amendment by the Parliament, the renegotiated toll rates must not be higher than 70% of toll rates that were valid before the negotiations. In order to perceive the shadow tolls the concessionaires will have to register all vehicles that use the motorway and are exempt from tolls and to submit to the GDDKiA each month a breakdown of these vehicles by category and toll rate.

Apparently the 70% multiplier has no justification based on assessment of the financial viability of the concessionaires after the implementation of the new solution. The limit initially proposed by the Ministry of Infrastructure was 100%. It was then reduced to 50% by the Parliament Infrastructure Commission and finally changed to 70% by the Senate.

In response both the A2 and the A4 concessionaires applied for the significant increase of the maximum toll limits justifying it with the necessity of compensation of the 30% reduction which – in their opinion - would not be balanced by the increase of traffic.

The draft amendment exempts from tolls all vehicles of a gross laden weight of more than 3,5 tonnes although “double charging” is prohibited only for vehicles a maximum permissible gross laden weight of not less than 12 tonnes, which means that all goods vehicles of a gross laden weight between 3,5 and 12 tonnes could be still double charged. Nonetheless, the European Commission is working on an amendment of the Directive 1999/62/EC which will consist among other things in extension of the “double charging” ban on all vehicles of a maximum permissible gross laden weight of not less than 3,5 tonnes. In this sense, the amendment accepted by the Council of Ministers of the Republic of Poland seems to be consistent with the EU secondary legislation on charging of heavy vehicles for the use of road infrastructure taking into consideration also future modifications of this legislation.

Another issue which makes current user-charge rates inconsistent with EU legislation is the structure of user-charge rates applied in Poland. According to the Article 7.8 of of the Directive

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65 This wording is quite clear as far as the on-going concessions are concerned. However, the procedure of setting shadow toll rates for vehicles heavier than 3,5 tonnes in the case of new concessions is not so clear. First, the amended Article 37a.1 of the Act on Toll Motorways and the National Road Fund says that shadow toll rates have to be negotiated. Does it mean that there will be no other possibility of setting them (e.g. setting by the administration in the specification of concession tender conditions or by bidders in the proposals as one of bidding variables)? Was it really the intention of the legislator to impose this limitation? Second, to what toll rates that were valid before the negotiations would refer this clause if there were no toll rates set before?

66 According to latest news (12 July 2005), both concessionaires Autostrada Wielkopolska S.A. (A2) and Stalexport Autostrada Małopolska S.A. (A4) are considering the possibility of taking the State to the court for having taken measures that threaten financial equilibrium of their concessions.
1999/62, user-charge rates should be in proportion to the duration of the use of the infrastructure. Table I.2.4 shows the vignette rates charged for the use of national roads in Poland nowadays.

According to the “rationale” attached to the amendment project, the intention of the Ministry of Infrastructure is to adjust the pricing structure to the requirements set in the Directive 1999/62. In order to do so, the price of most expensive one–year vignettes will be increased. That is why in the amendment to the Act on Road Transport accepted by the Council of Ministers the maximum price of the vignette is raised from 800 EUR to 1000 EUR. This is far below the maximum set in the Annex II of the Directive 1999/62 which is 1550 EUR. Therefore this solution is consistent with the EU legislation provided that other maximums for other vehicle categories and emission standards are maintained.

67 1648 EUR in the draft Directive amendment.
Table I.2.4. Vignette rates charged for the use of national roads in Poland

<table>
<thead>
<tr>
<th>max. permissible gross laden weight</th>
<th>axes</th>
<th>emission standard</th>
<th>one day</th>
<th>seven days</th>
<th>one month</th>
<th>six months</th>
<th>one year</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.5 - 12 t.</td>
<td>two</td>
<td>NON-EURO</td>
<td>6</td>
<td>20</td>
<td>60</td>
<td>240</td>
<td>400</td>
</tr>
<tr>
<td>3.5 - 12 t.</td>
<td>two</td>
<td>min. EURO I</td>
<td>5</td>
<td>18</td>
<td>54</td>
<td>210</td>
<td>360</td>
</tr>
<tr>
<td>3.5 - 12 t.</td>
<td>min. three</td>
<td>NON-EURO</td>
<td>20</td>
<td>60</td>
<td>180</td>
<td>720</td>
<td>1280</td>
</tr>
<tr>
<td>3.5 - 12 t.</td>
<td>min. three</td>
<td>min. EURO I</td>
<td>18</td>
<td>54</td>
<td>165</td>
<td>650</td>
<td>1150</td>
</tr>
<tr>
<td>&gt; 12 t.</td>
<td>up to three</td>
<td>NON-EURO</td>
<td>30</td>
<td>70</td>
<td>210</td>
<td>840</td>
<td>1600</td>
</tr>
<tr>
<td>&gt; 12 t.</td>
<td>up to three</td>
<td>min. EURO I</td>
<td>27</td>
<td>63</td>
<td>190</td>
<td>760</td>
<td>1450</td>
</tr>
<tr>
<td>&gt; 12 t.</td>
<td>min. four</td>
<td>NON-EURO</td>
<td>45</td>
<td>100</td>
<td>300</td>
<td>1200</td>
<td>2200</td>
</tr>
<tr>
<td>&gt; 12 t.</td>
<td>min. four</td>
<td>min. EURO I</td>
<td>40</td>
<td>90</td>
<td>270</td>
<td>1060</td>
<td>1900</td>
</tr>
<tr>
<td>buses &gt; 3.5 t.</td>
<td>-</td>
<td>NON-EURO</td>
<td>12</td>
<td>45</td>
<td>120</td>
<td>480</td>
<td>800</td>
</tr>
<tr>
<td>buses &gt; 3.5 t.</td>
<td>-</td>
<td>min. EURO I</td>
<td>11</td>
<td>40</td>
<td>108</td>
<td>430</td>
<td>700</td>
</tr>
</tbody>
</table>

Apparently, as seen on the following chart, these rates do not meet the proportionality criterion required by the Directive.

Chart I.2.2. Improporportionality of the vignette rates to the duration of their validity

![Chart](chart.png)
Although the amendment is consistent with the current EU legislation it seems to be divergent from the long-term EU infrastructure charging strategy to some extent. One of the main principles of the EU transport policy is the “user pays” principle\(^{68}\), which means that all users of transport infrastructure should pay for the costs they impose including environmental and other external impacts. Additionally, the charging scheme directly related to these costs encourages greater efficiency in the use of transport infrastructure. Therefore, as the improvement of the efficient use of the European road network is one of the main long-term objectives in the road infrastructure charging policy, cost-related kilometre charges are preferred by The European Commission to the Eurovignette. Finally, in the long term an electronic charging scheme for trucks is seen as an attractive and natural successor to the vignette system.

It is worth mentioning that according to the draft Polish *National Transport Policy for the years 2005-2025*\(^{69}\) the “user-pays principle” will be introduced gradually as one of the principles of infrastructure financing. The target solution will be to charge for the use of public road infrastructure in proportion to the freight traffic intensity in terms of ton-kilometres, type of vehicle, congestion, investment and maintenance costs as well as external costs.

It seems then that Poland, at least at the policy level, returns to the idea of charging for the use of infrastructure based on the distance travelled rather than on the period for which the user is conferred a right to use the infrastructure. In the practice however tolls for heavy goods vehicles are cancelled and vignettes are maintained.

The only positive effect of maintaining vignettes for heavy goods vehicles and exempting them from tolls is the potential shift of the heavy traffic from alternative roads to motorways, which may have its rationale in high number of casualties on those roads as well as high congestion and deterioration of their surface. This effect is very important and was intended by the Ministry.

As up to now many truck drivers have been trying to avoid paying tolls, a significant part of the potential motorway traffic concentrated on alternative non-toll national roads. Some of them (e.g. national road 92, the alternative for A2 toll motorway) had been promoted to national from

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\(^{68}\) The “user pays” principle was defined as an important infrastructure charging policy component of the European Union in the White Paper of The European Commission “Fair Payment for Infrastructure Use: A phased approach to a common transport infrastructure charging framework in the EU”, Brussels, 22.07.1998, COM(1998) 466 final. It was confirmed in the White Paper “European transport policy for 2010: time to decide”.

voivodship roads in order to assure a non-toll alternative for toll motorways in spite of being of a relatively inferior standard and not adapted to heavy traffic. Consequently they become constantly deteriorated. Additionally, as they normally pass through municipalities the increased heavy traffic affects negatively the standard of living of their inhabitants. As a result of the amendment, social benefits and savings on reconstruction and maintenance of alternative non-toll national roads may be achieved.

On the other hand, apart from the apparent incompatibility with the EU and Polish transport policies the abolition of tolls for one group of vehicles only (heavy goods vehicles) may escalate the poor acceptance of tolls among road users. According to the study Public attitude towards the need of bearing costs for using the road infrastructure in Poland by the individual users analysis by PBS, although 54% of national road users think that the situation with tolls will change for worse in the next five years, 75% is of the opinion that the total length of motorways will increase. This may be interpreted as readiness of users to accept tolls in the long term.

The exemption of heavy vehicles for reasons of compatibility with the EU legislation with a simultaneous preservation of tolls for private passenger cars may be difficult to understand by the owners of the latter and undermine their confidence in necessity of a toll system and its durability. While it is strongly advisable for the Government to take measures to increase the acceptance of tolls among the general public, the amendment may have a completely opposite and adverse effect.

The adopted solution does not seem to be an option that might be maintained in the long term. It should be treated then as transitory. The long term tendencies in the EU infrastructure charging policy are clear whereas the future of the Eurovignette directive is uncertain due to prolonged works on its modification and apparent lack of agreement between the Member States. Electronic Toll Collection systems are already operated in three European countries: Germany, Austria and Switzerland. Other countries like the Netherlands or Czech Republic are considering or preparing its introduction in the nearest future. Sooner or later also Poland will have to implement an ETC system. This will require another turn in the charging policy towards heavy goods vehicles.

Giving up the vignette for heavy goods vehicles and reduction but not a complete cancellation of tolls would be the best and simplest solution. The reduction of tolls would require compensations for the concessionaires, but lower than the compensations that will

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70 There were even demonstrations (road blockades) held in protest against the increased heavy traffic passing through small municipalities situated along the alternative non-toll roads.
be paid to the concessionaires according to the adopted solution. The negative financial result of this alternative (although very reduced as indicated in the section I.2.3 and taking into consideration costs of administration of the vignette system) might be quite easily recovered by a correspondent increase of the road usage-related taxes (e.g. fuel surcharge, excise fuel tax) or simply increase of the percentage of the excise fuel tax earmarked for roads development.

Nevertheless, such decisions should rather be taken as a part of a broad long term infrastructure charging strategy taking into consideration all consequences they can have. Reversing them in order to return to the long term policy goals or to restore the viability of the road infrastructure financing system may be a quite costly tasks if we bear in mind the problem of the social acceptability of tolls in Poland.

Compatibility of the tolling and financing strategy with the EU grants eligibility criteria

As it has been developed above, there are some differences between Poland and EU road tolling policy. A package of measures must be implemented to make each policies coherent and compatible.

In a first revision, analysing the toll transport policy in Poland and its foreseeable evolution, any incompatibility with it and the EU grants eligibility criteria have not been found. Anyway, some points should be mentioned dealing with EU grants eligibility criteria and the tolling and financing strategy.

First of all in the EU grants context income-generating projects are considered priority. Secondly, private financing of infrastructure is supported.

In regard to Structural Funds the co-financing ceilings have been explained but they can also vary according to other criteria: investments in infrastructure generating substantial revenue. Revenue is substantial if it reaches the level of at least 25% of a total cost of investment. The contribution rate may not exceed 40% of the total eligible cost in Objective 1, which may be increased up to 50% in the Member States covered by the Cohesion Fund.
In any event, the additionality principle mentioned in section I.1.5 must be respected, which means that Polish Government must maintain public spending on infrastructures of transport at no less than the level reached in the preceding period since EU funds were created to complement the contributions of the Member States, that is to make a project feasible.

I.2.6. COMBINING EU FUNDS WITH PRIVATE FINANCING

In the general goal of convergence between Member States, EU grants play a crucial role. But at the same time, new Member States face a great challenge: to be able to absorb the levels of EU funding for which they are eligible. It is easy to find some issues that can make this task difficult, for instance, the capacity of the administration, unforeseen delays in project implementation or the government’s ability to find enough funds to co-finance projects with EU funding.

A good way to achieve this goal could be to blend EU grants with private funds. The EU does not prevent the use of private financing or any other, as a means of infrastructure development co-financing. For this reasons it is odd that there have been so few projects that combined the different sources of finance.

Different EU entities and recent consulting studies have found recently some points that try to explain why the combination EU grants and private financing has not been used much.

- PPP is a relatively new concept. Its knowledge is not widespread. That includes knowing if it is possible to combine funds from different sources, to find a public sector prepared to manage the process or to be able to find the external help when it is needed.

- More complexity of these projects. An important coordination is needed since there are more parties involved.

- There is a lack of precedents and it is not easy to find information about.

- EU funds are not unlimited and when they are, banks are usually less interested in the project.

- There are eligibility criteria to apply to EU funds (ERDF, Cohesion Funds, TEN-T) that require time and resources.
Moreover, the Administration must take into account some other circumstances when private capital is committed to a project such as skills needed and the risks sharing between all involved parties. So, launching a PPP project requires a trustworthy Administration in all senses: organization, planning and programming, project selection procedure, tendering and award PPP process, etc.

The present report has needed an analysis of numerous documents, including some other consultants’ works and, in particular, the EU Commission documents. It turns out that the treatment of private participation in EU co-funded projects varies depending on the kind of EU Fund. Additionally it is worth knowing that the limitations for private participation in such projects come not only from the EU legislation, but they often result also from national programming documents such as the SOPT.

**Structural Funds**

First of all, as already mentioned, there are some ceilings defined in the EU legislation\(^\text{71}\) that limit the EU Funds co-financing rate.

The Structural Funds under Objective 1 are subject to the ceiling of not more than 75% of the total eligible cost or the total public or similar eligible cost. The rate can be increased to 80% in exceptional and duly justified cases for regions situated in a Member State eligible for assistance from the Cohesion Fund.

The calculation method adopted in Poland is based on the second alternative, i.e. the total public cost. In accordance with this approach, the national contribution to the projects is treated in the SOPT as a part of public funding, which may come from central state budget or local government budgets only, whereas private funds are considered separately\(^\text{72}\).

Another ceiling, which is relevant for PPP projects, is a maximum of 40%, or 50% in States covered by the Cohesion Fund (e.g. Poland), of the total cost under Objective 1 in the case of investments in infrastructure generating substantial revenue\(^\text{73}\).

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\(^{71}\) Decree on Sectorial Operational Programme Transport for the years 2004-2006 complement (Rozporządzenie Ministra Infrastruktury z dnia 8 października 2004 r. w sprawie przyjęcia Uzupełnienia Sektorowego Programu Operacyjnego Transport na lata 2004-2006, Dz.U. 2004 Nr 235 poz. 2350).

\(^{72}\) Additionally in the “Sectorial Operational Programme Transport for the years 2004-2006” no private funding is foreseen for EU Structural Funds co-funded projects within the Priority 2 “Safer road infrastructure” under which road projects are eligible.

\(^{73}\) Revenue is substantial if it reaches the level of at least 25% of a total cost of investment.
This means that in the case of Structural Funds in Poland, according to the EU legislation and Polish programming documents, if private participation were foreseen in the SOPT for road projects the Community assistance would complement the contributions of the State. In such a case it would be not possible to eliminate totally national public component. Nevertheless it could be reduced substantially.

This agrees with the Spanish experience. According to Spanish experts that already have implemented projects combining private financing with EU funding, ceilings for the total eligible volume in such projects apply to the financing-gap, i.e. the part of projects cost that has to be contributed from public funds to assure financial feasibility of the project. The 40% ceiling for a total cost is also binding if the project generates substantial revenues.

To sum up, it is possible to blend private participation in the project with EU Structural Funds and national funding (coming from the budget, KFD or another public source). Especially due to the facts that in the EU grants context income-generating projects are considered priority and generally, private financing of infrastructure is supported. The combination of private financing with EU funds may reduce the volume of public funding necessities. It will be however unlikely that private funds replace entirely the national matching funds contribution, especially if for simplicity reasons the Government opts for the EU Funds contribution calculation method based on total public cost in the Operational Programmes for the years 2007-2013, exactly the same way it was done in the SOPT 2004-2006. Projects with private participation and EU-funding will require also co-funding from national public sources, although private financing will enable their public co-funding needs in relation to only public funding option.

There is also another barrier for blending EU and private funds in one project. There are closed lists of eligible beneficiaries included in the SOPT complement for 2004-2006.

The list included in the SOPT is restricted to the GDDKiA for measure 2.1 Construction and reconstruction of national roads (including submeasures 2.1.1 Motorway construction, 2.1.2 Expressway construction, 2.1.3 National Roads reconstruction) and to powiat towns for measure 2.2 Improvement of transit through cities and towns. It does not make Public Private Partnerships with EU Structural Funds participation impossible, but may pose some problems in the PPP Agreement structuring process. It would be desirable to formulate the lists of beneficiaries in a more liberal way in an analogous document for the programming period 2007-2013. On the other
hand it has to be admitted that these regulations are not irreversible. As Decrees of the Minister of Infrastructure they can be amended if need be. A quick amendment of such a document may be however difficult due to procedural requirements.

Cohesion Fund

The Cohesion Fund grants aim to co-finance major projects involving the environment and Trans European Transportation Networks financing up to 85% of a public or equivalent expenditure for this kind of projects. According to the Council Regulation 1164/94 establishing the Cohesion Fund, this includes “expenditures by bodies whose activities are undertaken within the administrative or legal framework by virtue of which they may be deemed to be equivalent to public bodies”. The European Commission Guide to the Cohesion Fund 2000-2006 refers in the Annex D, devoted to the financing of revenue generating projects, to the treatment of expenditures borne by bodies - referred to in the Council Regulation 1164/94 - that operate within an administrative and legal framework which ranks them as public bodies. According to the Guide, they are treated as public for the needs of Cohesion Fund eligibility determination. What is important for Public Private Partnerships is that the Guide states that concessions covering construction and operation of infrastructure eligible for assistance from the Cohesion Fund constitute the legal and administrative framework, which enables expenditures incurred by the concession-holder to be regarded as expenditures to be treated as public expenditures. Additional condition for such treatment of concessions is inclusion in the Concession Agreement of rules on fixing of tariffs and providing for authorities and methods to control these tariffs.

It means that the Cohesion Fund grants may be used to co-finance the concessionaire’s expenditures the same way they co-finance fully State-owned projects.

The same provisions apply when the concession-holder is a company whose capital is held entirely or primarily by the public sector and which is likely to be privatised.

It can be understood then that there are no barriers in the EU legislation for combining private financing with the Cohesion Fund. According to the rules set in the Regulation and in the Guide national co-financing can be either public or private.

As far as the rate of assistance from the Cohesion Fund in the revenue generating projects are concerned, the same Guide determines that it may be reduced to take account of the estimated amount of revenue generated by the project. The rate of assistance that may be granted to the
project is constituted by the ratio between the equity gap (i.e. the difference the current value of the net revenue and the current value of the investment) and the net investment\textsuperscript{74}. Alternatively, the maximum assistance rate will be the one laid down in the Regulation, if the equity-investment ratio is higher.

Nevertheless, there are some issues that prevent public and private agents from undertaking Public Private Partnerships with the EU funding components. One of them has been already commented on in the section devoted to the Structural Funds.

The problem of closed list of beneficiaries concerns also the Cohesion Fund. According to The Framework Reference Document for Cohesion Fund the final beneficiaries may be the entities defined as implementing bodies. For the road sector the only implementing body defined in the Document is the General Directorate of National Roads and Motorways.

Surprisingly, it seems that it is Poland who sets barriers for blending private and EU funding within one project. If such a strategy is taken into consideration by the Polish Administration as a serious option for developing the county’s infrastructure and accessing the EU funds these obstacles must be removed from the programming documents which are being prepared currently for the next financial perspective 2007-2013.

On the other hand, the EU is not without fault either.

First, EU grants can be clawed back if the project fails to produce some contracted outputs that are normally related to social benefits from the project.

As the outputs expected by investors and lenders are of a different nature and are limited mainly to financial profits these additional requirements for EU grants increase the risks for investors and lenders. Apart from usual PPP risks related to penalty and contract termination private partners would have to face the possibility of withdrawal of the EU grants if the expected outputs were not met. If the State does not guarantee this additional risk the project may be unattractive for the private sector due to excessive risk.

\textsuperscript{74} The Guide includes some general information on the methodology applied to the calculation of net revenues and costs of investments for CF co-financed, revenue generating projects.
Second, the EU rules do not permit the execution of the lenders’ step-in-rights in case of the project’s default.

Taking control of the project by lenders in case of the project being unable to meet its financial obligation or liquidity requirements may be treated as a significant modification to the project. In case of such modification during the period of 5 years from the last payment received by the beneficiary the EU may require an immediate repayment of all grants. These principles increase the risk for the banks and financial institutions or even introduce uncertainty, as the EU position on the execution of step in rights may be unforeseeable75.

Finally, a completely different approach to the problem of combination of private financing with EU Funds that has been adopted already in some cases has to be mentioned. Splitting one project in two projects through separation of the construction phase and the operation phase is a quite comfortable solution as it permits to combine EU co-funding of the investment carried out by a public entity and private participation in the infrastructure operation only76. This way these two different financing sources do not collide. Nevertheless, the main drawback of this approach is that the biggest advantage of the Public-Private Partnership is lost, because it does not permit to spread all investment and operation costs over the whole life of the project and significant upfront expenditures for construction works have to be made prior to the beginning of operation, the same way it is done in the traditional procurement method.

75 Legal barriers in the national legislation related to step-in-rights are commented on in the section I.3.1

76 In Poland A2 Konin-Stryków Motorway is executed this way. It is currently being build by the State with EU Funds support. Then it is planned to be tendered as a concession for operation only.
I.3. PPP AS AN OPTION FOR THE DEVELOPMENT OF ROAD INFRASTRUCTURE

I.3.1. LEGAL FRAMEWORK FOR PUBLIC PRIVATE PARTNERSHIPS IN POLAND

The aim of this section is to review the actual situation of the Polish legislation applicable to PPP contracts. Its strengths and weaknesses will be explored, focusing attention on how contractual formulae are defined, especially public works concessions and on the issues indicated in the study by ECORYS. The difficulties related to the tendering procedures and regulatory organization will be dealt with in section I.5.

A general legal framework for private infrastructure finance might not be required at all. This is particularly consistent to the public works concession institutional matrix: regulation by contract.

As shown below, this is the case of the Republic of Poland where no general legal regime for PPP contracts has existed until now. The legal framework for PPPs in the road sector consisted of the Toll Motorways Act of 27 October 1994\textsuperscript{77}, which established rules for project preparation and contracting of motorways construction and operation as well as institutions relevant to these matters. It entered into force on 2 January 1995. This basic legal framework created a chance for attraction of private initiative to road construction and operation, but some barriers remained though.

As states ECORYS – “Following the identification of the legal barriers and taking into account international practices, it has been decided by the Ministry of Economy to initiate a special PPP Law in combination with amendments to sector and subject legislation.”

Although, according to INECO’s opinion, there was no necessity for a specific PPP legislation and a simple removal of existing obstacles would do, the PPP Act was expected to have an educational and stimulating character, eliminating the private and public sector’s concerns about the possibility of application of Public-Private Partnerships.

Originally, the PPP Act was designed for infrastructure and especially roads development. After consultations with stakeholders the approach changed a little expanding the scope of application of the law to the whole area of public utilities. Another reason for PPP Law development was some

\textsuperscript{77} Ustawa z dnia 27 października 1994 r. o autostradach płatnych [oraz Krajowym Funduszu Drogowym], Dz.U. 1994 nr 127 poz. 627.
problems with mixed enterprises that were created since the beginning of the nineties. As local authorities had serious concerns about accounting of such entities a necessity of a PPP Law arose. Its main purpose would be to give them security regarding this issue and initially it was elaborated as a manual rather than as a statute.

The Act on Public-Private Partnerships came into force after 30 days from the date of publication, i.e. on 7 October 2005, and enriched substantially the legal framework for PPP in Poland. The issue of applicability of different legal acts to different types of public roads in Poland after the entry into force of the new Act on PPP has been discussed on in section II.1.3.

The version of the PPP Law draft taken into account by the ECORYS consultants was dated 5 July 2004. It had been approved by the Council of Ministers on 29 June 2004. The latest version that INECO has been provided with dates 17 June 2005, as approved by the Polish Parliament and sent to the Senate. Apparently both versions differed and it seems that some of the problems identified by ECORYS have been already solved. The main goal of the latest reforms of the Draft Act was to remove red-tape-likely provisions and clarify all existing inconsistencies in order to create a slim framework law that regulates only that part of PPP aspects that had not been covered by the Civil Code up to now.

As already mentioned, some barriers seem to be solved already whereas some others still may obstruct PPPs. First, we would like to comment on problems that have been fixed and subsequently the ones that – in INECO’s opinion – still lack a complete and satisfactory solution.

**Unclear terminology as a general defect of the Act**

According to ECORYS, the wording used in the draft PPP Act was unclear. It concerned especially the terminology for making reference to the contractor means of remuneration and the input provided by the public sector for the project. Although it was so in the draft dated August 2004, the latest version of the Act of June 2005 provides for a much clearer terminology. First, Art. 4 introduces definitions of “own contribution” and “private partner’s remuneration”. Second, the former Articles 19-24 referring to the “own contribution” which could produce some confusion have been removed.
The definitions included in the current version of the Act are sufficiently clear and the wording is used in a more consistent way so there is not much room for a terminological confusion anymore.

**Limited possibility of transferring GDDKiA tasks to private partners**

According to ECORYS, one of the unsolved legal obstacles for Public Private Partnerships was the lack of possibility to transfer tasks of the General Directorate of National Roads and Motorways to private partners. It seems however, that this issue has been solved in the PPP Act recently passed by the Parliament. First of all, the definition of a PPP included in the Article 1.2 of the Act says explicitly that a PPP is “a based on a contract collaboration of a public entity and a private partner that serves for execution of public tasks”. It means that GDDKiA, which is a public entity, may execute its specific tasks, enumerated in the Art. 18.1 of the Act on Public Roads, and general tasks of a road manager with regard to National Roads, within the confines of a PPP, i.e. a collaboration with a private partner based on a contract. Moreover, the PPP Act, which includes now all introductory provisions, introduces, by means of its Art. 30, a series of changes to the Act on Public Roads. These amendments should dispel all doubts about the possibility to transfer the tasks of the GDDKiA to private partners. First, the clause 1) of this Article introduces explicitly a possibility of execution of tasks of motorway and expressway construction and operation not only under the ruling of the Act on Public Roads and the Act on Toll Motorways and the National Road Fund, but also under the ruling of the PPP Act. And last but not least, the clause 3) lists which tasks from the list of tasks of a road manager included in the Art. 20 of the Act on Public Roads may be transferred to a private partner in the case of a Public Private Partnership. In accordance with this provision, all tasks regarding performance of investor functions, maintenance of roads and engineering structures, coordination of works, traffic engineering, periodic infrastructure condition checks, maintenance, intervention and preservation works, road deterioration prevention, etc. may be executed by private partners. The tasks of planning, national defence aspects of road infrastructure development and use, issuance of administrative permits, road database maintenance, imposition of limits, closure of roads and indication of detours remain reserved for public managers. The advantages of the latter provision are the extension of the possibility of tasks transfer to all types of roads, not only motorways and expressways and a clear

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78 a central body of the governmental administration with competences in National Roads matters, according to the Art. 18.1 of the Act on Public Roads (Ustawa z dnia 21 marca 1985 r. o drogach publicznych, Dz.U. 1985 Nr 14 poz. 60)

79 enumerated in the Art. 20 of the Act on Public Roads
indication of tasks that may be and others that may be not transferred to private partners. This should finally remove the uncertainty about the possibility of transferring of GDDKiA tasks to private partners.

**Limited possibility to contract multi-year financial obligations**

One of the most common barriers to PPP contracts – regarded as the most important by ECORYS - are domestic statutory restrictions for public entities financial obligations overcoming the one-year period. If this were the Polish case, a severe obstacle should be removed. In spite of some primary conclusion, *Public Procurement Act* enables long-term commitments for concessions. Article 142.2 states:

> “The conclusion of a public contract for a period longer than 3 years, whose object consists in periodical or continuous services shall require the consent of the President of the PPO expressed by an administrative decision issued prior to the start of a contract award procedure.”

However, paragraph 4.5 of the same Article declares this consent unnecessary for concessions. Taking the wide-range definition of public works concession contracts contained in Article 2.4 (“those works contracts where the consideration of their execution consists either in the right to exploit the work or in this right together with payments”), most of the PPP contracts should fit into the category and therefore would be freed of that limitation. Additionally, Article 14 of the PPP Act excludes the provision of Article 142.2 of the Public Procurement Act to PPP contracts. The problem of the limited possibility to contract multi-year financial obligations seems to be solved.

**Public policy required for the contract to be valid**

One of the ECORYS’ main concerns about the *PPP Act* was the provision regarding the requirement of creation of long-term directions and principles of public policy in a given sphere of public tasks as an essential condition of the PPP contract validity.

It is a very good practice to base all actions taken by public authorities on well-developed and consistent policies. In fact, the United Kingdom Commission on PPP defined Public Private Partnership as a “risk-sharing relationship between the public and private sectors based upon a shared aspiration to bring about a desired public policy outcome”. But in reality in Poland neither concessions nor other types of PPP have ever been considered as priorities of the infrastructure
policy. Generally speaking, the involvement of the private sector in the infrastructure provision was conditioned by political decisions and limited only to motorway concessions.

Still the Polish Administration seems to be reluctant to look for more private participation in the road infrastructure. On one hand it is seen as an interesting source of additional financing that needs to be encouraged, but on the other it evokes serious concerns. It is seen as a potential source of corruption and as an expensive method of infrastructure provision.

Thus it would be reasonable to base all PPP applications on a coherent sectorial policy in order to eliminate the public servants and private investors concerns about the possibility of resorting to this way of procurement.

Probably this was the intention of the legislator who introduced in the Act four Articles devoted to PPP policy preparation and made the conducting of PPP contracts dependent on existence of such policy. This way what should be a good practice could become another burdensome duty for the Administration. Additionally – as suggests correctly ECORYS – preparation of a PPP policy would be a costly and time-consuming exercise and it would introduce a perpetual uncertainty, at least in the case of a part of projects, about their conformity with the PPP policy. This uncertainty would act as a dissuasive factor for civil servants and potential investors limiting the number of projects that could be implemented as PPPs and increasing costs of projects carried out.

Fortunately, all provisions regarding PPP policy requirements have been removed from the latest version of the Act, so that this limitation does not exist anymore.

**Limited term of contract**

One of the barriers mentioned by ECORYS was also a limit of three years imposed on PPP contracts by the provisions of the Public Procurement Act. This probably refers to the requirement, set in the Art. 142.2 of the Public Procurement Act, of a President of the Public Procurement Office consent for conclusion of a public services contract for a period longer than 3 years. Such consent should be issued by way of an administrative decision prior to the start of a contract award procedure.

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80 Another approach was adopted in the Czech Republic where first the PPP policy would be defined, then legislative modifications would be made and finally the policy would be implemented. In this approach a policy is the origin of all legal changes and Public Private Partnerships and not a formal requirement for PPP contracts validity imposed by the Law.
The solution adopted in the PPP Act (Art. 14.1) consists in exemption of PPP contracts from the scope of application of the Art. 142.2.

**Criteria of best offer selection**

The Article 91.3 of the Public Procurement Act establishes that “Tender evaluation criteria shall not pertain to the characteristics of the contractor, and in particular to its economic, technical or financial credibility”. Rationally, ECORYS studies understood that this could introduce some interference in the process of the optimum private partner election. That is because PPPs require really complex contracts where some parameters as economic, technical or financial credibility are crucial to ensure a success of a project.

For this reason the PPP Act (Art. 14.1) exempts the application of the Article 91.3 of the Public Procurement Act from PPP procurement process.

**Settlement of contract termination based on policy issues**

One of the legal barriers mentioned by ECORYS was concession contract termination regime. In the Act on Toll Motorways and National Road Fund, Article 57.6, recently revoked by the 2004 Introductory Act for the Freedom of Trade Act, stated the concessionaire was under the obligation to “enable the Agency to take control, at any time, of the construction and operation of the motorway and submit data and documents relating to the above”. This implicit contract termination power was not balanced by reasonable demands for previous audience to the concessionaire, advisory body opinion and just compensation principle. Setting in those terms, Article 57.6 simply discouraged agents from getting into contract with Polish public administrations and exasperated investors anxieties. Unfortunately, the incorrect treatment of contract termination remains. Although the Article 145 of the Public Procurement Act, which is in force at the present, gives tremendous discretionary power in this issue to the contracting authority:

> “1. In the event of a material change of circumstances which causes that the execution of the procurement contract is no longer in the public interest, and which could not have been foreseen at

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81 Ustawa z dnia 2 lipca 2004 r. Przepisy wprowadzające ustawę o swobodzie działalności gospodarczej, Dz.U. 2004 nr 173 poz. 1808
the time of concluding the contract, the awarding entities may renounce a contract within a period of 30 days from the date on which they became aware of these circumstances.

2. In the case referred to in paragraph 1, the contractor may demand remuneration due for the performed part of the procurement contract”.

Public Private-Partnerships have been excluded from its scope application according to the Art. 14.1 of the Act on Public Private Partnerships. Thus it should not pose any problem anymore.

Nevertheless, perhaps a better idea that simple exemption of PPPs from the scope of application of the Public Procurement Law Art. 145 would be to maintain the public authority rights to retract from the contract in case of a material change of circumstances, but with sufficient securing of a fair compensation to the private partner including not only remuneration due for the performed part of the contract, but also all costs incurred in order to perform services in future as well as due benefit.

On the other hand, the PPP Act remits to the PPP contract as a document which should determine the conditions of earlier contract dissolution and principles regarding settlements and compensations.

Necessity of loss incurrence by private partners embedded in the PPP definition

The definition of PPP in older versions of draft Act introduced obligation of the private partner to bear the financial outlay to implement a project. In ECORYS opinion, it could be interpreted that a project could meet the definition of PPP only if the private partner incurred losses. If it were really like this, Public Private Partnerships would be totally unfeasible for potential private partners.

First of all, the phrase related to financial outlays of the private partner has been removed from the Article that defines PPPs and was moved to Art. 2.1. It means that the obligation still exists, but without being embedded in the PPP definition. Nevertheless, it is really hard to interpret the Polish phrase “ponosić nakład”, traduced in the ECORYS study as “bear outlays”, as a reason or an equivalent of compulsory losses. A detailed perusal of the PPP Act leads to a conclusion that the Art. 2.1 requires that private partner in a PPP puts some financial effort into the Partnership, i.e. bears some costs, which does not have to mean incurring losses.
Restriction on freedom of subcontracting

To be respectful with EU Public Procurement Law, Chapter III of the Title III of the Directive 2004/18 must be implemented into Polish legislation. ECORYS Report mentions the excessively tough restrictions imposed onto PPP partners in subcontracting matters and in choosing their contractors for partial execution of the undertaking, equivalent, in practice, to a formal ban due to the huge costs of the arrangements. Although the problem of the toughness has been solved in the PPP Act, Directive 2004/18 has not been taken into consideration. Articles 63-65 provide a good balance between two extremes: rigidity and softness. They sensibly submit concessionaries/PPP partners contracts with third parties to some degree of publicity “when awarding works contracts to third parties where the value of such contracts is equal to or greater than EUR 6.242.000” (Article 63.1), which is a generous threshold, and excludes from the application of the regime (Article 63.2) the “Groups of undertakings which have been formed to obtain the concession or undertakings related to them shall not be considered third parties”. In the sense of Article 63:

“Related undertaking shall mean any undertaking over which the concessionaire can exert a dominant influence, whether directly or indirectly, or any undertaking which can exert a dominant influence on the concessionaire or which, as the concessionaire, is subject to the dominant influence of another undertaking as a result of ownership, financial participation or the rules which govern it. A dominant influence on the part of an undertaking is presumed when, directly or indirectly in relation to another undertaking, it:

(a) holds a majority of the undertaking's subscribed capital;

(b) controls a majority of the votes attached to the shares issued by the undertaking; or

(c) can appoint more than half of the undertaking's administrative, management or supervisory body.

The exhaustive list of such undertakings shall be included in the application for the concession. That list shall be brought up to date following any subsequent changes in the relationship between the undertakings.”

The Directive does not impose, as we can see, an unsupportable burden onto concessionaries/PPP partners. It just looks for transparency and equal-opportunity standards when big contracts are being granted by entities that, like concessionaires and other governmental delegates, enjoy special or exclusive rights. Permitting no-restriction awarding of this kind of contracts would be against the basic principles of EU Law.
Although the imposition of public procurement standards on contracts between concessionaires and their subcontractors may be acceptable, the application of these standards to services related to tender preparation seems to be an excessive precaution that only leads to creation of another unnecessary obstacle for PPP.

**Limited lenders step-in rights**

One of the main points of concern regarding the PPP Act is the omission of the lenders step-in rights.

The explicit recognition of contract takeover by financiers in the case of concessionaire (read PPP private partner) failure to attend the debt payments, whether or not he has been formally incurred into insolvency, is a critical issue for any financial institution. Bankers are not commercial entrepreneurs, but non-recourse financing makes step-in rights the sole guarantee for capital recoup. This is a worldwide banking practice, usually consecrated by statutes. By executing step-in rights, bankers become what they would never have wanted to be, that is, the direct managers of the project through commissioners provisionally appointed in substitution for the companies’ ones.

The PPP Act must establish step-in rights if Polish Government really wants to attract investments from international capital markets without increasing financial costs. Step-in rights ought to be legally fashioned with some degree of automatism, for instance by permitting the inclusion of first-hand demands clauses in the debt contracts between the concessionaire and the lenders. The more conditioned the step-in rights are, the higher the interest rates are, as far as risks are transferred to the debt capital prices. Article 27 of the PPP Act does not meet the indispensable requirements in this field and should be subject to a deep revision.

**Form of public contribution to the project**

The Article 4.3 of the *PPP Act* includes the definition of public “contribution” to a project to bear a part of the implementation of the undertaking: it can consist in funds to face project costs or real estate, movable property, licenses, intangible assets, etc.
This draft also shows how to materialize this contribution and, in particular, mentions different ways contained in the Civil Code. For instance, in a short but, in INECO’s opinion, open list donation, purchase, renting, etc. are mentioned.

The interpretation of ECORYS is that, according to the Draft, the unique way to transfer funds to bear a part of the implementation costs of a PPP contract is through the donation and the obvious conclusion: “The problem of a possibility to pursue claims for public donations therefore arises”.

Nevertheless, INECO understands this list of forms of public contribution included in the Draft as open where it can be channelled by any way observed in Polish legislation so that funds could be contributed also by any other mechanism, different from donation.

Lack of entrepreneurial initiative incentives

The Draft Act surprisingly refers in Article 10 to the interested party initiative for promoting a PPP contract through a formal application. There is no indication on its contents and is expressly denied (see paragraph 2) “any special treatment [to the applicant] from the public entity during the procedure of selecting the private partner”. In other words, there are no incentives for entrepreneurial push-up projects.

In INECO’s opinion it would be desirable to introduce a mechanism that incentive entrepreneurial initiative. The idea of such mechanism would be not to eliminate competence between bidders or to cover the Administration with an avalanche of unsolicited and useless proposals but rather to prevent the omission of any project that might be executed with private financing in the benefit of the country’s infrastructure development and has not been recognized as a PPP candidate by the Administration.

This is why a balance between the risks of the proponent and the reward for a project submission should be struck. A preferential position in the bidding process has to be discarded as a solution that would be against the EU regulations on public procurement and discouraging competition in the tendering process. A sound solution might be the one that has been adopted in Spain in the new Concession Law. The Law should define a package of documentation to be submitted by the proponent that would be regarded as a complete proposal. Finally, if a project were awarded to a company other than the proponent, the proponent would be recompensed for the proposal preparation costs and granted a legally established bonus amounting approximately a sum equal to the benefit obtained in the market for provision of similar of services.
I.3.2. INSTITUTIONAL FRAMEWORK AND ADMINISTRATIVE CAPACITY

A stable institutional framework is indispensable in order to benefit from successful PPP development. In this section the existing institutional framework for Public Private Partnerships is analysed.

The most relevant entities involved in PPPs in the road sector are: the Ministry of Infrastructure and the General Directorate of National Roads and Motorways.

Strategic decisions are taken in the Ministry of Infrastructure. Particularly, the Proxy of the Government for the construction of National Roads and Motorways has taken decisions recently on how to proceed with private participation in road infrastructure provision. On the other hand, INECO has been also informed that all decisions on private participation in road infrastructure provision are taken in the GDDKiA and it may inform the Ministry even after having taken such a decision.

These facts confirm the conclusion drawn in chapter 1 that competencies in the area of road infrastructure development are dispersed and not clearly assigned to different institutions.

The GDDKiA is the executing body and awarding authority. For all aspects related to concessions a special department exists within the Directorate. The Department of Concessions consists of two units: one specialized in control of existing concessions and the other in preparation and implementation of new PPP projects.

As in the case of other aspects of its activities the main problem of the Directorate is lack of staff.

Each of mentioned units that make up the Department of Concessions has only four employees. In consequence, the current team is constantly overwhelmed with work.

Most team members that are also responsible for preparation of Terms of Reference and Requests for Proposals for new concessions are young people with little experience. Due to salaries that are lower than in private industry a possibility that employees would leave the Directorate becomes a real and constant threat. This implies also a threat for maintenance of continuity and knowledge within the Directorate.

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82 see sections I.1.4 and I.5.2
The GDDKiA is also responsible for the definition of concession formula to be applied in a given project.

An important drawback in the process of concession formula definition as well as preparation of Terms of Reference and Requests for Proposals is that little attention is given to the point of view of potentially interested developers and possibilities of financing of the projects.

This issue is especially important, as PPP should be understood as business that must be sufficiently profitable for private partners and credible for lenders. If these conditions are not met it is no wonder that private partners are not interested in long-term relations with the Administration.

Attractiveness of projects is indispensable to assure sufficient competition for projects which is the best way to guarantee “Value for Money”83.

A significant part of project preparation works84 and especially those related to the Public Private Partnerships including the contract bidding and awarding85 are commissioned to external consultants.

An option to hire technical assistance for all aspects relative to road concessions from one source instead of appointing different advisors for each task and each concession should be also considered. The benefit would be more efficiency and consistency of the assistance based always on the same coherent criteria. This remark applies not only to PPP projects, but may be also taken into consideration for outsourcing consultant services for the preparation of projects with no private participation.

The relations between the Administration and private partners are deficient. There is no monitoring framework to supervise the concessionaires’ performance. There are no structures for technical and financial audit.

This is one of the aspects of the problem of transparency of PPPs in Poland. The lack of capacity to monitor projects fuels concerns about a possible excessive enrichment of concessionaires or not keeping to all agreement conditions. This in turn stirs up general reluctance to PPP both in the

83 For more information on concession tenders, see sections I.5.1 and I.5.2.
84 related to in chapter I.1.
85 related to in chapter I.5.
Administration and among the general public. On the other hand, also concessionaires complain about insufficient support from GDDKiA.

More than the introduction of certain measures, ECORYS in a consulting work entitled *Building the foundation for PPP in Poland* suggests implementation of a new institutional framework in the government sector. Adapting models implemented in other countries ECORYS suggests creating a PPP Centre and sectorial PPP Units.

Currently, a PPP Department exists inside the Ministry of Infrastructure, but the future creation of a PPP Centre dependent from the Ministry of Economy is uncertain after changes that have been done in the *PPP Act*.

In the INECO Team’s opinion, the MI should be the central entity where decision on the application of PPP system in road sector should be taken, since it is responsible of infrastructure policy. A task force composed by the GDDKiA, the Ministry of Infrastructure, the Ministry of Finance and the Ministry of Economy representatives should formulate the PPP formula, considering the results of feasibility studies and the GDDKiA and MI initiatives. The involvement of the MF is justified because a PPP contract may affect public deficit and debt as well as future budgetary situation. As the infrastructure policy constitutes one of the sectorial policies that altogether make up the economic policy of the Government also the ME should be more involved in the decision taking process. The MI must participate in the evaluation of the offers and be responsible for the concession award proposal by the Council of Ministers.

The PPP Department in the MI could be also reinforced and equipped with PPP monitoring competencies. Additionally, it could undertake research on PPP application possibilities, elaborate PPP policy guidelines and disseminate good PPP practice standards. As the majority of PPP deals is closely related to the infrastructure development, such a unit could be an alternative to the creation of the PPP Centre.
I.3.3. PPP FORMULAE APPLIED IN POLAND UNTIL NOW

Although a special Law on Public-Private Partnership has not been in force until now, Poland has some interesting experiences with PPP and not only in the road sector.

One of the first examples of PPP in Poland is the project of the construction of a new Terminal for the International Airport in Warsaw, which was initiated in 1990. Although the contract was procured under a legal framework that differed substantially from the one that is in force nowadays it preserved the main PPP characteristics providing for the allocation of a part of the risk on the private partner. The project has been included in the “Resource Book on PPP Case Studies” published by the European Commission in 2004 as an example of the first major planned PPP airport pilot project in the EU Candidate Countries.

In the road sector only toll motorway projects have been executed in a Public-Private Partnership system. Basically three different formulae of road concessions have been implemented:

1. A Design Build Operate Transfer formula with sovereign financial guarantees of the State.

   In this formula:

   • The State contributes only land to the project and grants the project lenders sovereign financial guarantees.86

   • The concessionaire builds and finances the construction, maintains and operates the motorway.

   • The business risk lies mainly with the concessionaire.

   This formula has been applied to the 150 km long Nowy Tomyśl - Konin section of the A2 motorway. The section is in operation. The concessionaire is Autostrada Wielkopolska S.A.

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86 The initial intention of the Government was not to grant such guarantees. In the A2 case they were granted after the concession award due to the concessionaire inability to raise financing for the project.
2. A Design Build Operate Transfer formula with a significant contribution of the State and financial guarantees of the State through the KFD

In this formula:

- The State contributes to the project the land and a negotiated financial contribution. Additionally the State guarantees to the concessionaire an agreed level of revenues. The business risk for the concessionaire is very limited. Only 6% of revenues is expected to be linked to tolls.

- The concessionaire designs builds and finances the construction, maintains and operates the motorway.

- The business risk lies with the State. The State sets the toll levels. All tolls come in to the National Road Fund. The State guarantees to the concessionaire revenues (paid from the National Road Fund) sufficient to cover all operating and financial expenditures and ensuring the return on equity

This formula has been applied to:

- The 90 km long Gdańsk – Nowe Marzy section of the A1 motorway. The construction of this section is expected to start in 2005. The concessionaire is Gdańsk Transport Company S.A.

- The 63 km long Nowe Marzy – Toruń section of the A1 motorway. The concessionaire is Gdańsk Transport Company S.A.

Similar solution may be adopted for:

- The 105 km long Świecko – Nowy Tomyśl section of the A2 motorway. The construction of this section is expected to start in 2005. The concessionaire is Autostrada Wielkopolska S.A.

87 The lack of risk transfer to the private partner means that this contract formula is a “fake concession” which in reality is an ordinary public works contract with deferred payment. In this case the whole investment cost is added to the public deficit in the construction period.

88 For more information on the security agreements for the A1 motorway see section I.2.4.
3. A concession to upgrade and operate already built sections of motorways

In this formula:

- The State contributes to the project a section of motorway built in a traditional way with public funds.
- The concessionaire adjusts the motorway for toll collection, builds Service Areas etc., maintains and operates the motorway.
- The business risk lies with the concessionaire. Motorway tolls have to cover all ongoing operating and financial expenditures and ensure the return on investment. Profits are to be shared by the concessionaire and the State.\(^{89}\)

This formula has been applied to:

- The 61 km long Kraków - Katowice section of the A4 motorway. The section is in operation. The concessionaire is Stalexport Autostrada Małopolska S.A.

Another project which is being tendered according to this formula:

- The 190 km long Wrocław - Katowice section of the A4 motorway. The concession is being negotiated with two companies chosen in a tendering.

This formula will be applied to all other sections built with public funds, e.g. 94.5 km Konin-Stryków section of A2.

Three issues have drawn the INECO Team’s attention. First, the evolution of the formulae after concession award. Second, the variety of concession formulae used in Poland. Third, an extremely low risk transfer to the private partner in the A1 case.

As far as the first issue is concerned, it seems that in all three 1997 tenders no clear concession formulae were defined. After having awarded the concessions the Government started to negotiate essential economic and financial terms of Concession Agreements with the awardees.\(^{90}\) The final outcome was significantly different from initial expectations, first and foremost as far as the

\(^{89}\) If this contract clause is not combined with a minimum income guarantee in the first years of motorway operation it means that toll rates are too high.

\(^{90}\) For more information on concession tenders and Concession Agreement negotiations see section I.5.2.
Governments financial involvement is concerned. The second issue is a logical consequence of the first one.

As regards the A1 Gdańsk-Toruń formula, due to many concessions done to the concessionaire during the long negotiation period the Agreement actually lost concession characteristics and evolved into a works and service contract with payments spread over the contract period.

The return on equity guarantee for the concessionaire frees him from any commercial risk and the scope of risk assumed by the Government and its financial involvement\(^{91}\) makes the whole deal little favourable for the State compared to the traditional procurement.

In order to assure the effectiveness of the bidding procedure and smooth execution of the contract it is essential that the concession formula is defined before starting the tender and clear-cut and quantifiable economic variables are taken into consideration for the concessionaire selection. Bidders must be aware of the obligations they make and the winner has to be obliged to meet them.

Otherwise, not optimal proposals may be chosen and the bidders will submit overoptimistic bids counting on a possibility to renegotiate the Concession Agreements in order to improve their position after the concession award. “Perpetual” renegotiations may be the result like in the A2 case.

On the other hand fair treatment of the concessionaires and a stable policy are a must. Ensuring the credibility of the awarding authorities will bring profit for both sides.

In the second part of the study solutions that meet all these requirements are proposed.

I.3.4. PPP FORMULA PROPOSED BY OTHER CONSULTANTS

ECORYS proposed to the Polish Administration a concession formula for non-toll roads that has not been implemented in Poland before, based on a combination of shadow-tolls, availability payments and quality indicators. According to this formula:

\(^{91}\) See section I.2.4.
The State contributes to the project a road section built in a traditional way with public funds and semi-annual payments made up of three components:

- Shadow tolls for heavy vehicles only,
- Availability payments,
- Bonus based on road quality indicators.

The private partner designs, upgrades, maintains and operates the road.

According to the report presented by ECORYS the main risks (design risk, construction risk, traffic risk and availability risks) are transferred to the private partner. However, also a possibility of direct agreements between lenders and state treasury is foreseen, which may represent a necessity of state treasury guarantees for the loans given to the private partner.

No roads have been upgraded in Poland this way mainly due to legal constraints. Introduction of the Law on PPP that creates a possibility to transfer the GDDKiA tasks to private partners on non-toll roads eliminates several other legal obstacles and can create more confidence of both sectors in Public-Private Partnerships eliminating doubts about the possibility of such agreements. It was planned to carry out the reconstruction of the National Road no. 19 as a pilot project for this formula as soon as the Law on PPP enters into force.

It has to be mentioned that although the initial works (in a formula based on shadow tolls and availability payments) are privately financed over the PPP contract period, the final origin of all funds destined for the project is public. Finally all funds destined for payments to the private partner have to come from the national budget, the National Road Fund or any other alternative public source. In the case when no direct user charges are applied public funds can be freed up temporarily. No additional sources of funding are created, but the public expenditures are spread over a longer period of time, relieving the Governments budgetary situation in the contract period and especially in the works execution period92.

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92 It is also worth mentioning that if the construction, availability and demand risk requirements of the Eurostat are not met shadow tolls may be treated by the Eurostat as future liabilities from the State and increase the State’s public debt. The decision on the use of this instrument should be therefore preceded by the analysis their impact on public accounts. In any case the annual payments of the Public Administration to the private partner will consolidate with the Public Accounts having potential impact on budgetary deficit.
Basically, the payment method, as described by ECORYS, transfers commercial risk to the private partner. This is important because otherwise all financial commitments of the State would be qualified as a public debt. This issue has been explained in the next section.

I.3.5. FINANCING OF PROJECTS AND THE EUROSTAT CRITERIA FOR THE OFF-BALANCE SHEET TREATMENT OF PPP

The impact of Public Private Partnerships on national accounts has not been monitored in Poland up to now. This was mainly due to the lack of dedicated accountancy schemes. They will have to be developed because of obligations to report to EUROSTAT. It would be reasonable to consider the issue of the impact of PPPs on public accounts especially in the light of public deficit and debt situation of Poland.

Public debt and budgetary deficit in Poland vs. Maastricht criteria

Following the signing of the Accession Treaty on 16 April 2003 Poland became a Member State of the European Union on 1 May 2004. The next step in Poland’s integration with EU will be its accession to the European Economic and Monetary Union (EMU), which is considered in Poland as one of the country’s major goals for the next few years.

It is compulsory for each Member State to satisfy so called Maastricht criteria in order to be able to participate in the third stage of EMU. The convergence criteria are presented in Article 121(1) of the Treaty establishing the European Community. They reflect the degree of economic convergence that Member States must achieve in order to be able to participate in the monetary policy that is common for all EMU Member States without this causing any adverse effects on the economy of each State and of the rest of the Economic and Monetary Union.

There are four Maastricht criteria:

- Achievement of a high degree of price stability
  
  The inflation rate of a given Member State must not exceed by more than 1.5 percentage points that of the three best-performing Member States in terms of price stability during the year preceding the examination of the situation in that Member State.

- Sustainability of the Government financial position
This criterion is composed of two elements:

- **Annual government deficit**

  The ratio of the annual government deficit to gross domestic product (GDP) must not exceed 3% at the end of the preceding financial year. If this is not the case, the ratio must have declined substantially and continuously and reached a level close to 3% or, alternatively, must remain close to 3% while representing only an exceptional and temporary excess.

- **Government debt**

  The ratio of gross government debt to GDP must not exceed 60% at the end of the preceding financial year. If this is not the case, the ratio must have sufficiently diminished and must be approaching the reference value at a satisfactory pace.

- **Observance of the normal fluctuation margins provided for by the exchange-rate mechanism of the European Monetary System**

  The Member State must have participated in the new exchange-rate mechanism (ERM II) of the European monetary system without any break during the two years preceding the examination of the situation and without severe tensions. The ERM II allows one standard fluctuation band of 15% on either side of the central rate against the euro defined for the currency of the Member State that desires to participate in the euro area. At the same time the Member State must not have devalued its currency on its own initiative.

- **Durability of convergence achieved by the Member State and of its participation in the exchange-rate mechanism of the European Monetary System being reflected in the long-term interest-rate levels.**

  The nominal long-term interest rate must not exceed by more than 2 percentage points that of, at most, the three best-performing Member States in terms of price stability. The period taken into consideration is the year preceding the examination of the situation in the Member State concerned.

According to the Eurostat notice in a report entitled *First notification of deficit and debt data for 2004* Poland is really close to the limit of the thresholds established. The tendency is unfavourable.
Table I.3.1. Poland’s public deficit and debt data in the years 2001-2004

<table>
<thead>
<tr>
<th>POLAND (million PLN)</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>GDP mp</td>
<td>760,595</td>
<td>781,112</td>
<td>814,922</td>
<td>883,656</td>
</tr>
<tr>
<td>Government deficit</td>
<td>-29,358</td>
<td>-27,989</td>
<td>-36,665</td>
<td>-42,768</td>
</tr>
<tr>
<td>Government deficit % GDP</td>
<td>-3.9</td>
<td>-3.6</td>
<td>-4.5</td>
<td>-4.8</td>
</tr>
<tr>
<td>Government debt</td>
<td>279,393</td>
<td>321,454</td>
<td>369,695</td>
<td>385,697</td>
</tr>
<tr>
<td>Government debt % GDP</td>
<td>36.7</td>
<td>41.2</td>
<td>45.4</td>
<td>43.6</td>
</tr>
<tr>
<td>Primary balance % GDP</td>
<td>-0.7</td>
<td>-0.7</td>
<td>-1.6</td>
<td>-2.2</td>
</tr>
</tbody>
</table>


It should be expected then, that Poland is interested in reducing its public deficit and debt not only because of Maastricht criteria, but also simply for macroeconomic stability reasons. The public finance reform called Hausner-Plan will probably bring only modest effects on public deficit limitation. This is why further efforts in this matter are needed.

Unfortunately, due to some Eurostat criteria Public Private Partnership contracts may even contribute to increase of public deficit and debt. On the other hand, appropriate contract structure which is conform to the Eurostat may prevent negative impact of PPPs on government deficit\(^\text{93}\). In the INECO Team’s opinion, these issues should be taken into consideration during the design of PPP schemes for road sector in order not to produce adverse consequences between different policies of the Government. In this section the Eurostat criteria for the off-balance sheet treatment of PPPs is commented on.

**Treatmen of investments of public entities as off-budget under Eurostat criteria**

The main problem with the national account treatment of investments of public entities is to determine the economic nature of the public entity. It is necessary to decide whether the entity must be classified inside the general government sector (its accounts consolidate with the government accounts) or outside, in the financial corporations sector (the entity is defined as a market entity). In the first case, the investment must be recorded as a non-financial expenditure from the general government sector, with public deficit effects, while in the second, as an entrepreneurial investment without public deficit effects.

\(^{93}\) It is also possible that in future also National Road Fund liabilities consolidate with public accounts. More details in the section I.2.2.
Eurostat, the entity of the Commission that has developed the European System of Accounts (ESA95), explains this treatment through the Manual on Government Debt and Deficit. Basically two issues must be analysed:

1. Whether an entity can be considered as an institutional unit.

2. If it can be considered an institutional unit, whether it is a public market institutional unit or public non-market institutional unit

**Institutional unit**

In ESA95 context, an entity is an institutional unit, if it has decision-making autonomy in respect of its principal function, and either keeps a complete set of accounts or it would be possible and meaningful, from both an economic and legal viewpoint, to compile a complete set of accounts if they were required.

In order to have autonomy of decision in respect of its principal function, a unit has to:

- Be entitled to own goods or assets in its own right; i.e. be able to exchange the ownership of goods or assets in transactions with other institutional units;

- Be able to take economic decisions and engage in economic activities for which it is itself held to be directly responsible and accountable at law;

- Be able to incur liabilities on its own behalf, to take on other obligations or further commitments and to enter into contracts.

Moreover, in order to be said to keep a complete set of accounts, a unit must keep accounting records covering all its economic and financial transactions carried out during the accounting period, as well as a balance sheet of assets and liabilities.

When an entity is used without a real economic goal, when it only channels funds that come from Public Administration these criteria must not be considered.

**Public market/non-market institutional units**

In the case of an institutional unit, according to the ESA95, to classify it as a public market unit (corporate sector) or, alternatively, as a public non-market unit (general government sector) it is necessary to apply the 50% rule. It means that 50% of production costs have to be covered by sales.
“Sales” cover all sales excluding taxes on products but including all payments made by general government or the Institutions of the European Union and granted to any kind of producer in this type of activity, i.e. all payments linked to the volume or value of output are included in this category, but payments covering an overall deficit are excluded.

“Production costs” are the sum of intermediate consumption, compensation of employees, consumption of fixed capital and other taxes on production. For this criterion other subsidies on production are not deducted. To ensure consistency of the concepts “sales” and “production” costs when applying the 50% criterion, the production costs should exclude all costs made for own-account capital formation.

In infrastructure of transport sector it is really important to be careful with depreciations and amortizations treatment. They have to be included in production costs.

Payments from general government to public institutional units in respect of actual services provided are to be treated as corresponding to sales in the implementation of the 50% rule when prices are economically significant, for instance:

- When prices paid by the general government to public producers in respect to actual services provided are also applied to similar services (of the same quality) provided by private producers, who accept to sell services to general government on the basis of these prices.

- When, in the absence of private producers in the same kind of activity, the general government pays public units for actual services (rather than through a coverage of costs) in order to have a significant economic influence on the supply and on the demand.

The 50% rule must be analysed in a period of several years not considering punctual fluctuations in turnover.

**Economic flows treatment in PPP projects under Eurostat criteria**

The PPP scheme tailored ad hoc for each project must observe some rules of risk sharing. If it does not so, a final decision of Eurostat about the risk allocation in a single project could change the initial consideration of some economic flows, and all that could have a negative impact in public deficit and debt. Many risks may be observed in practice in such arrangements but Eurostat has selected three main categories of “generic” risks.
In brief, to elude these negative effects, private partner must assume the construction risk and one of the two followings: availability risk and demand risk. Eurostat uses the expression *bearing a risk*, to say that a party bears the majority of the risk.

In the **construction risk** are included such concepts like late delivery, non-respect of specified standards, additional costs, technical deficiency, and external negative effects. Government's obligation to start making regular payments to a partner without taking into account the effective state of the assets would be evidence that government bears the majority of the construction risks.

The **availability risk** where the private partner has to deliver a concrete quantity of a final product or has to give a service with a guarantee of quality preset in some standards (punctuality, safety, cleaning, etc.) fixed in the agreement between public and private parties. The risk is really allocated to the private partner when the payments can be reduced or called off, as it was a penalization in breach of the standards. In fact the government must act as a normal customer.

Finally, the **demand risk** covering variability of demand higher or lower than expected when the contract was signed irrespective of the behaviour (management) of the private partner. This statement does not apply where the shift in demand results from an obvious government action, such as decisions of units of general government (and thus not just the unit(s) directly involved in the contract) that represent a significant policy change, or the development of directly competing infrastructure built under government mandate.

### I.3.6. REDUCING THE RISKS PERCEIVED BY PRIVATE SECTOR LENDERS IN PROJECTS PARTLY FINANCED THROUGH THE ROAD FUND AND THE APPLICABILITY OF WORLD BANK GROUP RISK MITIGATION INSTRUMENTS

There is no question, in our view, on the aptness of the National Road Fund settlement to slow down the potential lenders' concerns about the reliability of the Polish public sector financial involvement in road projects. Bankers use to consider the Budget as a Pandora’s Box in which everything exists but in an unknown place and a long chain of specific political decisions are required to make effective the application of resources. The National Road Fund works as a separate account and reasonable forecasts can be at the foundation of its functioning.

Problems could arise in the not too distant future when the Polish motorways network becomes a massive application of capitals and the National Road Fund has a huge amount of financial obligations. That point of maturity will put to the test the strength of the Polish financial market and
its fitness to absorb both equity and debt flotation operations. At the time in which the issue of bonds by the Bank of National Economy take place to capture resources for the Fund, the investors will appraise the reliability of the system and the governmental capability to manage it as well. Interest and discount rates, the so-called spread, will measure the risks perceived by financial agents. Rating agencies will keep an accurate eye on loan placements linked to the Polish road projects and perhaps credit enhancement devices might be required to reduce financial costs.

The World Bank is not a fairy godmother. It simply gives advice, pushes viable projects through, works as a financial arranger and eases the domestic institutional adaptation to internationally recognised good practices. But impediments are not swept away by magic. Money will not come in a Manna-from-Heaven way as a result of the World Bank presence. Transparency, fine sense, hard work and public managers reputation are National intangible assets of great value in financial terms. Some Polish Government support may be needed in the form of guarantees or financial participation in the road projects. National Government financial endorsement might be given in combination with the World Bank facilities. Nevertheless none of these instruments that have a key importance for the Administration should be given aside from the bidding process in a situation of a bilateral monopoly without real market pressure.

Our description will follow the World Bank’s general guidelines:

A) **IFC Loans.** IFC financial support could be given for a publicly owned entity in the context of pre-privatization equity. IFC could alternatively help provide financing needs (including acquisition costs) of a private purchase of a State-owned entity. IFC loans can be made to any private company in the transport sector (whether infrastructure or transport operators). IFC loans can be made to the successful private bidder in a PPP transport scheme.

B) **IBRD/IDA Investment Loans.** IBRD/IDA loans can be made for public sector transport enterprises, either for investment, structural reforms or transition costs such as workforce restructuring. Loans can be made to the Government, or guaranteed by the Government, for onlending to small and medium private transport operators, for example, as part of a rural development project. IBRD/IDA loans can be made to the public sector to meet a capital financial commitment to a PPP scheme. They may complement an IFC loan as above.

C) **IBRD/IDA Policy/Program Loans.** They can be used by clients subject to a program of sector reforms which would be inappropriate to associate with a specific investment loan.
Part of a program loan could be used to support the public sector financial commitment to a PPP.

D) **MIGA** Guarantees. MIGA is available to provide non-commercial risk guarantees (transfer and inconvertibility, expropriation, civil disturbance and breach of contract) to investors, including contractors and operations & maintenance providers, as well as commercial Banks. Breach of contract coverage is of particular interest for PPPs as it guarantees the investor/lender against the non-honoring of sovereign or sub-sovereign obligations regarding the PPP project, including payment obligations.

E) **IBRD/IDA** Guarantees. Partial risk and partial credit guarantees can cover debt or cash flow to private investors for specified project risks related to areas of Government responsibility or payment obligation or specified political risks. Those guarantees are subject to counter-guarantee from the Government.

**Regarding sovereign guarantees granting by the Polish Government, the experiences so far are not satisfactory.**

Although it has been always the Administration’s intention to avoid granting such guarantees in the case of motorway concessions it always turned out to be necessary to support the loans with sovereign guarantees\(^{94}\). Also in the case of the A1 Motorway Gdańsk-Nowe Marzy, although it was intended to avoid such guarantee for an EIB loan and secure the loan repayments through a KFD payments scheme\(^ {95}\) off-balance sheet financing has not been achieved. It should be taken into consideration that for cost and availability reasons EIB loans are preferred by the concessionaires and solutions based on them are accepted by the Government. However due to the EIB policy sovereign guarantees for the bulk of this financing are always required. Important contingent liabilities arise, but at the time of decision taking they apparently recede into background in the face of the pressure on the achievement of the financial closing.

**In INECO’s opinion, these contingent liabilities of the Government should be taken into account in the concession awarding process. The concessionaires’ ability to achieve the financial closing of the project without the State Treasury’s guarantees is an important factor that should be not disregarded. If some guarantees were granted though, an analytical accounting framework for contingent financial liabilities should be elaborated.**

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\(^{94}\) See the A2 case in the section I.5.2.

\(^{95}\) See section I.2.4 for more information on the adopted model.
within the MF and used for the analysis of potential impact of the guarantees on public accounts.

One of the most important remarks, in our opinion, is that governmental guarantees for investors and concessionaires shall be appraised in monetary parameters and must be internalised into the road project structure to maintain incentives for efficiency and preserve fairness. It is crucial to let the pressure from the borrowers play onto the project private partner. Therefore it would be most reasonable and effective to evaluate the amount of financial guarantees required by a potential concessionaire in the bidding stage as one of the awarding criteria. Such a procedure would assure the Administration that the chosen proposal is the most attractive one from the financial point of view and would allow stopping the ineffective and not transparent practice of agreeing the most important financial terms of the agreement including the provision of financial sovereign guarantees after the bid selection.

Analogous criteria shall be taken into account regarding EBRD financial facilities for concession/PPP projects. The EBRD institutional position is quite suitable, for obvious reasons, to reinforce infrastructure investments in Poland and, in general, its approach to Western-European countries projects funding participation can be considered more flexible. This allows long-term commitments with private investors and other multilateral capital providers. The EBRD also has valuable and complementary partnerships with other multilateral institutions and organisations such as the European Investment Bank, the World Bank, the Asian Development Bank, the Organization for Security and Co-operation in Europe and the International Monetary Fund. The EBRD fosters transition of the transport sector by financing economically viable infrastructure and transport projects. The EBRD’s policy aims to build efficient, reliable and secure transport systems, including road networks improvement. The EBRD provides loan and equity finance, guarantees, leasing facilities and trade finance.

However, as stated in the 2004 EBRD Report, its high volume of business has been achieved through a careful project selection process that ensures that every transaction reflects the mandate of the Bank and can meet the stringent conditions of sound banking and transition impact96. In brief, international financial standards are applied by the EBRD to decide on the worthiness of the investment, although no rigid exclusion rules have been fashioned, as happens with EU Funds granting.

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I.4. PROJECT SELECTION FOR IMPLEMENTATION WITH PRIVATE PARTICIPATION

I.4.1. LEGAL FRAMEWORK

Up to now, no special legal requirements have been in force regarding the selection of projects for Public Private Partnership. The selection of motorway projects was done rather by an administrative decision of the Government regarding the definition of a toll motorway network. The Act on Toll Motorways conferred to the Council of Ministers the right to establish, by way of a Decree, motorways section that would be built as tolled. The toll motorway and expressway network defined by the latest Decree on Toll Motorways\(^97\) from 2002 does not differ much from the Motorway Development Programme formulated in 1993.

In other words, the Act on Toll Motorways created a framework that defined the motorway projects that could be executed as BOT concessions\(^98\) and all motorways included in the Motorway Construction Programme were initially planned to be built by private concessionaires. At the same time, there was no special legal framework that could facilitate PPP schemes application for the rest of the national roads network\(^99\). Exceptionally, the rules regarding toll motorway construction were extended for expressways by way of a Decree. This was done twice: in 1995 in the case of the S22 expressway Elbląg – Grzechotki – (national border with Russia)\(^100\) and in 1997 in the case of S14 expressway bypass of Łódź\(^101\).

No additional tests were prescribed by the Law to be carried out in order to check if the Public Private Partnership was a feasible and best solution for procurement of a given motorway section. The new PPP Act sets more requirements in this aspect. They are presented in the section I.4.3.

\(^97\) Rozporządzenie Rady Ministrów z dnia 16 lipca 2002 r. w sprawie autostrad płatnych , Dz.U. 2002 nr 121 poz. 1034
\(^98\) Additionally the regulations regarding toll motorways were extended to the expressway S22 Elbląg – Grzechotki – State Border in 1995 and to the expressway S14 Łódź Western Bypass by correspondent Decrees (Rozporządzenie Rady Ministrów z dnia 5 kwietnia 1995 r. w sprawie rozciągnięcia przepisów ustawy o autostradach płatnych na drogę ekspresową Elbląg-granica państwa (Grzechotki), Dz.U. 1995 nr 38 poz. 186; Rozporządzenie Rady Ministrów z dnia 18 lipca 1997 r. w sprawie rozciągnięcia przepisów ustawy o autostradach płatnych na drogę ekspresową S14, Dz.U. 1997 nr 83 poz. 533)
\(^99\) see section I.3.1
\(^100\) Decree extending the regulations on toll motorways to the expressway Elbląg-State Border (Grzechotki) (Rozporządzenie Rady Ministrów z dnia 5 kwietnia 1995 r. w sprawie rozciągnięcia przepisów ustawy o autostradach płatnych na drogę ekspresową Elbląg-granica państwa (Grzechotki), Dz.U. 1995 nr 38 poz. 186)
\(^101\) Decree extending the regulations on toll motorways to the expressway S14 (Rozporządzenie Rady Ministrów z dnia 18 lipca 1997 r. w sprawie rozciągnięcia przepisów ustawy o autostradach płatnych na drogę ekspresową S14, Dz.U. 1997 nr 83 poz. 533)
I.4.2. PREVIOUS EXPERIENCE REGARDING PROJECT SELECTION FOR IMPLEMENTATION WITH PRIVATE PARTICIPATION

Although practically all PPP applications in the roads sector in Poland were limited to the planned motorway network some of the decisions regarding PPP application had to be taken. First, there were decisions on exclusion of some motorway sections from the Motorway Construction Programme. Second, there were decisions on execution in a traditional way of some sections that had been previously planned to be built by a concessionaire102.

According to the initial plans of the Government from 1993 the first stage of the Motorway Construction Programme was to be implemented by a special state-owned company Autostrady Polskie S.A. and the rest of the network by private concessionaires. Nevertheless, the idea of Autostrady Polskie S.A. was abandoned the same year and consequently all motorway network was to be built by private concessionaires.

The exclusion of the Wrocław-Łódź sections of A8 and the whole A3 motorway (Świnoujście – Szczecin – Gorzów Wielkopolski – Zielona Góra – Legnica – state border) from the programme and replacing them by expressways was motivated by the insufficiency of traffic for toll motorways to be financially feasible in these sections103. Nevertheless, some other planned motorway sections that have even less traffic were not excluded from the Programme. This is due to the fact that A1, A2 and A4 form international corridors included in the TEN-Network and have strategic importance for the Polish and EU economies. On the other hand there are some sections of national roads that are planned to be built as expressways that have traffic forecasts104 that could make the construction of toll motorways socially desirable and financially feasible. These are e.g. Warszawa – Radom – Kielce section of S7, Warszawa – Lublin section of S17 and Warszawa – Piotrków Trybunalski105 section of S8 or connection between Warsaw and Bydgoszcz. However their inclusion in the Motorway Construction Programme is not considered but might be reasonable.

102 Due to difficulties in raising financing for the A2 project the concessionaire AWSA gave up its concession for the Konin-Stryków section. Currently it is being executed in a traditional way.
103 It has to be mentioned that these two motorways were not included in the initial version of the Motorway Construction Programme from 1993. They were added later to be finally removed from the Programme.
104 According to the study “GDDKiA 6-year programme and 12-year cash flow” by Scott Wilson Kirkpatrick and the University of Birmingham.
105 However if these road sections were selected to be procured as toll motorways two problems would occur. First, in accordance with the Article 1.2 of the Act on Toll Motorways and the National Road Fund a special Decree of the Council of Ministers would be necessary to confer a toll motorway status to these sections. Second, delivery of a toll-free alternative national road could pose a problem in these cases.
The decision on building the Konin – Stryków section of A2, previously awarded to Autostrada Wielkopolska S.A. as a part of its concession, in a traditional way was taken in 1999 as a consequence of the inability of the concessionaire to finance all sections of its concession according to the timetable provided for in the contract. Currently the construction of this section is being completed in a traditional way.

The matter of the sequence of the construction of sections of toll motorways was apparently related to the existence of short sections of motorways that had been built prior to the Motorway Development Programme from 1993. The existence of:

- the Wrocław - Krzywa section of A4 motorway built in the late nineteen thirties by the Germans,
- the Konin – Września section of A2 motorway finished in 1988 and
- the Kraków – Katowice section of A4 almost finished in the beginning of the nineties

probably influenced the decision of completing the construction of missing A4 links and continuing the construction of the Western part of A2 in order not to avoid further fragmentarisation of the network. Although this decision had its rationale, a consequence was the construction of motorway sections with less traffic potential than other sections like e.g. A2 Warszawa - Stryków or A1 Stryków – Pyrzowice.

To sum up, the system of project selection for implementation with private participation has been quite rigid until now, based on the Decree indicating a series of corridors where the toll motorways should be located. PPP in the case of non-toll motorways has not been applied. In general, the decision to build a section of motorway with private involvement was conditioned by a political decision that was followed by a search for a project suitable for such involvement. There was no special comparison of the private and public option done neither in the project and tendering preparation phase nor in the tendering and negotiation stages.
I.4.3. PROJECT SELECTION PROCESS AND VALUE FOR MONEY APPRAISAL TOOLS

One of the most important decisions to be taken in the project portfolio preparation stage is determination which projects are to be implemented as Public-Private Partnerships and which ones should be best left for traditional methods.

This issue is often discussed using the concept of Value for Money that describes the relative attractiveness of PPP procurement in comparison to the traditional alternative.

According to ECORYS, it is also the main objective of the Polish Government - to get the projects done in a relatively better way rather than get them done anyway, i.e. the objective is to get more Value for Money. This approach is convergent with the idea of PPP applicability presented by The European Commission in Guidelines for successful Public-Private Partnership. Factors that are determinant for Value for Money mentioned in the Guidelines… are:

- Reduced life cycle costs,
- Better allocation of risks,
- Faster implementation,
- Improved service quality,
- Generation of additional revenue.

According to the Guidelines… “PPPs should only be adopted as a procurement and implementation option if they are reasonably expected to deliver enhanced Value for Money over traditional methods”. Therefore the Value for Money should be assessed in different stages of the decision taking process.

- First, to check the suitability of PPP for a project,
- Then to check the suitability of a particular PPP design for a project and
- Finally, at the evaluation stage, to decide which bidder is able to offer the best solution.

The European Commission suggests different approach to Value for Money assessment depending on the type of a project:

1) For financially free-standing projects, i.e. the projects in which the contractor recovers all costs through charges, e.g. tolls collected from the final users the Value for Money optimisation is achieved through the effective competition in the tendering process between potential contractors. No special assessment methods are necessary in this case. The Contracting Authority should only assure itself that PPP is indeed the preferred form of the execution of the project.

2) In case of Concession Contracts with Public Grants that are mainly financed from user charges and the public sector is a minority founder all considerations referring to free-standing projects also apply. Nevertheless the benefit gained from applying public funds to the projects “should be compared with the benefit gained from applying them to an alternative project that would otherwise not proceed”.

3) Finally, for the projects where public sector is the main financial contributor the European Commission recommends a detailed Value for Money assessment. It should compare costs and benefits in monetary and non-monetary terms of the preferred PPP tender with the costs and benefits of traditional procurement. This kind of assessment should be carried out at the end of the public procurement process.

The Guidelines for successful Public-Private Partnership also discuss different elements of Value for Money assessment. Beside the non-monetary comparison that considers all relevant factors that have a significant economic and social impact but are difficult to quantify in monetary terms, more attention is paid to the monetary comparison. The monetary comparison is carried out using the financial comparator whose main purpose is to compare the cost of the preferred PPP tender with either the cost of delivering the project through traditional public sector procurement, the best available alternative, a price benchmark or other comparable existing PPP projects, depending on type of PPP and data available.

The study Building the foundation for PPP in Poland by ECORYS proposes a Value for Money assessment methodology that consists of three tools applicable to different stages of the projects preparation process: PPP Potential Scan (PPS), Public Private Comparator (PPC) and Public Sector Comparator (PSC):

1) PPP Potential Scan is designed to be the first filter in the process of selection of projects to be carried out as PPPs. This tool serves for a preliminary analysis of a project. It is
supposed to reveal whether the project has sufficient potential, i.e. is sufficiently attractive in terms of Value for Money, to be executed as a PPP. If not, the project should be rather left for the public sector.

2) Second tool proposed by ECORYS to the Polish Government is the Public Private Comparator. The objective of this comparator is to obtain information on possible advantages of a PPP approach with relation to the alternative (public) procurement method. As it serves as a tool to select the most appropriate PPP formula for the project it should be applied before taking decision to start the tendering.

3) Finally, ECORYS suggests the Public Sector Comparator as an instrument to be applied in the tendering phase. It is designed to be used for evaluation of submitted proposals. It enables the evaluation of Value for Money created by each bid. A comparison of results of different bids with the public alternative formula helps to determine which offer is the best one in terms of Value for Money and if it really creates more Value for Money than traditional public procurement. If not, a conclusion should be drawn that PPP is not the best way of procurement for the project and it should rather be implemented in a traditional way, which means that the tendering would be cancelled.

All these tools correspond to the Value for Money assessment as suggested in the Guidelines for successful Public-Private Partnership. PPS helps to decide the suitability of a PPP for a given project, PPC - to decide the suitability of a particular project design, and the PSC – to decide which offer is the best one in terms of Value for Money and if the created Value for Money really overweighs the public procurement option.

The Value for Money assessment is not required as one of the elements of the project procurement, neither by the Act on Toll Motorways and the National Road Fund nor by the Decree on specific conditions for the motorway concession bidding procedure. Thus in the case of the toll motorway network which is defined by the Decree on the Motorway and Expressway Network no special method of Value for Money assessment has to be applied exactly as it is

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108 Rozporządzenie Ministra Transportu i Gospodarki Morskiej z dnia 27 kwietnia 2001 r. w sprawie szczegółowych warunków postępowania przetargowego na udzielenie koncesji na budowę i eksploatację autostrad płatnych, Dz.U. 2001 nr 50 poz. 531.
109 Rozporządzenie Rady Ministrów z dnia 15 maja 2004 r. w sprawie sieci autostrad i dróg ekspresowych, Dz.U. 2004 nr 128 poz. 1334.
specified in the Guidelines for successful Public-Private Partnership unless a public sector is a main founder of the project.

On the other hand, the definition of PPP included in the Article 3 of the PPP Act\textsuperscript{110} has a built-in Value for Money requirement for such partnerships:

1. The public private partnership may be a form of implementing an undertaking, in accordance with the procedure and principles set out herein, in case when it results in benefits for the public interest that outweigh the benefits resulting from other methods of carrying out such undertaking.

Additionally, clause 2 of the same Article gives three examples of “benefits for the public interest”:

- Savings on the expenses of the public entity
- Higher standard of the services to be provided
- Reduced inconvenience for the environment.

Moreover the PPP Act in its Art. 11 defines the scope of the analysis of the project needed to be done prior to taking the decision to implement a project as a PPP. Two of them are:

- Analysis of “the economic and financial aspects of the contemplated undertaking, including the comparison of the costs of implementing the undertaking in the form of a public private partnership with the costs of its implementation in another form”
- “Comparison of the social benefits and threats involved in the implementation of the undertaking in the form of a public private partnership with the benefits and threats involved in its implementation in another form”.

Both items coincide with the Public Private Comparator proposed by ECORYS. There are no mentions of the Public Sector Comparator-like instrument to be applied in the private partner selection phase.

According to the Article 11.2 the minister proper for public finances in agreement with the minister proper for the economy shall set down, by a decree, the elements of the analysis. For the time being this decree has not been issued. It is likely that due to the Government change the works on the Decree will be prolonged. Lack of the decree will constitute an important barrier for quick

\textsuperscript{110} Ustawa z dnia 17 czerwca 2005 r. o Partnerstwie Publiczno-Prywatnym.
launching of new PPP projects, as the Administrations will be not willing to run the risk of performing analysis that will be inconsistent with legal requirements or not performing them at all, which would cause the contract null and void, according to the Article 21.

Although the suitability of Public Private Partnership for a given project should be always analysed and the PPP Law orders the public administration to carry out such an analysis before taking decision of implementing an undertaking as a PPP, the necessity of application of the complex instrumentation proposed by ECORYS and its applicability in Poland should be reconsidered.

INECO’s concerns about the Value for Money analysis proposed by ECORYS relate to the real objectives of PPP application in Poland, the problem of administrative capacity, time and information input required for a proper application of all tools and the issue of credibility of the administration in the tendering process. In the analysis of these issues the origin of proposed solutions and the specific situation of Poland have to be taken into consideration.

According to ECORYS, the main objective of the Polish Government is to do projects in a better way and not to get them done anyhow. However, the situation of Poland suggests that not exactly the willingness of improving the undertakings but rather a necessity to close the infrastructure gap as soon as possible in a situation of public expenditure constraints is the main driver for the application of PPP as an alternative way of infrastructure procurement. The Value for Money assessment methodology has its origins in Great Britain where it was designed for the Private Finance Initiative programme in order to help to determine the relative advantages of PPP solutions proposed by private partners in a competitive negotiation procedure. The application of PPS, PPC and PSC means that there are three occasions for a project to be turned down as a PPP-candidate and in each case it means that it would have to be implemented in a traditional way. That means that the traditional option has to be always available. It may be so in the case of Great Britain. However, the public expenditure constraints in Poland suggest that this condition will not always be met. Therefore abandoning the PPP model for most projects during the Value for Money assessment would implicate delaying them until undefined future, which can practically mean abandoning them. In other words Value for Money fine-tuning is a great solution only where there is a real possibility of substitution of PPP schemes by traditional financing for all projects.\footnote{\textit{“It is just one of a number of ways of evaluating a proposed PFI deal. It is directly relevant only when the publicly financed option on which it is based is a genuine alternative to the PFI deal.”} - Public Accounts - Twenty-Eighth Report, House of Commons Session 2002-03.} Most probably this is not the case of Poland.
Secondly, the capacity of the Polish Administration may not be disregarded. Private Finance Initiative was a concept that evolved in Great Britain during last several years. During that period and especially in the beginning a correct assessment of Value for Money posed a serious problem. The methodology of Value for Money assessment was gradually developed and it took a few years to get a sufficiently reliable model. During all that time new experiences and knowledge regarding PPP were gained by the personnel responsible for PPP implementation. Institutional reinforcement is a must for the Ministry of Infrastructure and the GDDKiA, but most probably it will take some time. One has also to bear in mind that a specific “PPP culture” created in Great Britain, tools that are fruits of it and experiences and knowledge necessary to use them cannot be directly transferred to another country that lacks this experience and has different characteristics. While the preparation of credible, high quality and independent feasibility studies for all projects is still a problem, introducing more complicated and sophisticated analytical tools may be too heavy burden for the Administration and it may lengthen the project preparation and tendering process which is exactly the opposite of the needs of Poland. The necessity of contracting specialized consulting firms or experts for technical assistance is not out of question.

Perhaps, the introduction of coherent cost-benefit analysis and feasibility studies that could serve as a basis for the preparation of rankings of the financially and economically most profitable projects (as planned in the draft National Transport Policy for the years 2005-2025) should be treated as priorities at the moment before introducing more sophisticated methods. The possibility of introduction of bidding mechanisms that can optimise the Value for Money through competition for contracts also in the cases where public participation is required should be taken into consideration.

Thirdly, there is an issue of time and data needed to apply the Value for Money evaluation tools. As the Guidelines for successful Public-Private Partnership says: “developing a financial comparator is often a time consuming and expensive task and the results are only as good as the baseline information provided”. According to ECORYS the duration of each PPP assessment tool varies from 0.5 to 8 months or in some cases even a year, depending on the level of input information provided. The application of all three tools would take 6,5-13,5 months. Bearing in mind the lack of experience of the Administration in using these tools the upper limit seems to be more realistic.
However, it does not seem to be the best idea to extend the project preparation and bidding period while there are measures taken in order to accelerate the whole process at the same time\(^{112}\).

Besides as a consequence of a rather scarce experience record in the application of PPP schemes there may be no sufficient reliable data required to evaluate all risks, which is indispensable input for the preparation of reliable financial comparators. This will bring into question the credibility of the results of the comparators and consequently the overall usefulness of these tools in the Polish context.

Finally, the issue of the potential negative influence of the application of Value for Money evaluation tools during the tendering process on its credibility as seen from the potential bidders’ point of view should be discussed. The Public Sector Comparator is designed to be applied during the tendering process to confront the private bids with the public procurement option. If none of the proposals presents a higher Value for Money that the traditional procurement method the tendering shall be declared ineffective (cancelled). It is worth noting that this possibility creates an additional dose of uncertainty for potential bidders.

Most tendering processes for the on-going concessions lasted long periods of time\(^{113}\). This is due to the option for negotiated procedure (the last tendering stage), which is very time consuming and relatively expensive for both the bidders and the administration. Moreover, transparency is definitely not strength of the Polish concession tendering practice. Introducing the possibility of ineffectiveness of the whole process to be disclosed at its very end surely will not attract the interest of potential bidders.

For the time being none of the Value for Money assessment procedures is applied in Poland. For instance, the new A1 project Kraków-Pyrzowice has been selected to be executed as a concession and the pre-qualification procedure has been launched recently without any Value for Money evaluation.

The Value for Money assessment methods proposed by other consultants are very advanced. They require a high level of expertise and experience of the administration, reliable data, a lot of time and money. Although at least some of GDDKiA officials are keen on application of such methods INECO strongly recommends that the Administration

\(^{112}\) e.g. the Act on special principles of preparation and implementation of investment projects related to national roads

\(^{113}\) See section I.5.2.
reconsider their applicability in Poland taking into consideration the personnel constraints and the burden of work it has now, the necessity of preparation of road projects in larger quantity and better quality in order to speed up infrastructure development and make use of EU funds. Especially in the face of new legal requirements that in the GDDKiA opinion are likely to lengthen the project preparation process the application of techniques based on comparators may have an adverse effect on project preparation speed.

For these reasons tendering schemes that use market mechanisms for Value for Money optimisation might be a solution for Poland and are recommended in the second part of the report.

114 See section I.1.4
I.5. CONCESSION/PPP TENDERING AND AWARDING

I.5.1. LEGAL AND INSTITUTIONAL FRAMEWORK AND ADMINISTRATIVE CAPACITY

The legal framework for road concession/PPP tendering and awarding is constituted the Act on Toll Motorways of 27 October 1994\(^{115}\) with its Decrees. This framework is going to be completed soon by the Act on Public-Private Partnerships.

The Article 41 of the Act on Toll Motorways and National Roads Fund states:

“The company shall be selected in a three-tier tendering process conducted by the General Directorate of National Roads and Motorways and including:

1) Pre-qualification,

2) Tendering limited to applicants qualified to submit bids, hereinafter referred to as ‘tendering’,

3) Negotiations of the contract for construction and operation or only operation of motorways.”\(^{116}\)

This form of contractor selection was invented and put into practice by the British Highways Agency during the nineties and it took a long time to be improved and accurately shaped. Also the Rationale attached to one of the previous versions of the Draft PPP Act explicitly mentioned, the British experience on PPP as taken into consideration to evaluate the benefits derived for the public interest from this way of governmental action. This tendering procedure could be transferred into Polish legislation, if it is considered pertinent, but implies a demanding performance by the contracting authorities. It requires especially sufficient experience that is not extant in Poland.

In reality, most of staff that is responsible for Terms of Reference and Requests for Proposals are young people with little experience. GDDKiA admits that some external assistance in the ToR/RfP preparation would be probably necessary but it is not always provided. According to GDDKiA,

\(^{115}\) Ustawa z dnia 27 października 1994 r. o autostradach płatnych i o Krajowym Funduszu Drogowym, Dz.U. 1994 nr 127 poz. 627.

\(^{116}\) This three-stage procedure was introduced by the Act amending the Act on Toll Motorways and other Acts from 17 November 2000 (Ustawa z dnia 8 września 2000 r. o zmianie ustawy o autostradach płatnych oraz o zmianie innych ustaw, Dz.U. 2000 nr 86 poz. 958). Before the procedure consisted of two stages: pre-qualification and restricted tendering. Current procedure is defined with more detail by the Decree on specific conditions for the motorway bidding procedure from 2001 (Rozporządzenie Ministra Transportu i Gospodarki Morskiej z dnia 27 kwietnia 2001 r. w sprawie szczegółowych warunków postępowania przetargowego na udzielenie koncesji na budowę i eksploatację autostrad płatnych, Dz.U. 2001 nr 50 poz. 531).
several technical assistance programmes have been launched recently covering a wide range of aspects, including feasibility studies, financial engineering, technical and legal issues.

In the practice – as it has been already commented on in the section I.3.2 - little attention is given to the point of view of potential developers and lenders. This issue may be a significant barrier for attracting interest of private initiative for projects. As a result there is little competition and it is not easy to agree fair conditions for both parties and assure “Value for Money” for the Administration regardless of methodology that is applied to measure it.

In the second part of tendering procedure - evaluation of proposals - some criteria established by the Concessions Department of the GDDKiA are applied. They include technical and economic factors.

The GDDKiA has detected some problems in this stage.

First, there are still uncertainties regarding risk assignment. Second, the Administration has not enough information of foreseeable results of projects. This is probably due to some imperfections of feasibility studies. Additionally, it is claimed that staff involved in evaluation of proposals and contract negotiations would need some further training.

On the whole it is agreed that the entire procedure takes too long\(^\text{117}\). The GDDKiA is eager to improve the process.

The bidding stage may turn out to be even more time-consuming and more costly in the case of tenders for projects that will be governed by the new Act on PPP. The Act on PPP, unlike the Act on Toll Motorways does not have its own specific bidding procedure regulation. The rules established in the Public Procurement Law apply in principle to tenders of PPP projects governed by the Act on PPP. It means that for PPP projects one of three procedures, i.e. open procedure, restricted procedure or negotiated procedure with publication, can be applied. The Act implicitly suggests the use of the latter through lessening (in Art. 14.1) the usual restrictions on the use of this procedure. An example of these restrictions that do not apply to PPP contracts are the

\(^{117}\) see section I.5.3
conditions for the use of negotiated procedure that are enumerated in the Article 55 of the Public Procurement Law\textsuperscript{118}. This way the Polish legislation tries to start at the point where the British experience has reached in the last 15 years.

Apart from the problem of high costs, as well as time and consultant support required to apply the negotiated procedure, the application of Public Procurement Law rules for PPP tenders may cause significant delays in the PPP procurement due to the problem of appeals that are very often lodged by the bidders that lost the tender\textsuperscript{119}.

Awarding entities might put into practice simpler selection procedures. Competitive dialogue is too hard to be applied by Polish Administrations. The restricted process offers a good chance for a previous “cut” in the pre-qualification stage based on potential bidders credibility (experience and financial consistency), to reduce the technical and financial design uncertainties and, at the same time, misleading negotiations.

As far as the evaluation of the characteristics of the contractor, and particularly its economic, technical or financial credibility are concerned, the Act on Toll Motorways and the National Road Fund, permits to consider economic and financial standing of the bidder as well as technical and management skills to build and operate a motorway. Also the Article 14.1 of the PPP Act permits the consideration of technical and financial features of the bidders to evaluate the offers, which is generally forbidden by Article 91.3. The same solution was chosen in the Public Procurement Act for public works concessions - the Article 119 exempts them from the scope of application of the Article 91.3. This move allows taking into consideration some intrinsic characteristics of bidders closely related to the credibility and entrepreneurial strength of the tenders to select the best offer. This is a good solution, as reliable offers delivered by international skilful companies should be

\textsuperscript{118} 1) During the prior award procedure under open or restricted tendering no tenders have been submitted or all the tenders have been rejected and the original terms of the contract are not substantially altered;
2) In exceptional circumstances, where the object of the contract is works or services, the nature of which or the risks attaching to them do not permit prior pricing;
3) The specific characteristics of the services to be procured cannot be established in advance in such a way so as to enable the choice of the best tender;
4) The object of the contract is works carried out purely for the purpose of research, experiment or development, and not to provide profits or to recover research and development costs incurred;
5) The contract value does not exceed the equivalent in PLN of EUR 60 000.

The same solution was chosen in the Public Procurement Act as far as public works concessions are concerned. For public works concessions award Article 118.2 states the resource to the negotiated procedure with publication and excludes the list of conditions set for its application by Article 55.

\textsuperscript{119} This problem has been commented on in the section I.1.4.
stimulated. The credibility of potential private partners in the case of long-term contracts for capital-intensive projects of public interest is not less important than the economic offer.

I.5.2. TENDERING PROCESS AND CONCESSION AGREEMENT NEGOTIATIONS – PAST EXPERIENCES

The experiences of Poland with motorway concession tendering are quite interesting and confirm that this stage may be one of the biggest weaknesses of the system.

In June 1995 the first tendering was announced for adjustment for toll collection and operation of Katowice-Kraków section of the A4 motorway (61 km). The ABiEA was assisted by Europistas and Scott Wilson Kirkpatrick in the tendering preparation process and negotiations. Three consortia – GTM Entrepose, Autostrada Konsorcjum Drogowo-Mostowe S.A. and Stalexport S.A. - were competing for the contract. Finally Stalexport S.A. was qualified to the final stage. The concession was awarded to this company in September 1997 (after 27 months from the start) and adjustment works started in October 1998 (after 38 months).

The second tendering was announced in September 1995 for construction and operation of the whole Świecko-Stryków section of A2 motorway (362 km). Initially seven consortia were interested, but only three, Euroute Polska S.A., Autostrady S.A. and Autostrada Wielkopolska S.A, were qualified for the second stage, although - according to the NIK – five of them scored similar number of points. What is more, the threshold for qualification to the second stage was established after opening the proposals. Technical Assistance to the ABiEA in the tendering preparation, proposal evaluation and negotiations was provided by HDR International Inc. According to the NIK report from 1997\(^{120}\), the consultant’s opinion on submitted proposals was rather negative. Information provided in the proposals was regarded insufficient for a correct election of the best offer. Among other things, none of the proposals included a concrete financial offer, nor construction, maintenance or operation costs. In both proposals traffic and income assumptions were unclear. Moreover, they required modifications of road location decisions and were in some respect inconsistent with the Request for Proposals and the Toll Motorway Act. Both offers assumed that a key component of financing would be an EBRD loan and the EBRD made its participation dependent on objective and clear election of a concessionaire. Finally, the consultant

\(^{120}\) Implementation of the Act on Toll Motorways and the governmental motorway construction programme, Supreme Chamber of Control, 1997 (Realizacja ustawy o autostradach płatnych oraz rządowego programu budowy autostrad w Polsce, Najwyższa Izba Kontroli, 1997).
recommended to the Administration to request additional explanatory information from both consortia. It also stated that it would be advisable to increase competition in the tendering in order to minimize potential subsidies for the concessionaire that might turn out to be indispensable. In spite of this, in February 1997 the proposal from Autostrada Wielkopolska S.A. was selected as the best offer, sufficient for signing a satisfactory Concession Agreement. One of the main points of the justification of this decision was the conviction of the Tender Commission about the ability of the consortium to finance the project without subsidies and State Treasury guarantees for loans. This conviction was based on a consortium’s declaration. It is worth mentioning that similar declaration done by one of the rejected companies scored less points in the pre-qualification stage and the financial plan submitted by Autostrada Wielkopolska S.A. included only financing of construction costs, without taking into consideration operation costs. The Concession Agreement with Autostrada Wielkopolska S.A was finally signed in September 1997. The whole process, from the tender announcement to the signature of the Concession Agreement took 24 months. Soon Autostrada Wielkopolska S.A. being unable to obtain financing resigned from one of motorway sections (Konin-Stryków) it had been awarded.

The Concession Agreements for both above-mentioned motorways were negotiated by two negotiation teams that consisted of ABIEA employees, supported by national and foreign consultants. It was planned to include representatives of the Legal and Financial Departments of the Ministry of Transport and Maritime Economy. However, they did not participate in the negotiations from the beginning. Consequently, as the Agreements included so called Support Mechanisms for the first years of operation (subsidies and State guarantees), both drafts were rejected by the Minister. New versions were drafted in hurry in order to meet deadlines. Again the Directors of both Departments had little time to analyse the Agreements and decided not to accept them fully.

The tendering for the last concession that has been awarded in Poland up to now was announced in December 1995. It included construction and operation of the Gdańsk-Toruń section of A1 motorway (152 km). The interest of the private sector was relatively low. In private sector’s opinion, this project was not profitable enough to be executed as a concession without public support. From three consortia only two\textsuperscript{121} - Euroute Polska S.A. and Gdańsk Transport Company S.A. – met legal and tender requirements for pre-qualification. Only the latter passed to the second stage of the tendering, which means that the subsequent award of the concession to this company was done

\textsuperscript{121} The Decree on specific conditions for the motorway concession bidding procedure (Rozporządzenie Ministra Transportu i Gospodarki Morskiej z dnia 12 maja 1995 r. w sprawie szczegółowych zasad postępowania przetargowego na udzielenie koncesji na budowę i eksploatację autostrad płatnych, Dz.U. 1995 nr 58 poz. 306), which was in force at that time, required participation of at least three consortia in the pre-qualification stage.
without any competition. The awarding authority did not cancel the bid although there was such possibility and although it was known that the project could not be financed without State Budget participation. Nevertheless the authority believed that it was possible to negotiate a concession agreement that would meet the tendering requirements. After the award it turned out that there was no agreement between the Administration and the concessionaire on basic financial parameters of the contract. According to NIK, inter- and intra-ministerial collaboration lacked in the Concession Agreement negotiation process. A draft Agreement was initialled by the Minister of Infrastructure and GTC S.A. in August 2002, but could not be signed due to objection of the Minister of Finance. The Department of Financing and Economic Analysis of the MI also objected to the Agreement. The main concerns were related to the financing model (guarantees required for the project), construction and maintenance costs and clauses that were incompatible with Polish law. All in all, the negotiations took seven years and finally in August 2004 a Concession Agreement was signed. The financial close was reached in the summer 2005. The concessionaire plans to finish construction works in November 2008 after 13 years from the start of the tendering announcement.

The 187 km long Wrocław-Katowice section of the A4 motorway was built in a traditional method (the section Wrocław-Opole was finished in 2000). The first tendering for the concession for adjustment and operation of the whole section was announced in June 1997. Just like in the case of the A1 motorway the interest of the private sector was very low. The deadline for submission of bids had to be postponed twice in order to find three interested consortia, which was a legal requirement at that moment. Finally, the bidding procedure was cancelled in February 1999. The Minister of Transport and Maritime Economy justified this decision by the intention to re-launch the tendering under amended Toll Motorway Act. The bidding procedure was re-launched in 2000, but again with no success. In consequence, the State incurred additional expenditures on some indispensable adjustment works and the 225 million EUR EIB loan repayments, tasks that were supposed to be assumed by a concessionaire. The bidding procedure was re-launched for the third time in 2004. Two companies Autostrada Południe S.A. (consortium Budimex S.A., Cintra S.A.) and Stalexport Autostrada Śląska S.A. submitted proposals and both of them were considered equivalent and admitted to the negotiation stage in the second half of 2004. Current status of the procedure is not clear.

It is striking that no new tenders have been launched in Poland between 1997 and 2005. Secondly, the number of interested consortia seems to be relatively low. In consequence, there is

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122 On 8 July 2005 the GDDKiA published an invitation for pre-qualification for the tender of a new construction and operation concession of the 181 km long Stryków-Pyrzowice section of the A4 motorway.
no competition between consortia, what in turn impedes the consecution of the final goal of the bidding procedure, i.e. election of the technically and economically most favourable offer.

It is also worth mentioning that, according to the study entitled *Public attitude towards the need of bearing costs for using the road infrastructure in Poland by the individual users analysis*, the GDDKiA tenders are perceived by the general public as little transparent and suspicions of dishonesty are not rare. In this sense, it seems strange that the results of bidding for construction and operation of public infrastructure are considered as confidential. This issue certainly does not arouse confidence of potential investors and may be a dissuading factor for participation in next tenders, which – due to limited competition - will not facilitate consecution of an optimum solution by the Administration.

These are the reasons why simplification of the procedure and assurance of more transparency belong to the most important tasks for the Polish Road Administration.
I.6. CONCLUSIONS

Although Poland has had some experience with private participation in infrastructure development, Polish infrastructure provision system is still based on a traditional model. As governmental abilities cannot be taken for granted, all kinds of modifications of the system will require learning and possibly a change of mentality in the Administration. This can be done not by making fine legislative frameworks but by dealing with concession projects and awarding concessions. To make it possible, availability of mature projects ready to be awarded is an indispensable prerequisite.

We think the following conclusions reflect the main problems that have to be solved in order to lay the foundations of the Polish PPP/concession system:

- One of the main problems of the institutional framework for PPP is an insufficient development and delimitation of responsibilities and competencies of all entities. In this sense, not only more staff, training or a complete legal framework are necessary, but also more coordination between entities, better definition of competencies and responsibilities, simplification of the implementation process in order to gain time and make easier the final decision and stimulation of the cooperation within and between entities.

- According to some information from international financing institutions, project preparation standards in Poland often still do not meet standards needed both for EU funding and IFI financing as well as for application of PPP/concession system. Before opting for private participation, improvement in this area should be done. Good quality cost-benefit analysis, informative studies, environmental impact assessments and economic and financial feasibility studies are indispensable for all projects.

- In order to achieve a transparent PPP/concession system a regulatory organisation should be set up on sensible criteria: functional independency, professional human resources policy, no interferences with the political and contracts awarding line and with close relations to budgetary and public finance entities.

- Tolls should be legally treated in a different manner and put in the hands of the regulatory entities. Profit sharing between the Government and the concessionaire if combined with prior financial participation of the Government in the first years of the concession may be a useful instrument. Nevertheless, it may also turn out to be inefficient if the concession is not structured well enough.
• Award of a PPP contract is not a political matter. It is an administrative decision based on objective and transparent criteria. However, the application of a PPP/concession system for provision of infrastructure does constitute a political decision of the Ministry of Infrastructure, which should be based on technical criteria provided by the GDDKiA. The final political decision should be conferred to the Council of Ministers, on the basis of a proposal of the Ministry of Infrastructure.

• Awarding entities might put into practice simpler selection procedures. Negotiated procedure is too hard to be applied by Polish Administrations. The restricted process offers a good chance for a previous “cut” in the pre-qualification stage based on potential bidders credibility (experience and financial consistency), to reduce design uncertainties and, at the same time, misleading negotiations. Simplification of the bidding procedure would also allow the Administration to save time. Road project procurement in high-developed countries normally takes up to 8 years (approximately 4 years for project preparation and other 4 for implementation). PPP/Concession system permits to reduce this time to about 6 years. In contrast, in Poland concessions implied very long procurement, mostly due to long-lasting negotiations.

• The solution proposed by INECO will include a reduction of the third phase of the negotiated procedure (negotiations of the contract for construction and operation or only operation of motorways) to only few clauses of economic content, with decisions that could be taken in real time with the aid of a financial simulation model elaborated ad hoc for the project. Logically, this would require better definition of projects.

• The initiative from interested enterprises to promote PPP projects is worth to be encouraged. We could consider the option to fashion a specific procedural step to express the intention by any entrepreneur of getting into the PPP route. The specification of the documentation package the promoter must deliver together with the application should be helpful. This would also simplify the planning burdens public entities have to bear and would also tighten the links with the private sector to identify viable projects. Needless to say, the initiative will be subject to public inquiry and redirect later on through the pertinent tendering process.

• Step-in rights for creditors must be clearly recognised by the law, including the option to automatic succession in the concessionaire contractual position by lenders.
• Poland faces a great challenge to be able to absorb the levels of EU funding for which it is eligible. A good way to meet this target and make the infrastructure projects profitable could be to blend EU grants with private participation. The EU does not prevent the use of private financing or any other, as a means of co-financing infrastructure development. However, most probably it will be not possible to eliminate totally national public component of co-funding. Nevertheless, it can be reduced substantially. It should be also born in mind that such hybrid projects probably never will constitute the easiest way of executing projects due to different characteristics and requirements of both financing sources.

• But for this, all activities regarding preparation of projects have to be improved so that a sufficient number of mature projects (in accordance to the EU regulations) is supplied on time.

The INECO Team deems strongly advisable to counterbalance the negative inertia created by previous experiences in public works concessions in Poland with well-fashioned, profitable - both financially and socially - projects. A portfolio of mature projects that are ready to be executed is indispensable, first, to make the right choice of projects destined to be implemented with private participation and, second, to be able to absorb the EU Funds. Once the first package of viable projects has been launched, governmental skills come along with the support of experienced consultants and, at the same time, the web of originally isolated projects starts to make sense as a system.
II. RECOMMENDATION OF AN APPROPRIATE PPP FRAMEWORK FOR USE IN POLAND AND IDENTIFICATION OF POTENTIAL CONCESSION PROJECTS
II.1. PROPOSED CONCESSION/PPP BIDDING AND AWARDING MODEL

Apart from the macro-benefits resulting from the increase of the investment potential of the public sector, private participation in infrastructure provision also contributes more efficiency and innovation, the private sector’s expertise and innovation capacity. However, private participation itself will not ensure economic efficiency. It is clear that it can be only achieved under conditions as similar as possible to the conditions of perfect competition. Nevertheless, motorways are pieces of infrastructure that exemplify natural monopolies. Because of their large fixed costs and economies of scale, direct competition in the market is not feasible in the infrastructure provision. Even so, under certain conditions, competition can be created for the market (through concessions) where companies bid for the right to provide a service that will have no competition in the market. In such a case, due to the lack of direct competitive pressures on the firm to ensure efficiency, the concession bidding stage is a critical moment in the whole life-cycle of the project when the economic and financial conditions of the contract can be optimised from the administration’s as well as from the users’ and tax-payers’ point of view. Once set, the conditions will be binding for both parts until the end of the contract period. Therefore, it is essential to create the best conditions for strong competition in the bidding stage on one hand, and for appropriate monitoring and enforcing of the terms of the concession contract on the other.

In this chapter recommendations on how to create a competitive concession market are made. Chapter 2 presents a strategy of creation of a competitive concession/PPP market that allows making use of the proposed model. It also explains how to ensure high quality of services provided by a private partner and introduces changes that need to be made in the institutional framework for appropriate contract awarding as well as for monitoring and enforcing of its provisions.

II.1.1. DIRECT COMPETITION MODEL

Having taken into consideration the need for sufficient competition in the PPP/concession bidding process as well as the Polish experience in concession tendering, we recommend reordering the procedures applied in Poland to award such contracts. We suggest opting for direct competition system, in which:

- Open tendering procedure is used.
• The PPP/concession model is precisely defined by the administration in advance.

• A larger number of bidders compete against each other.

• Economic and financial quantifiable and clear-cut parameters of the PPP/concession agreement are used as evaluation criteria of the proposals. Excessive complexity of the proposal evaluation system should be avoided.

• Evaluation criteria are established and disclosed in advance by the awarding authority.

• The concession/PPP contract is awarded directly to the company whose offer has been evaluated as the best one based on evaluation criteria.

• The proposals of the bidders are binding for them and cannot be changed or negotiated after the best offer is chosen.

• Financial close is normally not required before the concession/PPP contract award.

Such a model has a series of advantages:

• It ensures more competition, which in turn results in better conditions for the awarding authority, the users and the taxpayers.

• It provides for comparability of submitted proposals.

• It provides for more objective bids evaluation and more certainty as far as the election of the best offer is concerned.

• It requires less time for the election of the private partner than the negotiated procedure.

• It is also cheaper for the bidders as well as for the administration.

More competition – higher Value for Money

The public interest in the PPPs is fundamentally concerned with getting the best option for investment and operating a service that is related to it. The bidding procedure must be designed first and foremost for this purpose. It is clear that the natural interest of the private partner is to maximize his profits. Restriction of the competition allows to the bidder to impose terms as favourable as possible for him. Negotiations limited to one preferred bidder create therefore perfect
conditions to reach an agreement in which the economic and financial conditions are skewed to the interests of the private partner. This will be the case present especially in Poland where the awarding authorities are less experienced than their counterparts in other countries with longer PPP experience record. In spite of that, they will have to face the negotiations with private companies that have greater knowledge and technical, legal and financial expertise and better access to specialized assistance. It may be naive to think that such negotiations will be used by the bidder to develop innovate solutions adjusted to the needs of the contracting body. In such case, the main objective of the bidder will be to improve the contract conditions for him and therefore it is the contracting body who will have to take care of its own needs and to provide a framework that allows covering them at the least possible cost.

Conversely, in the model that is based more on broad competition, the whole effort of bidders is directed to propose better conditions than the opponents will do within the framework established by the administration. Unlike in the negotiated procedure with limited competition, in the direct competition model bidders have no possibility to put all effort to improve their position, and exploit the information asymmetry or possible omissions or failures by public authority.

The advantage of stronger competitive tension does not only refer to competition between bidders. Thus, if financial close is not required from bidders before submission of their proposals, the use of advantages of a competitive market can be made also in the case of project’s financing. After the concession/PPP contract is awarded, the winning consortium can negotiate the financing package with all possibly interested financial institutions. The financial close has to be reached within a period specified in the bidding documentation (e.g. 6 months). If the financing closure were required before the submission of proposals, financial institutions would be not likely to offer their best conditions due to a high number of bidders competing for financing.

In any event, bidders should collaborate with financing institutions in the process of preparation of proposals in order to assure a realistic financing structure. All bidders should justify and provide in their proposals guarantees (in form of indicative letters of support from financial institutions) that sufficient financing for the project is assured. Such guarantee should cover the whole period starting from the signature of the Concession Agreement till completion of all investments and financing according to the proposal. Nevertheless, the requirement of such guarantees does not mean complete arrangement of the financing package before submission of bids. Financing conditions can be improved by the winning consortium or even arranged with other financial entities within the period between contract award and the deadline specified in the bidding documentation.
Comparability of the proposals

It is clear that the natural interest of the private partner is to maximize his profits. Limiting the competition strengthens the bidder’s position and allows him imposing terms as favourable as possible for him. But even assurance of strong competition does not guarantee that finally the best solution will be chosen. It may happen that proposals submitted by bidders differ a lot from each other as regards technical solutions and economic conditions of the contract. Such differences may include technical parameters of the infrastructure, risks to be assumed by the concessionaire and those to be retained by the State, concession term, toll structure, toll levels and toll adjustment formulae, public support required to make the project feasible, minimum traffic, income, or return rate guarantees, sovereign credit guarantees for lenders, etc. Finally, it may result to be impossible to compare various completely different solutions and determine which one is really the best one. Therefore, it is indispensable to ensure comparability of proposals.

In order to ensure comparability of proposals, the first step to be taken by the administration is to define the project’s specifications in sufficient detail. The needs to be satisfied by the project must be assessed. The scope of works to be carried out and a specification of outputs to be provided by private partner have to be determined. Next, a project has to be studied carefully by the administration in order to determine its technical and financial feasibility as well as a social benefit. Then taking into consideration the determined requirements towards the private partner and possible conditions that make a project feasible and socially profitable, the Concession Agreement conditions that are not to be negotiated and those subject to be proposed by bidders must be clearly defined. Subsequently, bidding documentation including fixed Concession Agreement clauses and those to be proposed by the bidders should be prepared. This way all crucial conditions of the Concession Agreement stipulated in the bidding documentation will have to be accepted by the bidder and only a small margin of arrangements will be left to be proposed by bidders. However, this margin must be wide enough to detect significant differences between offers and to allow important improvements of the project by bidders, if there is a possibility that they can add sufficient value for the administration and users. On the other hand, this margin must be narrow enough so that the comparability of proposals does not get lost.
More transparency

Bids evaluation must be based on clear-cut quantifiable variables so that there is no margin left for discretionality or arbitrarity in the process. In this way a complete and undisputable comparability of proposals and at the same time more transparency of the bidding process is achieved.

The election of evaluation variables depends on the infrastructure policy of the government, characteristics of a project, needs it has to satisfy, its financing possibilities, etc. In particular the variables may include:

- toll structure and rates;
- concession period;
- public financial support for the concessionaire (which can be co-funded by the EU Funds);
- payment offered by the concessionaire for transfer of assets or rights to be used for the provision of services that are subject of concession;
- present value of revenues;
- assets reversion price (especially in the case of short term PPP/concession contracts);
- minimum traffic, income, return or any other State guarantee;
- capitalization ratio, solvency ratio, disbursed capital;
- project financing guarantees (from financing institutions).

The choice of evaluation variables should also comply with priority objectives of the transport, infrastructure or infrastructure charging policy of the State. If the State’s priority is to homogenize user charges for the use of the whole network, variables related to tolls shall be fixed in advance. If the State wants to limit its contingent liabilities, sovereign guarantees for credits shall be excluded from the bidding documentation and the bidding criteria.

When deciding which criteria to choose to evaluate proposals, it is convenient not to opt for variables that are interdependent. For instance, evaluating bids on the basis of proposed concession period, tolls and public support creates a problem of lack of comparability of bids as all these variables are interrelated and the trade-offs between them may be difficult to evaluate. It can allow gathering by the bidders points that do not reflect real advantages of their proposals. In such
cases, it’s advisable to reduce the number of variables and to fix those that are related to the State’s clear objectives and priorities and allow the bidders to adjust other variables in their proposals.

On the other hand, the reduction of the number of bidding variables must not be excessive. It might create a danger of insufficient consideration of financial credibility, technical preparation and experience of bidders, which is also very important for the success of a project. Indeed, it is useless to award a contract to a company that proposes the best technical and financial conditions, being incapable of keeping them. Therefore the pre-qualification stage should be used to ensure the credibility of the bidders. In other words, the pre-qualification stage should be used to determine if bidders and their proposals comply with all requirements stipulated in the bidding documentation, including technical quality as well as technical and financial solvency.

**Time-saving**

It may be essential to notice that the recommended direct competition model requires less time than the alternative procurement in which the whole contractual framework may be negotiated. In the procurement model based on competitive negotiations the whole process lasts between 2 and 4 years on average\(^{123}\) and the proposed model should not require more than 6-8 months\(^{124}\). This is due to simplification of the procedure (one stage instead of four: Pre-qualification, Tender, BAFO, Preferred bidder), disclosure of the project before the start of the tendering procedure and no necessity to negotiate all Agreement clauses with the preferred bidder. From our point of view, such reduction of procurement time might have a very positive impact on the perception of PPP system among road users, administration, politicians, potential bidders and financiers, especially if we bear in mind that the Polish experience with lengthy Agreement negotiations is generally perceived as quite upsetting.

\(^{123}\) Rubio de Cárdenas N. (Ferrovial Infraestructuras S.A.), presentation for “Jornadas sobre financiación y gestión de infraestructuras en Centro América y Caribe”, 2003.

\(^{124}\) This timeframe includes only the bidding stage. Preparatory works are not included. For a complete breakdown of time required for preparation and launching of road projects in Spain see appendix 8. See also table II.1.2 for information on time required for each step in the suggested bidding process.
Lower transaction costs

The experience shows that negotiating PPP deals involves high transaction costs that finally at least partially offset the PPP benefits at micro-level and significantly reduce the attractiveness of this way of procurement.

The costs incurred in the preparation of bids and negotiation with the administration finally become sunk costs for the bidders that fail to win. Thus, it must be stressed that specialized legal, technical and financial support required during such negotiations by the administration as well as by bidders, is extremely high and normally reaches sums in the order of € 3 millions - € 12 millions. In addition, the total cost of employing advisers to negotiate terms of a complicated contract is so high that it can impede effective competition as only a small number of competitors can afford them. A perspective of sunk negotiation costs may act as a deterrent even for bidders with enough economic potential. The final result - reduced competition does not favours good deals neither for the administration, users nor taxpayers.

The direct competition model means lower costs for the administration thanks to shortening of the procedure, lack of necessity of exhaustive negotiations of the Concession Agreement and increased comparability of proposals. The estimated costs of such procedure are sums in the order of hundreds of thousands of euros and should not exceed € 1 million. Nevertheless, it should be remembered that the appropriate preparation of the project before starting the bidding procedure may require advisory and consultant services whose overall cost could reach approximately up to 2-3% of the total project construction cost.

Table II.1.1 presents a summary of differences between procurement model based on negotiations and recommended by INECO direct competition model.

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Table II.1.1. Negotiated and direct competition model – summary of main characteristics.

<table>
<thead>
<tr>
<th></th>
<th>Procurement based on negotiations</th>
<th>Direct competition model</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negotiations of the contractual framework</td>
<td>Extensive</td>
<td>Inexistent</td>
</tr>
<tr>
<td>Number of possible bidders</td>
<td>Low</td>
<td>High</td>
</tr>
<tr>
<td>Efficiency of the winning proposal (in terms of IRR)</td>
<td>Low</td>
<td>High</td>
</tr>
<tr>
<td>Value added by the PPP regime</td>
<td>Low</td>
<td>High</td>
</tr>
<tr>
<td>Cost of risks assumed by the private partner</td>
<td>High</td>
<td>Low</td>
</tr>
<tr>
<td>Comparability of proposals</td>
<td>Difficult</td>
<td>High</td>
</tr>
<tr>
<td>Grade of objectivity in the evaluation of proposals</td>
<td>Low</td>
<td>High</td>
</tr>
<tr>
<td>Procurement process duration</td>
<td>Long (2-4 years)</td>
<td>Short (6-8 months)</td>
</tr>
<tr>
<td>Procurement costs</td>
<td>High (€ 3 M - € 12 M)</td>
<td>Low (€ 0.5 M - € 1 M)</td>
</tr>
<tr>
<td>Financial close requirement</td>
<td>Obligatory</td>
<td>Usually not required</td>
</tr>
</tbody>
</table>

II.1.2 RECOMMENDED BIDDING AND AWARD SCHEME

We suggest the use of the direct competition model presented in the section II.1.1 as the most suitable for implementation of all three projects recommended in chapter 4. We believe that its numerous virtues such as: transparency, agility, moderated costs and relatively high efficiency in terms of overall project costs for the public sector and infrastructure users makes it the most reasonable solution.

In particular, we recommend using a bidding mechanism that involves, qualification of bidders and actual evaluation of proposals, preceded by following activities:

1. **Project preparation.** - In accordance with the recommendations made in the section II.1.1, the project should be thoroughly prepared by the administration. Firstly, to provide the awarding authority with sufficient information on conditions that they may expect from the market. Secondly, to reduce unnecessary risks. Finally, to build a solid base for election of the private partner. Complete information on the project characteristics and minimized legal, administrative and environmental uncertainties regarding the project should reduce the necessity of post-bid negotiations.
2. Distribution of information on the envisaged project, including its technical parameters, envisaged funding model (real tolls [including their structure and maximum levels], shadow tolls, level of public aid [that can be subsequently co-funded with EU Funds] in the construction period, etc.) to potentially interested bidders.

3. Receiving feedback on the project from potential bidders and its possible modification focused on improvement of its functionality, costs and attractiveness for the private participation, but still safeguarding the public interest. - This can be done during a “road show” which serves for presentation of the project to potential bidders and direct discussion of its details. The objective of this activity is to ensure that the technical specifications and service requirements are viable, to detect which parts of the project require improvements and take into account the expectations of private investors. Such adaptation is necessary in order to attract to the bidding process as many participants as possible to make the competition for the project is more intensive. Additionally, the probability that any problems may appear in the concession award stage is significantly reduced. Finally, if all contentious or omitted issues are detected in this stage and incorporated into the bidding documentation and Concession Agreement, the necessity of post-bid negotiations can be practically eliminated.

4. Public, formal notification of the intent to procure a PPP project including a request for proposals.

5. Distribution of possibly complete information on the project, including bidding documentation, draft Concession Agreement (both updated after receiving potential bidder’s comments in the activity No 3), preliminary studies results (demand projections etc.), environmental impact studies, preliminary project, etc.

In the actual bidding process we recommend to implement a two-phase procedure that involves a sequential evaluation of the technical (7) and financial proposals (8), preceded by qualification of bidders.

6. Qualification phase. The objective of this phase is to ensure that the winning consortium has the technical and financial capacity to operate the concession successfully. Consortia whose reputation, experience or financial standing is deemed not sufficient to guarantee the success of the project, are to be excluded from the procedure at this stage, but always in accordance with the criteria disclosed in advance in the bidding documentation. The qualification criteria can refer both to quantitative (e.g. minimum required equity of
companies that form a consortium, similar operations in comparable markets, financial strength of consortium members, etc.) and qualitative aspects of the bidders (e.g. cost efficiency in other projects [both construction and operation]).

We recommend to defer qualification until the actual bidding stage and not to carry it out earlier as a separate bidding stage (pre-qualification). Following this way, bidders will have to prove that they meet established qualification criteria at the time of submission of proposals. In this approach, the interested companies will have more time to form consortia. What is more important, putting qualification and actual bidding together contributes to the increase of competition in the process. This measure will allow avoiding a situation that already occurred in Poland in previous concession tenders where only one or two consortia were pre-qualified to the actual bidding stage, which made it impossible to maintain competitive pressure on bidders throughout the process.

7. **Evaluation of technical proposals.** As all participants bid on the basis of the same technical specifications prepared initially by the administration and then fine-tuned in discussions with potentially interested investors, the technical evaluation stage should be conducted on a pass/no pass basis, i.e. the compliance or non-compliance of the proposals with the technical specifications should be evaluated.

This way, only financial proposals of those bidders:

- whose technical offers comply with the technical specifications of the project and

- who fulfil all requirements regarding financial and technical capacity (evaluated in the qualification phase)

are evaluated.

8. **Evaluation of financial proposals.** The concession is awarded to the bidder with the best financial proposal.

In accordance with our recommendation from the section II.1.1, we would like to emphasize that it is advisable to keep the system of the evaluation of proposals as simple as possible in order to ensure transparency, comparability of proposals and automaticity of award. In these sense, it is not advisable to evaluate bids on the basis of too many variables. On the contrary, it is better to concentrate on those variables that are not pre-defined by the infrastructure policy and can represent a clear economic advantage of one
offer over the rest. Moreover, if more than one variable are used to evaluate the bids, it makes no use to choose variables that are interdependent due to the fact that the trade-offs between them are often difficult to evaluate and the bids become less comparable and the procedure less transparent. The necessity of application of complicated formulae that are difficult to justify, subjective judgements and qualitative evaluations made by the awarding authority make the whole process less effective and more opaque.

Having regard to the facts that:

- some of the recommended projects involve public aid for investment,
- some of the recommended projects require costly compensations for the use of motorways by vehicles legally exempted from tolls,

we recommend using:

- the total amount of public support (which subsequently can be co-funded from the ERDF, the CF or the TEN-budget line), and/or
- the concession period

as the bidding variables. Adjusting the financial equilibrium of a PPP deal based on the amount of public aid is the best way to ensure that:

- the public support is used efficiently, i.e. only the amount required to ensure financial feasibility of the project is used,
- the return from the project for the private partner is reduced to the minimum (the most efficient proposal in terms of Value for Money is chosen),
- economic efficiency in terms of efficient investment and operation is promoted,
- socially important variables such as tolls can be structured the same way countrywide and do not depend only on demand forecasts.

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126 If the total amount of public aid is used for the evaluation of bids, it is a good idea to enable submitting bids also with “negative numbers”, i.e. fees paid to the government for the concession award. This way, if the awarding authority underestimates the project feasibility by mistake (despite having performed detailed feasibility studies) the efficiency of the winning proposal will be ensured.
Logically, the rest of economic variables, including toll rates charged to passenger cars users and those paid by the KFD, should be fixed in the bidding documentation and Concession Agreement draft.

The whole bidding and award scheme recommended by the INECO Team is summarized in the table II.1.2.

The Best and Final Offer negotiation stage (9) is redundant in the recommended direct competition model as the whole Concession Agreement is prepared by the administration in advance, disclosed to potential participants during initial discussions, fine-tuned according to the suggestions of the private investors and again delivered to all bidders together with the bidding documentation. Finally, after the winning consortium is chosen, the draft Concession Agreement is to be completed with clauses whose content was subject to bidding.

Whereas the objective of the Best and Final Offer negotiation stage is to clarify issues that arise as a result of incompleteness of the bidding documentation, the experience – and especially in Poland – shows that this phase can be lengthy and sometimes can be even abused by the bidders. First, if the winning consortium can change the basic parameters of the deal and especially those that were used as evaluation variables or were established in the bidding documentation, the reasonableness, efficiency and transparency of the whole process become questionable. Second, if the bidders expect that it will be possible to negotiate extensively almost all conditions of the Agreement after the best offer is chosen, they will tend to submit overly optimistic bids only to win the bidding. This undermines the reasonableness of the bidding stage and creates impression of possibility to submit unrealistic proposals without any consequences.
Table II.1.2. Summary of the bidding and award schemes recommended for three pilot projects.

<table>
<thead>
<tr>
<th>Phase</th>
<th>No</th>
<th>Stage</th>
<th>Evaluation</th>
<th>Time required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before bidding</td>
<td>1.</td>
<td>Project preparation (including preparation of feasibility report,</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>environmental reports and draft bidding documentation)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2.</td>
<td>Diffusion of information on potential project</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3.</td>
<td>&quot;Road show&quot; – further promotion of the project and getting feedback</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>on it from potential investors</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td>4.</td>
<td>Public notification of the project – Request for Proposals</td>
<td>n/a</td>
<td></td>
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<tr>
<td></td>
<td>5.</td>
<td>Distribution of bidding documentation and reception of proposals</td>
<td>n/a</td>
<td>3 months</td>
</tr>
<tr>
<td>Bidding and</td>
<td>6.</td>
<td>Qualification of bidders [pass / no-pass test]</td>
<td>Technical capacity:</td>
<td>2-4 months</td>
</tr>
<tr>
<td>award or</td>
<td></td>
<td></td>
<td>- similar operations in comparable markets,</td>
<td></td>
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<tr>
<td>After bidding</td>
<td>7.</td>
<td>Evaluation of proposals</td>
<td>- cost efficiency in other projects.</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>Technical proposals [pass / no-pass test]</td>
<td>Financial capacity:</td>
<td></td>
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<td></td>
<td>8.</td>
<td>Financial proposal</td>
<td>- financial strength of consortium members,</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>- minimum required equity of companies that form a consortium.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>9.</td>
<td>Best and Final Offer negotiations (REDUNDANT)</td>
<td>- Compliance of the proposals with technical specifications</td>
<td></td>
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<td></td>
<td></td>
<td>- Compliance of the proposals with technical specifications</td>
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<td></td>
<td>10.</td>
<td>Award</td>
<td>Least amount of required public aid</td>
<td>n/a</td>
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<td></td>
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<td>Least compensation for use of the motorway by exempted</td>
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<td></td>
<td></td>
<td></td>
<td>vehicles (vignette-payers)</td>
<td></td>
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<tr>
<td></td>
<td>11.</td>
<td>Financial closure</td>
<td>n/a</td>
<td>up to 6 months</td>
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</table>
We strongly believe that the recommended bidding and award scheme suits the necessities of Poland in the field of private provision of infrastructure. It employs competitive forces for optimisation of efficiency of provision of infrastructure. It permits the State to set the toll rates according to the adopted infrastructure policy and to harmonize them countrywide, so that the prices paid by users are not conditioned only by demand projections, they conform to the requirement of social equality and their dissuasive effect can be reduced. Finally, the public aid component, which is the main bidding variable, can be afterwards co-funded with the ERDF, the CF or the TEN budget line which permits efficient use of EU Funds for the infrastructure development and reduces the national public contribution required for making some projects financially feasible.

II.1.3. COMPATIBILITY OF THE PROPOSED CONCESSION/PPP BIDDING AND AWARDS MODEL WITH POLISH LEGISLATION

‘General’ vs. ‘special’ legislation as a juridical interpretative pattern. What does it mean?

Some passages of the INECO’s Part I Report put emphasis on the overlapping panorama offered by the Polish statutory regulation for private sector participation by contract in road construction and operation. In some way, this is a worldwide situation: legislation makers not always match the standards of neatness and compatibility between what they are producing and the existing statutes. This gives place to a wide range of doubts to know what is effectively in force or not and which regulation must be applied to a particular case. Lawyers manage those problems with the help of interpretation conventional tools.

The lex posterior one is quite simple: any new Act revokes the former. This can be whether explicitly said by the derogative Section or elucidated by means of juridical reasoning. The lex posterior criterion is put into practice just when the provisions of the new or the forthcoming legislation confront the existing one in terms of incompatibility, that is, when the contents of one and the other lead to opposite meanings for the same issue.

But juridical interpretation must deal with subtler problems in daily legal systems functioning. What happens when the defined scope of an Act does not intersect the scope of another one, at least directly? This is the so-called onion effect: legislation is generally organized as a regulatory

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127 See sections I.3.1 and I.4.1.
apparatus in different layers from the material viewpoint. In more professional wording, we face the game of general-special legislation. Basically, it helps to answer two questions:

a) When does the general legislation yield or not in favour of the special one?

b) How to ascertain the degree of prevalence of the special legislation in relation to the general one?

Legal practice – if we understand by this the art of giving fair and reasonable responses to social problems under Law - would be hardly useful regardless of the paradoxical situations of a living body of norms. The Law is certainly able to work in spite of the compulsive, incoherent behaviour of legislators. This problem becomes particularly acute in the public Law realm, where the administrative action must be legally backed and subject to a closer scrutiny in comparison to private bodies, but at the same time, renders even more indispensable those interpretative tools.

In brief, which rule shall be applied to a particular case to endorse governmental action, both from the formal –hierarchical- and the material viewpoint is the final result of the general-special legislation principle.

Why Public Procurement and PPP Acts might be considered ‘general legislation’ and what for?

According to most EU member States Law and EU Directives themselves, public contracts regulations are applicable to any sector of governmental activity and to any entity deemed as a contracting authority in the sense legally defined. Public procurement Law makes no sense as a whole without recognising the fact that it intersects vertically all levels of administrative relations by contract. The same conclusion is achieved on the grounds of Polish Law, as shown hereinafter.

Article 3 of the 2004 Public Procurement Act, partially a literal transcription of Article 1.9 of the 2004/18 Directive, states:

1. This Act shall apply to public contracts, hereinafter referred to as “contracts” awarded by:

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1) the public finance sector units within the meaning of provisions on public finances;

2) state organisational units not having legal personality, other than those specified in item 1;

3) legal persons, other than those specified in item 1, established for the specific purpose of meeting needs in the general interest, not having industrial or commercial character, if the entities referred to in these provisions and in items 1 and 2, separately or jointly, directly or indirectly through another entity:
   a) finance them in more than 50%,
   b) have more than half of shares or stocks, or
   c) supervise their managerial board, or
   d) have the right to appoint more than half of the members of their supervisory or managerial board;

4) entities, other than those specified in items 1-3, exercising one of the activities referred to in Article 122, if such an activity is exercised on the basis of special or exclusive rights, or if the entities referred to in items 1-3, separately or jointly, directly or indirectly through another entity, have a dominant influence over them, in particular:
   a) finance them more in than 50%, or
   b) have more than half of shares or stocks, or
   c) supervise their managerial board, or
   d) have the right to appoint more than half of the members of their supervisory or managerial board;

5) entities, other than those specified in items 1 and 2, if more than 50% of the value of the contract awarded by them is financed out of public funds or by the entities referred to in items 1-3,

6) entities, other than those specified in items 1 and 2, if the contract awarded by them is financed with the participation of funds, the allocation of which is dependant on the use of the contract award procedure provided for in this Act,
7) entities, who have been granted the works concession, hereinafter referred to as “concession”, by the entities referred to in items 1-3, insofar as they award contracts for the purpose of the execution of that concession.

2. Special or exclusive rights within the meaning of paragraph 1 item 4 shall be rights granted by a law, regulation or administrative decision, consisting in the reservation for one or more entities of the exploitation of a specific activity.

There is no doubt on the width of the Act, whose scope ranges the whole variety of entities, whether public or not, but controlled by administrative bodies, endowed with public powers or carrying out exclusive entitlements. Government by contract is the general label hanged over this strategy and statutory completed by PPP techniques. Article 14 of the 2005 PPP Act expressly remits to the “Provisions of the Act 29 January 2004 on Public contracts (Official Journal of Laws No 19, item 177, as amended)”, that “shall apply accordingly to the selection of private partners and contracts for public-private partnerships, with the exception of article 55, article 91 section 3, article 142 section 2, article 67 section 1 point 6 and 7, and article 144, in the scope in which the specification of the selection of private partners determines the change conditions or supplement of the contract on public-private partnerships, as well as article 145”.

The conclusion is quite clear: the general legislation for any operation implemented through contract by any public entity included within the category of contracting authority is constituted both by the 2004 Public Procurement Act and the 2005 PPP Act. This means that no matter the sector – roads, harbours, airports, water supply, public utilities, etc- or the governmental body involved for the compulsory application of this legal framework for contracts. Specific legislation is not set aside for this reason, simply a) it must be interpreted in accordance with the general one which prevails in the case of material conflict and b) provides guidance for the contractual outworking of the operation. Regarding the problems we are dealing with, this is a conclusion of considerable relevance, as far as it allows us to overwhelm the confusing state of the Polish legislation on road infrastructure provision, exploitation and maintenance especially in the shaping of contractual vehicle implications.

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131 On negotiated procedure with publication.
132 On the notification to all bidders of the reason for award procedure cancellation.
133 Requiring the consent by the PPO President in the cases of services contracts with more than 3-years duration.
134 On single-source procurement award of services, works and supplies contracts.
135 On nullity causes for the amendment and modification of procurement contracts.
136 On procurement contracts renunciation by the contracting authority on the grounds of material change of circumstances.
As a continuation of the arguments given in Sections 3.1 and 4.1 of the already quoted Part I Report, the legal regime for the award of concession and PPP contracts is undoubtedly the 2004 Public Procurement Act and the 2005 PPP Act. They have the status of general legislation for government contracts and, together with the lex posterior criterion, imply the derogation of any special legislation opposed to them, that is, unable to be driven towards compatible terms by interpretation. In this case, the special legislation is the 1994 Toll Motorways Act, with further amendments. Whatever the tolls, fees or other revenue devices are, the approval process for road location, the environmental impact assessment or any other issues like budgetary and public finance implications is the typical concern of the special legislation. As such, the Toll Motorways Act is preferably applicable to the general legislation on those matters, but it also gives the way to the Public Procurement and the PPP Acts in contractual matters. The 2004 Public Procurement Act offers no alternative: public works concessions shall be awarded exclusively according to this Act and tolling a motorway or expressway by a construction-operation contract is a public works concession. The same can be said regarding the 2005 PPP Act, insofar as it sends onto the Public Procurement Act for the award of PPP contracts with the exceptions just mentioned.

To sum up our legal opinion on these aspects, we finalize this section by saying:

- The legislation in force for road concessions and PPP contracts award is the 2004 Public Procurement Act.
- The 1985 Public Roads Act and the 1994 Toll Motorways Act the rule as special legislation the non-contractual features of road concession and PPP contracts, such as whether or not it is allowed to levy charges from users, the National Road Fund functioning, the types of roads and so on.

The proposed tendering process for pilot projects: Legal suitability and operational consistency with efficiency criteria

INECO’s Part I Report pays attention to the troublesome panorama created by the tendering process designed by the 1994 Toll Motorways Act, as amended by the Act of 8 September 2000. As stated above, all provisions on roads concessions award contained, among others, in Articles 40 to 53b), must be deemed revoked by the 2004 Public Procurement Act.

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In accordance with the EU Directives tradition, chapter 3 of the Polish Public Procurement Act envisages three different tendering procedures: open (Section 1), restricted (Section 2) and negotiated (with or without publication: Section 3 and Section 4 respectively). The Act does not transfer into Polish Law the competitive dialogue procedure, regulated in Article 19 of the European Parliament and Council 2004/18 Directive on the coordination of procedures for the award of public works, public supply and public service contracts, of 31 March 2004 (the Polish Act is dated on the 29 January 2004 and the term for the implementation into the Member States national legislations expires, according to Article 80.1 of the Directive, the 31 January 2006\(^{138}\)).

On the expediency grounds explained, we have chosen the bidding and awarding model which also fits into the legal framework actually in force, to be used for the contractual management of the three proposed mechanism in accordance to the specific characteristics of potential pilot projects. As far as the exceptions to the Public Procurement Act stated by Article 14 of the PPP Act affect neither directly, nor indirectly our tendering model, the former is wholly applicable.

The basic distinction between the open and the restricted procedure is the resource to the invitation to tender sent by the contracting authority to the selected tenders to submit offers. The selection must be justified on the criteria settled in the contract notice (Article 47 of the Public Procurement Act) and the invitation must be dispatched to all entrepreneurs satisfying those conditions within the terms stated in Article 51. Once the invitations to deliver offers have been sent, the restricted procedure follows the general pattern of the open procedure. The invitation to tender works as a previous cut to shape the array of proposals in a reasonable, transparent way, respectful with the equal-treatment principle to intended bidders. We do not consider pertinent, in the view of the previous experience in Poland, to suggest the application of the restricted procedure, although no tough requirements are demanded by the Public Procurement Act to put it into practice. The open tendering gives the chance to promote competition since the beginning of the process and to lead the contract award to a successful conclusion, providing we count on the adequate definition and use of some parameters of comparison throughout the stages. This is the core of our bidding and awarding model and its legal backing can be understood properly.

The Terms of Reference are an indispensable tool to fashion complicated contracts like public works concessions and PPP devices. They form part of the administrative proceedings and are at the disposal of all interested bidders to develop their moves, strategies and entrepreneurial skills. The 2004 Public Procurement Act, in the line with the EU Directives tradition, relies clearly on the

\(^{138}\) We are not dealing here, for obvious reasons, with the problem of the direct effect of the Directive in the case of non-accomplishment of the implementation duty by the Republic of Poland and its possible sanctionary results.
Terms of Reference to define the project in an intelligible manner, adding legal safety and setting up the variables that define the step-by-step way of action. INECO is quite keen on his comparative background in the international consultancy sector and has few doubts about the advantages of a robust, well thought out contractual apparatus in which the Terms of Reference play a decisive role. Article 91 of the Public Procurement Act gives a wide room to the Terms of Reference in the sense we point out:

1. The awarding entity shall select the best tender on the basis of tender evaluation criteria laid down in the specification of essential terms of the contract.

2. Tender evaluation criteria shall be price or price and other criteria pertaining to the object of the contract, in particular quality, functionality, technical parameters, use of the best available technologies with regard to environmental impact, exploitation costs, repair services, impact of the execution of the contract on the labour market in the site of the execution of the contract and contract execution date.

3. Tender evaluation criteria shall not pertain to the characteristics of the contractor, and in particular to its economic, technical or financial credibility.

4. Where the best tender cannot be selected as two or more tenders represent the same balance of price and other tender evaluation criteria, the awarding entity shall choose from among those tenders the one with a lower price.

5. Where the price is the only award criterion in a contract award procedure and it is impossible to select the best tender as tenders with the same price have been submitted, the awarding entity shall call upon the contractors to submit additional tenders within a specified period.

6. When submitting additional tenders contractors shall not submit tenders with higher prices than those submitted previously.

Everything must be out in the open. When the contractual process matches that standard, discretion is counterbalanced by good faith and reliance.

See appendix 3 for additional information on EU regulation of bidding of PPP projects and potential new legislative initiatives.
II.2. POSSIBLE IMPLEMENTATION STRATEGY

II.2.1. IDENTIFICATION OF TYPES OF INVESTMENTS TO BE EXECUTED AS PPP AND TO BE LEFT IN THE PUBLIC SECTOR

In order to talk about a strategy of PPP implementation at all it is important to have a clear idea on how to select projects for implementation in partnership with the private sector and which projects should be left for traditional procurement with public funding only (including EU Funds) and – if need be - with support from international financing institutions. Unlike it is often suggested, this task is not as complicated as it seems to be nor does it require laborious instruments, which does not mean that no analysis have to be done.

A starting point should be the consideration about what is the main goal of the road administration (including the Ministry of Transport and Construction, and the General Directorate for National Roads and Motorways) and what resources it has at its disposal for its realization. The main objective of the road administration is to build more and better infrastructure in order to respond to the necessities of the economic agents, provide impetus for the national economy and improve living standards of citizens. The resources the administration can use for this purpose are scarce and always will be scarce regardless of the amount of EU Funds that will be assigned to Poland. This is due to the huge backlogs in the development of infrastructure that Poland has been experiencing for the last years.

In other words, what has to be optimised is not the use of EU Funds within single projects, but rather the quantity and quality of produced infrastructure.

Given the budgetary constraints and abundance of EU Funds potentially available for infrastructure projects, it is advisable to make the possibly maximum use of private participation and financing of infrastructure, which can expand the overall amount of resources available for the achievement of the administration’s main goal.

Therefore, the first filter for the selection of projects should be the economic and social benefit from projects in order to ensure that the resources – regardless of their origin – are destined for the most important investment from the economic and social point of view.

139 Obtained as a result of a social and economic cost-benefit analysis that apart from financial sustainability of the project contains also elements relevant from the point of view of the whole society and not only the investor or owner of the infrastructure. These elements include all kind of externalities, i.e. external costs (e.g. negative environmental impact) and benefits (e.g. advantages in terms of reduction of risk of accidents in a specific route (human lives saved), savings in
From among selected projects, the ones with the highest financial rate of return, i.e. those that are able to bring substantial revenues, and for this reason are most attractive for the private sector, should be selected for implementation in partnership with private sector. The projects that are able to bring significant revenues, but from the financial point of view - not sufficient - for a purely private implementation, should be selected for implementation as PPPs with public support. This is the situation that can often occur not only in Poland. Many high developed courtiers that already have built motorways in the most important corridors with the highest demand through application of the concession model, are still experiencing necessities of further development of infrastructure. However, the remaining projects do not have sufficient demand that might enable implementation of stand-alone projects entirely financed from private sources and refunded from user charges. In these cases, the option of PPPs with public aid is chosen.

In Poland there is a possibility to co-fund this public contribution to such projects with EU grants from the Cohesion Fund, the European Development Fund and the TEN-T budget line.

Finally, the projects that for different reasons cannot generate revenues should be first and foremost implemented in a traditional budgetary method also with the EU financial support. In justified cases, projects that do not generate revenues from direct user charging can be also implemented with private participation, especially if a project has a significant economic and social impact and its accelerated implementation can bring important economic and social benefits.

In any case, the advantage of the use of PPP schemes over traditional procurement can be measured in terms of the increase of the investing potential of the administration. In other words, the advantage of a project financed from private sources comes from diversion of public funds that do not have to be engaged in the execution of that project to other economically and socially necessary projects. Conversely, the opportunity cost of not going the PPP way is the social benefit that cannot be achieved through execution of additional projects that could be potentially carried out with funds freed by the would-be PPP project. The same reasoning can be made for accelerated execution of projects not generating revenues from direct user charges.
II.2.2. DEVELOPMENT OF A COMPETITIVE CONCESSION/PPP MARKET

In chapter 1 we have proposed the application of a direct competition procurement model. Nevertheless, if the main virtue of the system is to derive from maintenance of competitive pressure on bidders, possibly large number of potential bidders has to be interested in participation. There are some requirements that have to be fulfilled, to make the system attractive for private investors and at the same time being fully operational.

Identification and precise definition of the project and PPP agreement arrangements

As it has been already mentioned, the recommended direct competition model requires quite precise definition of the project including the scope of works to be carried out and a specification of outputs to be provided by a private partner. Apart from the fact that the main Concession Agreement clauses have to be established in advance, the project has to be thoroughly studied in order to provide the awarding authority with sufficient information on conditions that it may expect from the market. However, all this work is worth doing because it gives in return more certainty that the public interest is adequately protected. Consequently, well prepared contract permits to avoid problems in the phase following the selection of private partner.

Should the contracting authority leave the definition of the requirements of the project to private operators it is highly probable that it will gradually lose the ability to administer it. On the other hand, bidders might be deterred from participating in a procurement procedure, if contracting authorities give the impression of opening a procurement procedure without really knowing what they want.

Apart from that, it is advisable to start the tendering procedure once all necessary administrative procedures related to the project preparation have been completed. This includes localization decision, environmental investment decision and construction permit. It is difficult to expect that the concessionaire assume construction risk, if the construction start date is uncertain and conditioned by completion of some administrative documentation and decisions that may be delayed.
Transparency / information disclosure

Transparency of the process gives confidence to bidders as well as to other stakeholders including public authorities and road users. It is worth mentioning that confidence of potential bidders in the process plays a very important role. If sufficient information on the planned contract and bidding conditions is not disclosed, opacity of the process may act as a deterrent. And – as it had been already mentioned – the lower the number of bidders, the less intensive the competition and – most probably – less favourable for the administration the conditions of the final concession agreement.

Once the awarding authority has defined the project’s scope, the interested companies shall be provided with the most important agreement conditions and the bidding variables and the maximum possible information on the project. Consequently, by reducing uncertainty regarding different aspects of projects, the administration creates conditions for preparation of more accurate bids at a lower cost. The importance of bidding procedure costs has been already commented on.

Before launching the tender, projects chosen to be executed as PPP might be promoted between potentially interested investors to improve their awareness of the existing investing possibilities. Thus, investors having sufficient information on a project will be more likely to participate in the bidding process.

Additionally, the transparency of the whole process can be improved through making all submitted proposals freely available for inspection of other bidders during a specified period after the deadline for submission of proposals.

It is often claimed that one of the main advantages of the competitive dialogue gives the possibility to specify together with the private partner the technical conception and some details of the projects, so that the best ideas of the private initiative and strengths of a particular private partner can be adequately harnessed by the public sector. A good way of achieving a similar effect in the direct competition model is to disclose a preliminary set of technical standards to prospective bidders. A “road-show” organized primarily in order to promote projects can be also used by the awarding authorities and monitoring entities to discuss the project, receive feedback on the envisaged PPP structure and most important contract arrangements and modify them if the suggestions of potential bidders are considered valuable. Following this way there would be a possibility to eliminate potential defects of projects that might reduce their attractiveness for potential bidders. Additionally, all interested companies bid on the same technical specifications and requirements, so that any doubt regarding the transparency and equal treatment and non-discrimination of participants can be eliminated.
Adequate return from projects

Projects to be executed as PPP have to offer high social and private return rates. High private return rate is indispensable to arouse interest of potential investors. Projects with lower private return rates will not be attractive enough to ensure sufficient competition and consequently, may result quite costly for the administration and taxpayers. If there is a project with a high economic and social benefit and a relatively low private return rate, it is better to support it with public funds (including EU Funds, the KFD or the State budget) to ensure potential for sufficient private profitability and optimise the quantity of public support in the bidding process. Project that are planned to be co-funded from EU Funds have to prove sufficient social return rate in order to be accepted by the European Commission. Therefore, projects lacking both high social and private return rates will not be executed as a PPP with EU support.

Optimisation of the public support for a project has high chances to succeed in being accepted by the European Commission. On one hand, increasing the multiplier effect of Community resources through mobilisation of private sources through PPP constitutes one of the premises of the new cohesion policy of the EU for the new Financial Perspective 2007-2013. On the other hand, the value of project revenues is always verified in order to ensure that the Community direct aid is kept at the minimum level necessary for the implementation the project. Too high public support, including Community support, is not welcome because of being interpreted as overcompensation and inefficient use of EU Funds.

Private financing possibilities

Existence of a sufficiently capacious local long-term debt market facilitates the financing of projects. Once Poland enters into the Economic and Monetary Union a broader European capital market will become more affordable for financing of investments in Poland. For the time being, exchange rates fluctuations present relatively high risk for lenders. However, the local long-term debt market is constantly developing. Due to lowering interest rates, investment funds are gradually becoming a reasonable saving alternative and the households’ saving instrument of choice. Also the steady growth of the open pension schemes’ (OFE) assets will require more and more attractive long-term investment opportunities in the future. It is worth mentioning that in the nineties the Chilean open pension schemes became an important source of financing for road concessions. As the Polish pension system reform was based on the Chilean experience, it would be reasonable
to adopt also other successful features of the Chilean model. However, enabling OFEs to invest in motorway projects' debts would probably require modification of the legislation in force.

As it has been already indicated in the section II.1.1 (table II.1.1), the recommended procurement model usually does not require from bidders financial close before submission of their proposals. This allows making use of advantages of a competitive market also in the case of financing of the project. After the concession/PPP contract is awarded, the winning consortium can negotiate the financing package with all possibly interested financial institutions. If the financing close were required before the submission of proposals, financial institutions would be not likely to offer their best conditions due to a high number of bidders competing for potential financing of the project.

In any event, the budgetary equilibrium is another factor of great importance for facilitation of accessible and attractive long term financing, without which the above mentioned will be less effective. A large part of the budgetary deficit is normally financed with resources from the financial system of the country. The government is usually the best and most credible borrower so that all financial investors are likely to lend him necessary resources. Unfortunately, it makes commercial credits more expensive and many private investments become unfeasible due to high cost of credit. The private investment is crowded out from the economy. This crowding-out effect can be avoided through maintenance of budgetary equilibrium. If there is no deficit to be financed more liquidity can be destined for financing of good projects and financial institutions are likely to offer better conditions. Therefore, it is highly advisable to maintain budgetary equilibrium in order to facilitate private investment, not only in infrastructure.

II.2.3. REGULATION OF QUALITY OF SERVICES THROUGHOUT THE CONCESSION PERIOD.

Competition is a source of cost efficiency what explains the use of concessions and competition for the market for having the private sector engaged in infrastructure delivery. But the only area where such competition is clearly feasible is bidding for the award of construction and service contracts. Then the market, although contestable, remains monopolistic. For this reason, although competition is an important cost efficiency driver, it does not ensure quality of services.

Incentive-based regulation through the contract is a solution for ensuring adequate quality of services demanded by the administration and road users. This applies both to construction and operation.
The factor that normally ensures timely completion of construction works is the concession period. The concession period starts in the moment of concession award (or any other date established in the bidding documentation). It covers the construction stage as well as operation stage regardless of the operation’s starting date. Therefore the concessionaire has a strong incentive to finish the construction phase as soon as possible in order to start the operation and receive incomes from tolls earlier.

Regarding the quality of construction, combination of infrastructure creation and its further operation, which is a typical feature of most PPP deals, causes that the private partner has a clear interest in ensuring an adequate quality of delivered assets, given their influence on the capacity to deliver a service effectively and efficiently. Where construction defects can remain hidden for many years and do not affect significantly the quality of provided services, construction quality must be ensured through contractual clauses and supervision of works. In the case of any deviations from contracted standards the private partner must pay penalties. As the final objective of such measures is to ensure an adequate quality of public infrastructure, the amount of the penalty must be high enough to deter the concessionaire from delivering defective works.

In the operation stage adequate service quality can be ensured through the use of a system of bonuses and penalties whose application depends on specific quality indicators. The objective of such measures is to introduce economic incentives that make the concessionaire act differently than he would do driven only by the cost efficiency incentives produced in the competitive bidding.

For this reason, before launching the project, the administration has to clearly identify the quality of services it wants the private sector to provide and then translate it into measurable quality indicators. Then all identified indicators should be established in the original concession agreement together with corresponding bonuses and penalties.

Below we present some general recommendations on the use of quality indicators:

1. Quality indicators should only measure the results to be achieved and not means to be used for achieving them. One of the central ideas underlying the Public Private Partnership concept is to make the most of the private sector’s creativity and know-how. The administration and road users finally are interested only in obtaining adequate, high-quality outputs. Therefore, it is better to leave the operator free to decide how to organize the supply of the service and concentrate on measuring the quality of outputs only.

2. The overall number of quality indicators included in the contract should be limited in order to facilitate their measurement and reduce the cost of supervision. The regulatory burden...
should be minimized so that supervision costs do not offset efficiency gains achieved through private management and social benefits from high quality of services.

3. Quality indicators should cover the aspects of the service that have the biggest impact on the social cost of road transport, e.g.:

- traffic safety,
- congestion,
- influence of the condition of road surface on users’ safety and comfort,
- users’ quality perception,
- traffic quality on alternative roads (This indicator might be especially useful in the case of Poland where heavy goods transport was reluctant to use motorways until the exemption of vignette-payers from tolls. In order to improve safety and traffic flow on alternative routes special bonuses can be awarded for attraction of a determined part of heavy traffic to motorways. The concessionaire can have the liberty to choose periods when special measures to attract heavy traffic are taken in order to manage efficiently the existing traffic. In this sense, reductions of tolls (down to zero) for vignette-payers can be introduced in the periods of lower traffic density, e.g. at night. The bonus can consist e.g. in extension of the concession period. In any event the bonus has to be attractive enough to make the concessionaire take adequate measures.)

4. Quality indicators should not be treated as a substitute of the supervision and control of those maintenance and operation activities that are not directly measured by established indicators. This way, such activities as e.g. cleanness of road shoulders, condition of signalling equipment will be not neglected.

5. Objective evaluation of indicators should be ensured in order not to arouse controversies in interpretation of contracts.

6. It is advisable to include users’ feedback on the quality of services. This can be done by means of structured surveys carried out once a year. In order to establish the dependence between the bonus or penalty and the survey result it is reasonable to benchmark the result against other concession’s scores. This measure however requires at least five
comparable PPP motorway concessions in operation, which in not the case of Poland. (An additional advantage of quality surveys is that public knowledge of the particular project and the PPP system in general is extended and there is a chance to build public support through emphasizing the importance of quality of services that the users are charged for. This aspect can be especially important in countries such as Poland where toll motorways are a highly visible and controversial issue.)

7. Penalties and bonuses should reflect the economic costs and benefits of the behaviour that they are designed to prevent or promote. This way the concessionaire will have proper incentives to adopt economically efficient behaviour. Nevertheless, the economic incentive should never outstrip the marginal social benefit produced by the improvement that the incentive is meant to promote.

8. Quality indicators should be realistic. Overly ambitious or unrealistic quality targets lose their incentive powers.

9. If possible, indicators should be continuous functions of quality aspects they measure. At the same time a continuous range of bonuses and penalties should be assigned to a corresponding indicator and they should be appropriately sensitive to the indicator’s variations. This way appropriately calibrated signals can be sent to the private partner.

10. Period related (e.g. annual) bonuses and penalties are better than global incentives. Bonuses awarded at the end of a specific relatively short period are more attractive to the operator as their reception is earlier.

11. An annual bonus can be established as a percentage of yearly incomes received from traffic related payments from the State in the case of shadow-toll based schemes. In the case of real toll motorways it is better to increase the concession period than to increase the toll cap, given the tolls acceptability problems and the necessity of toll harmonization in Poland.

12. In any event, bonus payments should have a predefined cap in order to limit the State’s future liabilities.

In any case, it is important to remember that in order to be effective quality indicators and formulae applied to calculate bonuses or penalties should be structured so that the resulting remuneration variations affect the private partner’s results in order to stimulate him to take measures desired by the administration.
It is worth mentioning that the effective application of quality indicators transfers the availability risk to the private partner, which is one of the Eurostat requirements for off-balance sheet classification of a PPP deal if the concessionaire does not assume the traffic risk\textsuperscript{140}.

Technical quality aspects must be specified in the project definition stage and the requirements of the administration regarding them must be disclosed to potential bidders before launching the procurement process. This is because they help determine future investment and maintenance needs. In the case of existing roads future quality targets have to be related to the initial state of infrastructure. Therefore, an inventory of the initial state of infrastructure must be drawn up.

In the box II.2.1 you can see some example quality indicators that can be included in concession agreements divided in three groups: related to technical quality of the motorway, operating quality of road services and safety aspects.

\textsuperscript{140} See New Decision of Eurostat on Deficit and Debt Treatment of Public-Private Partnerships from 11 February 2004 in appendix 4.
Box II.2.1. Example technical quality, operating quality and safety indicators

**Example technical quality indicators:**
- pavement roughness,
- pavement deterioration,
- condition of lighting,
- condition of markings,
- condition of signalling,
- quality of fire and rescue equipment,
- condition of maintenance and weather related equipment.

**Example operating quality indicators:**
- lane availability and shutdowns,
- average traffic speed by time of day (peak and off-peak),
- toll stations availability,
- queuing times at toll stations by time of day (peak and off-peak),
- road capacity, average traffic speed and visibility during bad weather,
- snow-clearing quality (snow-ploughs response times and snow-clearing effectiveness).

**Example traffic safety indicators:**
- number of accidents,
- availability of emergency equipment (response times and service level).


The effective use of bonus, penalties and quality indicators not only requires inclusion of corresponding clauses in the Concession/PPP Agreement, but it also causes the necessity to improve monitoring and enforcement capabilities of authorities. The quality ensuring mechanism will deliver expected results only if the behaviour of the operator can be adequately monitored and the quality regulating parameters can be effectively enforced. Therefore, the supervisory authority should be prepared to audit records and inspect infrastructure and equipment regularly. On the other hand, the concessionaire should be required to provide data on all technical, safety and operating quality aspects on regular basis.

141 For more detailed examples of quality indicators see: Appendix 9.
High quality of services provided by the private partner not only refers to the fulfillment of some technical, operating and safety parameters. It should be born in mind that PPP deals are usually based on long-term contracts reaching up to 40 years. During such a long period technical standards can change substantially due to the progress of the science and technology. A useful method to ensure that the private partner fulfills all requirements of the technical, environmental and security standards that are in force in a given moment, is to include in the contract so called progress clause.

A progress clause stipulates that the concessionaire shall maintain the motorway according to the progress of the science and in conformity with technical, environmental and security regulations that are applicable in each moment. In order not to produce adverse effect by creation of additional uncertainties, it is advisable to include in the contract also some regulations on which specific aspects of motorway operation the progress clause applies to and if and how the private partner would be remunerated if he incurs additional investment expenditures. The progress clause can be applicable to all aspects related to operation and maintenance of a motorway and particularly to: conservation (including routine and periodic maintenance as well as rehabilitation), availability, security measures, environmental measures, toll collection system and all other aspects closely related to the management of the road. As far as compensations are concerned it can be established that the administration will compensate the private partner for costs incurred for the works that will be necessary to carry out adjustments, but limiting the amount of these costs to the amount incurred normally for similar works. The administration may then decide the form of compensation including direct payment, extension of the concession period, increase of the sum paid to the concessionaire for the transfer of assets by the end of the contract, increase of tolls (if considered appropriate) or any other form of payment.

Obviously, if the application of the progress clause has a negative effect on the concessionaire’s financial equilibrium, the administration will be obliged to restore it.

II.2.4. INSTITUTIONAL ADAPTATION

The successful implementation of PPP requires an appropriate institutional support for the process not only in the bidding and award phase, but also earlier in the project preparation phase and finally throughout the operation period, i.e. in the project monitoring stage. The basic principle that should be a starting point for the institutional adaptation is to take a global approach and to establish
horizontal relationships across various ministerial departments, authorities (GDDKiA) and other institutions (KFD) involved in the process throughout the entire life-cycle of a PPP project.

**Project preparation**

Limited and probably not always satisfactory experience with PPP projects and sometimes lack of knowledge may discourage the administration from the use of PPP. While the preparation of EU co-funded projects is still not fluent and the administration is still learning to tackle all the problems it encounters in the process, experimenting with new more challenging structures can be the last thing the officials are taking into account. Therefore, given potential benefits from private participation – including structures that combine private financing and public support with EU financial aid component – training in the field of project finance and EU regulations and procedures will be indispensable to have projects well prepared for both private financing and EU co-funding.

In any event, the INECO Team suggests separating the issue of public aid for PPP projects from the issue of co-funding of this public aid from EU Funds, as the latter can and should be performed afterwards.

As regards the coordination in the project preparation phase, whereas the initiative should belong to the Ministry of Transport and Construction throughout the whole process, all other institutions involved, including the Ministry of Economy and the Ministry of Finance, should take a stand on the project in order to assess possible public expenditures that are necessary for its implementation. It is worth remembering that the participation of appropriate departments of the Ministry of Economy and the Ministry of Finance, justified by the facts that the infrastructure policy is one of the sectorial policies of the economic policy and can be crucial to the budgetary policy due to its potential influence on public deficit.

**Project procurement and award**

As commented in the section II.2.2, the awarding authority has to define precisely the technical parameters of the project it wants to implement, the outputs it wants to be delivered by the private partner, assess the key economic and financial parameters of the project and carefully tailor the procurement strategy – based on the model suggested in the section II.1.1 – to the needs of a particular project.
As regards the collaboration with the private sector in the bidding stage, the purpose and the commencement of the tendering procedure have to be clearly communicated to the private sector and to the public in order to give a clear signal that the procedure is fair, non-discriminatory and transparent. The quantity and quality of general information available to all bidders should be improved in order to minimise the necessity of bidders to make their own costly technical investigations. Therefore, the tender documentation should provide enough information to make easier proper evaluation of all risks involved, costs of the project as well as understanding of the bidding procedure and evaluation criteria.

As far as involvement of different administrations is concerned, the awarding committee should be chaired by a competent Secretary of State in the Ministry of Transport and Construction and composed of members of the General Directorate of National Roads and Motorways (GDDKiA), members as well as representatives of appropriate departments of the Ministry of Finance and Ministry of Economy competent with respect to national budget and economic policy, Department of Public Roads, Department of Budget and Economic Analyses, Department of Infrastructure Financing and European Funds (together with corresponding department of the Ministry of Development) and legal services of the Ministry of Transport and Construction.

The GDDKiA and/or the Ministry of Transport and Construction – to whom the initiative corresponds in the whole process - should elaborate technical reports for the awarding committee, which should be comprehensive and of high quality and remain available for all stakeholders including bidding companies. In addition, the technical reports as well as the reports from the meetings of the awarding committee should be possibly also subject to the scrutiny of the Parliament. The departments involved in the preparation of project for tendering should limit themselves to the preparation of corresponding reports, according to the competencies of each department.
As regards the procurement and award of motorway concessions in Spain, the initiative in this matter belongs to the Minister of Public Works, or the Secretary of State in charge of infrastructure. The whole procurement process is performed by means of the General Direction of Roads.

Due to the fact that motorways are normally very large and significant projects, consent of the Council of Ministers is required to start the tendering process. However, before being put forward to the Council of Ministers, the matter has to be approved by the Commission of Economic Affairs (the Commission is a sort of council of all ministers in charge of departments related to economic issues and is presided by the Deputy Prime Minister in charge of economic affairs). Prior to that it has to be analysed by the Committee for Economic Policy. The Committee evaluates if it is necessary to bid and award the contract first of all from the point of view of the infrastructure policy, but also from the point of view of the budgetary policy (it has to be remembered that even if there is no public funding involved in the case of insufficient transfer of risk the transaction can be recorded on balance sheet for the government as an outstanding debt), economic policy, regional development policy, etc.

Simultaneously, together with this political procedure, another legal and technical procedure takes place. Its objective is to ensure that the concession contract fulfils all legal requirements before it is approved by the Council of Ministers. In this way, the bidding documentation has to be examined by the Advisory Committee for Public Procurement, which issues its report. Then it requires another approval by the Commission of Subsecretaries, the Council’s of Ministers “waiting-room”.

After being approved by the Council of Ministers, the bidding documentation is published in the Official Journal of the State (Boletín Oficial del Estado) and the Official Journal of European Communities.

In all these procedures, the initiative comes from the General Direction of Roads, which can get support form other Units of the Ministry of Public Works in order to solve specific issues (General Technical Secretary, General Direction of Economic Programming and the Delegation of the Government in charge of National Toll Motorway Concessions).

After the bidding process is started proposals form interested consortia are accepted during a period of three, up to four months by the Procurement Committee 142, which assists the Awarding Authority (Ministry of Public Works). The Minister awards the concession contract to one of the bidders according to the suggestion of the Procurement Committee, within a period of two months extendable for two more months. Nevertheless, before awarding the contract the Minister has to obtain an authorization of the Council of Ministers.

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142 In Spanish: Mesa de Contratación
The Procurement Committee, presided by the Subdelegate of the Delegation of the Government in charge of National Toll Motorway Concessions is constituted by representatives of the Ministry of Economy and Finance (General Direction of Economic Policy and Budget), the General Direction of Roads, General Direction of Economic and Budgetary Programming, General Technical Secretary and the General Technical Secretary from the Ministry of Public Works. Additionally, the Chief of the Legal Advisory Services of the Ministry of Public Works and the Inspector from the Ministry of Finance delegated to the Ministry of Public Works form a part of the Procurement Committee as well.

Technical reports on the proposals submitted to the Procurement Committee are prepared by the General Direction of Roads (technical report) and the General Direction of Economic and Budgetary Programming (economic and financial report). In view of these reports the Procurement Committee takes a decision to whom the concession contract will be awarded. The concession contract is awarded by the Minister of Public Works (the Awarding Authority) after authorization by the Council of Ministers within a period of one month. The concession contract has to be signed one month after award at the latest.

Project monitoring

Public services whose operation was awarded to private entity still remain public. Therefore, the right and the obligation of the administration is to supervise all actions taken by the private partner and control results obtained by him throughout the concession period. This should be done within a monitoring regime established in the Concession Agreement and disclosed to bidders before the start of procurement process.

It is important to prepare detailed technical specifications of the motorway, carry out effective sponsor pre-qualification and choose the concessionaire in an efficient and transparent manner. The administration has to ensure that they will have good and timely technical, operational and financial information about the performance of the project and its participants. Such information is required not to meddle in the management of the project, but rather as data input for an “early warning system” to reduce the likelihood of project failure and bailout. It may be also useful in the cases of unexpected necessity of contract renegotiation or disputes, in which the administration shall have at their disposal all information that allows taking appropriate decisions and defend public interest.

For the above mentioned reasons Concession Agreements should contain clauses specifying reporting requirements for the concessionaire, the frequency of reporting and, if need be, reporting
format in order to facilitate introduction of data into the administration’s information system, quick analysis and comparison across various PPP projects.

In the box II.2.3 you can see some example data whose reporting can be requested by the administration, apart from technical quality, operating quality and safety indicators presented in the box II.2.3.

Box II.2.3. Example Reporting Requirements for a Motorway Concession

<table>
<thead>
<tr>
<th>Technical, operating and safety performance (see Box II.2.1).</th>
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</thead>
<tbody>
<tr>
<td>Revenue indicators:</td>
</tr>
<tr>
<td>• traffic volume by vehicle category,</td>
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<tr>
<td>• traffic volume by time of day (peak and off-peak),</td>
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<tr>
<td>• revenue collected by vehicle category,</td>
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<tr>
<td>• revenue collected by time of day (peak and off-peak),</td>
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<tr>
<td>• revenue generated by service areas,</td>
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<tr>
<td>• revenue and volumes from discount programmes.</td>
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<tr>
<td>Cost indicators:</td>
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<tr>
<td>• operating expenses on toll collection,</td>
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<tr>
<td>• operating expenses on road maintenance,</td>
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<tr>
<td>• operating expenses on road operations,</td>
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<tr>
<td>• operating expenses on emergency services.</td>
</tr>
<tr>
<td>Investment indicators:</td>
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<tr>
<td>• investment spending,</td>
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<tr>
<td>• physical investment.</td>
</tr>
<tr>
<td>Financial indicators:</td>
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<tr>
<td>• operating profit,</td>
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<tr>
<td>• working capital,</td>
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<tr>
<td>• debt service coverage,</td>
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<tr>
<td>• debt service projections,</td>
</tr>
<tr>
<td>• debt-equity ratio,</td>
</tr>
<tr>
<td>• debt-assets ratio,</td>
</tr>
<tr>
<td>• return on assets,</td>
</tr>
</tbody>
</table>
• return on equity.

Investment indicators:
• investment spending,
• physical investment.

Sponsor related information:
• audited income statement, balance sheet and cash flow statements,
• changes in the shareholders,
• financial operations.


With regard to the institutional structure for monitoring, it would be advisable to make use of the existing structures of the GDDKiA, but under direct supervision of the Ministry of Transport and Construction, the institution that bears the final responsibility for infrastructure. In this sense, we recommend to assign the specific competencies in the field of monitoring of PPPs to a Delegate of the Council of Ministers in the rank of the Secretary of State in the Ministry of Transport and Construction. This post would be similar to the hitherto Proxy of the Government for the construction of National Roads and Motorways, but with competencies focused rather on monitoring of ongoing PPP contract than on giving impulse for new PPP deals.

However, the role of the Delegate of the Council of Ministers shall not be limited only to the control of technical aspects of the infrastructure and quality of provided services. The concession company can take legal actions (incur debts, mortgages, enter into contracts, etc.) and be an object of legal trade (can be sold, can increase or decrease its own capitals, etc.). Moreover, it must be also remembered that it can be interesting for the awarding authority that the project’s sponsor liquidates his participation in a mature project (freeing resources engaged in this concession) so that he can invest them in new concession projects. Incentives for such behaviour of sponsors can be even introduced in the legal framework. All these possible events require authorization by the final owner of the infrastructure. This should be another competence of the Delegate of the Council of Ministers: keep a close watch on all new actors participating in the project and check if they fulfil all the requirements stipulated initially in the bidding documentation in order to prevent potential fraud.
Box II.2.4. Example of Spanish institutional structure for supervision of motorway PPP contracts

Delegation of the Government in charge of National Toll Motorway Concessions

In Spain there is a special authority called the Delegation of the Government in charge of National Toll Motorway Concessions, which is responsible for relations with motorway concessionaires, financial control and supervision of motorway concessions. The Delegation has a total of 6 employees including technical and administrative staff. Additionally, it usually collaborates with a few financial auditors. For specific technical issues the Delegation can request support from specialist staff of the Ministry of Public Works (General Direction of Roads).

The main tasks of the Delegation are:

- supervise and control the finances of concession companies,
- inform other bodies of the Administration about any incidences that can take place in the execution of a contract,
- control changes in the ownership of shares of the concession companies,
- recommend to the Ministry of Public Works revision of tolls requested by concessionaires,
- recommend to the Ministry of Public Works to approve the regulations on the use of motorway,
- recommend to the Ministry of Public Works sanctions for breach of contract in accordance with the Law,
- if the State owns direct or indirect shares in the of concession company a representative of the Delegation can take part in the meeting of the Board of Directors and veto that might be harmful for the public interest,
- supervise financial incidents that may occur in the concession company (for this reason the Delegation can request any economic or financial documents of the concession company or other companies established subsequently and financially related to the main concession company).
Transparency

As commented in the section II.2.1, the tendering procedure should be as transparent as possible so that the uncertainties of potential sponsors are minimized and on the other hand to be in conformity with the requirements of the European Union. But the main reason for maintenance of transparency, not only in the bidding and award stage but also in the construction and operation phase of the project, is to ensure public understanding of PPP mechanisms and their usefulness and to induce public support for private provision of infrastructure. Following such a way the government would be provided an adequate legitimacy to implement the system of Public Private Partnership.

It must be remembered that road infrastructure even if it is constructed and operated by the private sector, remains public which justifies the right of all citizens to access entire essential information regarding conditions of concession agreements and the way they were procured. As the motorways are finally funded with user charges or – in the case of subsidies – with taxes collected from all road users or taxpayers, all contributors should be provided with sufficient information on the general principle of motorway financing scheme adopted in each case and on particular results of each project.

The study Public attitude towards the need of bearing costs for using the road infrastructure in Poland by the individual users analysis prepared by PBS proved that road users feel that they have not enough information on how the road network is managed and financed. At the same time they demand up-to-date information on these issues.

In the reality however, in Poland the information on motorway concession procurement and conditions of concession agreements is not revealed to the public, which arouses a lot of mistrust and suspiciousness not only among road users, but also policy-makers. Regardless whether this mistrust has been justified or not so far, bringing the whole process under public scrutiny (combined with the implementation of the bidding mechanism presented in the chapter 1.1 and a strategy presented in this chapter) will force the awarding authorities to choose the best offers and to supervise the execution of awarded contracts.

Therefore, we strongly recommend, not only to provide potential bidders with sufficient information, but also to disclose the whole process to the public in order to restore faith of all stakeholders in the possibility of implementing successful Public Private Partnership projects in Poland to the benefit of Polish infrastructure and social prosperity.
II.3. PPP MECHANISMS RECOMMENDED FOR USE IN POLAND

There is no universal PPP mechanism for all cases. The recommended mechanisms should not be treated as durable and unchangeable solutions. Although guided by the objectives of infrastructure policy and based on some standards, all PPP deals should be structured on case-by-case basis.

Policy-makers and awarding authorities have a wide range of instruments at their disposal ranging from a pure BOT concession without any financial support of the State to formulae based on shadow tolls. Between these two formulae different forms of public support can be situated (including: subsidies for construction, subsidies for operation, different forms of credits and specific guarantees) that allow reducing tolls to be paid by users and ensure the financial feasibility of a project. The solution for each case should be an optimum combination of those instruments.

The suggested three mechanisms are designed to correspond to the characteristics of specific projects. They respond to the need of modern high capacity infrastructure (due to high congestion and accidentality) and road users’ limited ability to pay on one hand as well as budgetary constraints and availability of significant financial support from the European Regional Development Fund and Cohesion Fund on the other. Additionally such aspects of potential projects (that might be executed using the proposed models) as their relevance from the economic point of view (economic policy), their financial feasibility that might enable private financing and reduce public expenditures (budgetary policy), their strategic importance for regional development (regional policy) and for interconnection of all parts of the territory (strategic policy) were analysed. The mechanisms address such issues as the necessity of upgrading existing roads to a higher standard, construction of new motorways, adjustment and maintenance of motorways sections. The necessity of toll homogenisation and lack of possibility to charge users on all national roads are also considered. Nevertheless, as stated before, the following recommendation on possible PPP mechanisms should not be treated as a closed list. The application of these mechanisms to particular projects will be presented in the third part of the report. It is not to discard that the mechanisms can require some modifications in the case of their implementation in other projects with slightly different characteristics.
II.3.1. MECHANISM 1: CONCESSION FOR CONSTRUCTION, OPERATION AND MAINTENANCE OF A NEW MOTORWAY AND FOR OPERATION AND MAINTENANCE OF EXISTING MOTORWAY

The mechanism

The first mechanism we suggest to use in Poland is based on tolls and applicable to motorways. On one hand, it makes use of the fact that some section of motorways are built in Poland in a traditional method although they are intended to be operated and maintained as toll motorways by private concessionaires. On the other hand, it may solve the problem of public support required by some motorway sections due to insufficient financial profitability caused by relatively low traffic in some corridors. Finally, it also simplifies to some extent the problem of blending of EU funds, Polish public resources and private funds through combination of two sections in one project: one section that has been co-funded from EU-Funds and another one to be financed privately.

The mechanism is based on a concession contract that includes:

- operation and maintenance of a motorway section that has been built in a traditional method using public funding sources and,
- construction, operation and maintenance of a new motorway section.

A section of motorway built with public funds and transferred to the concessionaire to be operated and maintained together with the new section built by the concessionaire constitutes a payment in kind made by the State to the concessionaire, which is a form of public support. This support is equal to the capital expenditure made from public sources for motorway construction.

This solution permits to keep down tolls that on one hand seem to be a highly dissuasive factor for road users in Poland, and on the other are paid from the KFD resources in the case of heavy goods vehicles. It also supports the profitability of the project lowering the minimum toll level required to make the project financially feasible (tolls charged for the use of the section built before with public funds can be diverted to co-fund the rest of the project). Additionally, combination of “already-built” sections and new green-field investments under one concession will facilitate toll homogenisation, so that tolls charged for the use of sections built by the State and those built with private financing do not differ as much as in the case of currently operated A4 and A2 motorways.

In the cases in which the financial previsions are particularly optimistic the proposed mechanism offers the possibility of inclusion in the contract of additional road investments that are functionally
related to the main project, but for some reasons (special difficulty in charging tolls on periurban motorways or expressways, no free alternative route or legal constraints) are not susceptible to economic exploitation. This option is even more advisable than shortening the concession term or additional lowering of tolls. It permits a broader application of private financing to infrastructure elements that normally would be not easy to be financed using public or non-public funding sources and be off-balance sheet treated. Additionally, construction of access roads to motorways, including big cities non-tolled ring roads, can improve the financial profitability of the main part of the project through channelling of traffic flows to toll motorways.

If this approach is adopted the State can contribute financial support to the project in order to make it financially feasible. This in turn permits to employ the public support as the main bidding variable and evaluation criterion and finance afterwards a part of the public participation in the project with EU Funds. Nevertheless, the complexity of this approach requires that the awarding authority analyses the project thoroughly in order to properly evaluate its financing needs and find out what proposals can be expected.

This mechanism can be especially useful in the case of corridors that require urgent measures due to the necessity of elimination of bottlenecks and for reasons of their importance for the national economy.

The application of this mechanism would not be a complete novelty in Poland. Actually, in the case of the A2 concession covering the section Świecko–Konin, the State delivered to the concessionaire the section Września-Konin and the Poznań bypass which had been built with PHARE co-funding. If we consider that there are more sections that were, are being or will be built in a traditional method, this mechanism could be applied in many cases.

Off-balance sheet treatment possibilities

The proposed first PPP mechanism can be implemented in conformity with the Eurostat criteria for off-balance sheet treatment of PPP investments. However, it requires that all the road sections that are included in the project remain in the concessionaires balance, which means that the concessionaire shall undertake the tasks of their maintenance and operation (including the

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143 The Eurostat criteria for off-balance sheet treatment of Public Private Partnerships have been commented on in the section I.3.5. The appendix 4 of this report contains the full text of the Eurostat new decision on deficit and debt treatment of public-private partnerships from the 11 February 2004.
motorway sections contributed by the State and free road sections that also form a part of the project).

First, the construction risk (i.e. the risk related to construction of new motorway sections as well as construction of additional road sections) lies totally with the private partner. Construction overruns, additional construction costs do not cause tolls increase, additional public contribution to the project (neither coming from the national nor from the EU sources) or concession term extension. The concessionaire also has to take on the responsibility for incompatibility of the structure parameters with the agreed technical standards as well as for any technical defects.

Second, the demand risk (i.e. the risk derived from traffic variations) is assumed entirely by the concessionaire. The scheme does not include any minimum traffic, minimum income or minimum return on equity guarantee. The concessionaire’s income depends entirely on the traffic volume. Administration will not make any payments to the concessionaire that would make the traffic level fluctuations irrelevant for his profit.

Assignation of only those two risks to the private partner makes the scheme compatible with the Eurostat off-balance sheet treatment criteria. Nevertheless, in order to ensure high quality of services provided to the users it would be reasonable to include bonus and penalties related to the service quality. If any quality-related indicators that produced significant revenue and profit variations were included in the contract, it would mean that the private partner would take on the availability risk (i.e. the risk derived from failing to deliver contracted volume and/or quality of services). This should eliminate ultimately any doubt about the PPP contract accounting treatment.

**EU Funds access possibilities**

In this mechanism EU funds may be accessed easily through distinction within the complete PPP project of its two elements: the one that consists in construction of one section of the project through conventional public funding including an EU grant and the second to be financed by the private partner and – if need be - to be made financially profitable through public aid that can be then co-financed with EU Funds.
Pros and Cons of the mechanism

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>• gives public support to the financial feasibility of new green-field projects</td>
<td>• financing arranged by private partner is in principle more expensive(^{144})</td>
</tr>
<tr>
<td>• permits keeping tolls at a relatively low level</td>
<td></td>
</tr>
<tr>
<td>• facilitates toll homogenisation on motorway sections built using different financing methods</td>
<td></td>
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<tr>
<td>• under specific circumstances can allow financing of additional road investments that are functionally related to the main project</td>
<td></td>
</tr>
<tr>
<td>• if well structured, secures off-balance sheet treatment of the project according to the Eurostat criteria</td>
<td></td>
</tr>
<tr>
<td>• makes easier blending EU and private funds through separation of the EU co-funded and privately financed investments</td>
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</table>

II.3.2. MECHANISM 2: CONCESSION FOR MODERNIZATION OF EXISTING EXPRESSWAY BASED ON SHADOW TOLL PAYMENTS

The mechanism

As the motorway and expressway network of Poland is gradually expanded, the maintenance of existing infrastructure and the upgrade of existing roads will gain more and more importance. The reasons are: changing technical standards that make old existing roads obsolete and higher social expectations. While in the case of toll motorway concessions these tasks belong to concessionaires, in the case of non-toll expressways they must be assumed by the GDDKiA. A

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\(^{144}\) This phenomenon is often used as an argument in favour of government participation in infrastructure projects. However, it does not take into consideration that the relatively lower interest rates that the financing institutions are willing to offer to the government are due to government’s ability to resort to taxation which reduces the default risk and does not mean the inherently lower economic costs of government-funded projects. Additionally, civil servants usually have less incentive to invest efficiently than private managers. Finally, there is another issue that often escapes notice. Namely, it is the growth of public debt what makes the financial costs for private sector higher and higher (so called crowding-out effect).
significant part of the road infrastructure development plans included e.g. in the Schedule for motorways and expressways construction for the years 2007-2013 or in the Substantial and Financial Programme for road investments with the use of KFD funds refer to expressways. Some of them are to be built as new green-field investments, others through upgrade of existing single carriageway national roads or as reconstruction of existing dual carriageway national roads. As in principle expressways in Poland are free of charge, the use of PPP in their case would require a different, specific PPP mechanism. In the practice it would mean direct remuneration of the private partner from public sources, i.e. shadow-tolls. It would be useful to make use of private financing especially in the case of those expressway projects that on one hand require relatively moderated initial capital expenditures that would not produce excessively high shadow-toll obligations towards the private partner along the contract period, (i.e. upgraded or reconstructed national roads), but on the other hand are too expensive to be built in the short term.

The advantages of the use of private financing in expressway modernization projects consist in high economic and social benefits of such undertakings. There is no doubt that energy and timesavings resulting from decongestion of existing connection and reduction of external costs (including accidents and casualties, air pollution, noise and environmental impact) represent high economic and social benefits. Private financing may allow execution of such projects in advance in relation to pure public funding option or freeing public resources for other socially or economically justified purposes. In both cases total economic and social benefits are higher that in the case of relying on public funding only.

Moreover, according to international experience, the application of shadow-toll-based PPP contracts allows reducing the project execution period. This refers mainly to new green-field investments, however it seems logical that it occurs also in the case of road reconstruction and upgrade projects.

The second mechanism we suggest to use in Poland satisfies the need of private involvement in expressway projects. It is applicable to existing roads upgrade projects (including rehabilitation, capacity extension in order to absorb the traffic growth, and construction of new engineering works in order to increase traffic safety and reduce environmental impact) that are supposed to have a significant positive social and economic impact, expressways that have been operated up to now as roads with open access as well as interurban or periurban motorways and expressways in which even for technical reasons (difficulty in installation of toll stations, stopping the traffic flow on toll station causes congestion) it would be difficult to introduce toll collection systems. The mechanism is based on shadow tolls.
In this mechanism annual payments to the private partner destined to cover the initial capital expenditures as well as operation and maintenance costs would come from public sources. Apart from that the public contribution to the project might consist in the payment in kind, i.e. transfer of the old road to the concessionaire. This is not incompatible with another possibility: financial support of the construction works. This component can make at least some part of initial investments cost eligible for EU co-funding.

Inclusion of the latter public support component in the concession structure would allow the use of a concession-bidding scheme similar to the one proposed in the first mechanism. If the annual payments to the concessionaire and the concession term were fixed the amount of public aid (to be co-funded from the ERDF or the CF) could be the main bidding variable and evaluation criteria.

Payments to the private partner in the form of shadow tolls depend mainly on traffic volume. Nevertheless, in order to ensure a high quality of services provided to road users the remuneration scheme should include quality-related elements. The quality indicators and the formula applied to calculate a bonus or a penalty should be structured so that the resulting remuneration variations affect the private partner’s results in order to make him take care of the quality of his services. See section II.2.3 for more general recommendations on the application of quality indicators.

As in reality shadow tolls are subsidies for the users it will be not possible to make these payments through capital expenditures. They would have to be made through current transfers or current expenditures for goods and services.

Shadow-toll based concession have been used in different European countries. The experiences of some of them (e.g. Portugal) were not satisfactory, due to the negative impact of concessions on public debt calculation and high volume of liabilities incurred by the government. For this reason the Authorities should bear in mind all possible implications of such a system. It is advisable to use the suggested scheme cautiously and only for modernization and maintenance. In any event it should not be applied as a universal mechanism for all PPP road projects.
Off-balance sheet treatment possibilities

The proposed PPP mechanism for expressway modernization with the application of shadow tolls can be implemented in conformity with the Eurostat criteria for off-balance sheet treatment of PPP investments.\(^{145}\)

First, the **construction risk** (i.e. the risk related to construction of new structures and upgrade of existing carriageways) lies totally with the private partner. Construction overruns, additional construction costs do not cause shadow tolls increase or concession term extension. The concessionaire is also to take on the responsibility for incompatibility of the structure parameters with the agreed technical standards as well as for any technical defects.

Second, the **demand risk** (i.e. the risk derived from traffic variations) is assumed entirely by the concessionaire. The administration will not make any payments to the concessionaire that would make the traffic level fluctuations irrelevant for his profit.

In the case of shadow-toll based schemes for existing roads, the **availability risk** (i.e. the risk derived from failing to deliver contracted volume and/or quality of services), gains more importance, because normally traffic risk is relatively low in this kind of projects and final financial results of the private partner are less sensitive to traffic variations. In order to effectively transfer the availability risk to the private partner bonus and penalties related to the service quality should be included in the contract. If they have a significant effect on the concessionaire’s revenues and profits, it will be possible to state that he takes on the availability risk. This should finally dispel any doubt about the PPP contract accounting treatment and ensure compatibility of the scheme with the Eurostat criteria for off-balance sheet treatment of PPP projects. For more information on quality indicators see section II.2.3:

EU Funds access possibilities

As EU Funds in the case of infrastructure investments cannot cover operating costs and only are destined to support capital expenditures it will be impossible or at least very inconvenient to co-fund shadow tolls. Desegregation of shadow tolls into components corresponding to construction, operation and financial costs might be a difficult task. Additionally, in such a scheme the EU

\(^{145}\) The Eurostat criteria for off-balance sheet treatment of Public Private Partnerships have been commented on in the section I.3.5. The appendix 4 of this report contains the full text of the Eurostat new decision on deficit and debt treatment of public-private partnerships from the 11 February 2004.
support could be only programmed for the period covered by one EU financial perspective, i.e. not more than for seven years, which makes the whole operation not worth trouble.

Therefore, the only valid and practical option for the use of EU Funds in such a project is to co-fund investment costs from public sources in the initial phase of the project, so that the CF or the ERDF can support the investment. This solution, on one hand, allows reducing the amount of shadow tolls that burden national budget in the future and on the other gives to the awarding authority a handy bidding variable, namely the amount of the initial public support, which can make the tendering more competitive in terms of economic conditions of the winning proposal and significantly simplify the evaluation of proposals\textsuperscript{146}.

### Pros and Cons of the mechanism

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>• extension of private participation mechanisms also on roads where tolls cannot be applied</td>
<td>• shadow tolls charge national budget in future</td>
</tr>
<tr>
<td>• possibility to execute in advance (thanks to mobilization of private financing) more investments of vital importance for the national economy</td>
<td>• financing arranged by private partner is in principle more expensive\textsuperscript{147}</td>
</tr>
<tr>
<td>• monitoring of the concessionaire’s performance through the use of quality indicators and economic bonuses and penalties</td>
<td></td>
</tr>
<tr>
<td>• if well structured, secures off-balance sheet treatment of the project according to the Eurostat criteria</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{146} On condition that shadow-toll level and contract term are fixed by the awarding authority.

\textsuperscript{147} This phenomenon is often used as an argument in favour of government participation in infrastructure projects. However, it does not take into consideration that the relatively lower interest rates that the financing institutions are willing to offer to the government are due to government’s ability to resort to taxation which reduces the default risk and does not mean the inherently lower economic costs of government-funded projects. Additionally, civil servants usually have less incentive to invest efficiently than private managers. Finally, there is another issue that often escapes notice. Namely, it is the growth of public debt what makes the financial costs for private sector higher and higher (so called crowding-out effect).
II.3.3. MECHANISM 3: CONCESSION FOR CONSTRUCTION, OPERATION AND MAINTENANCE OF A NEW MOTORWAY WITH SUPPORT FROM THE TEN-T BUDGET LINE

The mechanism

The third mechanism is a traditional concession supported by the EU funding coming from the Community budget from the TEN-budget line and/or the Cohesion Fund, European Regional Development Fund with a corresponding national public input.

The difference between this mechanism and the first proposed mechanism (see section II.3.1) is that in this mechanism the EU Funds are used more directly. Another difference is that the first mechanism includes cross financing of functionally related road sections, which is especially useful in the cases in which traffic generated by highly populated areas has to be channelled.

As the public contribution in this mechanism is used to make the concession financially feasible, also in this mechanism concession-bidding scheme based on the lowest public financial aid can be used (provided that the concession term and toll level are fixed).

We would like to stress that the use of such concession-bidding scheme in all mechanisms favours a countrywide homogenisation of tolls.

Off-balance sheet treatment possibilities

The proposed third PPP mechanism can be implemented in conformity with the Eurostat criteria for off-balance sheet treatment of PPP investments.

First, the construction risk (i.e. the risk related to construction of a motorway) lies totally with the private partner. Construction overruns, additional construction costs do not cause tolls increase, additional public contribution (neither coming from the national nor from the EU sources) to the project or concession term extension. The concessionaire also has to take on the responsibility for

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148 In the first proposed PPP mechanism EU Funds were used through payment in kind to the concessionaire with a EU co-funded section of a motorway.

149 The Eurostat criteria for off-balance sheet treatment of Public Private Partnerships have been commented on in the section I.3.5. The appendix 4 of this report contains the full text of the Eurostat new decision on deficit and debt treatment of public-private partnerships from the 11 February 2004.
incompatibility of the structure parameters with the agreed technical standards as well as for any technical defects.

Second, the demand risk (i.e. the risk derived from traffic variations) is assumed entirely by the concessionaire. The scheme does not include any minimum traffic, minimum income or minimum ROE guarantee. The concessionaire’s income depends entirely on the traffic volume. The administration will not make any payments to the concessionaire that would make the traffic level fluctuations irrelevant for his profit.

Assignation of only those two risks to the private partner makes the scheme compatible with the Eurostat off-balance sheet treatment criteria. Nevertheless, in order to ensure high quality of services provided to the users it would be reasonable to the include bonus and penalties related to the service quality. If any quality-related indicators that produced significant revenue and profit variations were included in the contract, it would mean that the private partner would take on the availability risk (i.e. the risk derived from failing to deliver contracted volume and/or quality of services). This should eliminate ultimately any doubt about the PPP contract accounting treatment.

**EU Funds access possibilities**

EU co-funding from the Cohesion Fund of the European Regional Development Fund can be accessed in this mechanism according to common principles governing the use of EU Funds in the revenue generating projects in the current Financial Perspective (see section I.2.6) or according to new regulations for the next Financial Perspective 2007-2013 whose approval is still pending (see section II.4.2 for more details on this subject).

Additionally, if the project forms a part of the trans-European transport network and especially if it is one of 30 priority projects\(^\text{150}\) to be launched before 2010, according to the list which was compiled by the Commission following the recommendations of the Van Miert high-level group on the TEN-T, it can be co-financed from the TEN budget line. This aid is intended for projects that are potentially economically viable and for which the financial profitability at the time of application is deemed insufficient.

The forms of aid from the TEN budget line include:

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\(^\text{150}\) *In Poland the whole A1 motorway belongs to the priority motorway axis no. 25.*
• co-financing of studies related to projects, including preparatory, feasibility and evaluation
  studies, and other technical support measures for these studies (save in exceptional and
duly justified cases, the Community contribution may in general not exceed 50% of the
total cost of a study);

• contributions towards fees for guarantees for loans from the European Investment Fund or
other financial institutions;

• subsidies of the interest on loans granted by the European Investment Bank or other public
or private financial bodies;

• direct grants to investments in duly justified cases;

• where appropriate, a combination of the above-mentioned forms of Community assistance.

According to the legislation in force the total amount of Community aid in principle may not exceed
10% of the total investment cost\textsuperscript{151}. Exceptionally, it may reach 20% under certain circumstances
and in the case of motorways particularly if:

• it is a section of a project of European interest, identified in Annex III to Decision No
1692/96/EC, and

• if it is started before 2010, and

• it is implemented with the aim of eliminating bottlenecks and/or

• filling in missing sections, if such sections are cross border or cross natural barrier, and
  contribute to the integration of the internal market in an enlarged Community, promote
  safety, ensure the interoperability of the national networks\textsuperscript{152}.

As far as the selection of projects for support from the TEN-T budget line is concerned, should be
assigned to projects that are potentially economically viable and for which the financial profitability
at the time of application is deemed insufficient.

\textsuperscript{151} Council Regulation (EC) No 2236/95 of 18 September 1995 laying down general rules for the granting of Community

According to the proposal of the European Commission for a new regulation determining the rules for the granting of Community financial aid in the field of the trans-European transport networks, in the new Financial Perspective 2007-2013\textsuperscript{153} some of these principles are to be changed in order to improve the catalyst effect of the Community aid for Public Private Partnerships. The whole TEN-T budget will remain concentrated on priority projects, but also another group of projects will be susceptible to this financing instrument. This group includes other projects of common interest in particular the projects that contribute to the improvement of the quality of service offered on the network and which favour, \textit{inter alia}, security and safety for users, and provide for interoperability between the national networks, notably deployment programmes for systems of traffic management for rail, air and sea. What seems especially interesting, is the increase of the maximum co-financing rate to a maximum of 30\% for certain sections of the priority projects and, in exceptional cases for cross-border sections, to a maximum of 50\%\textsuperscript{154}. The maximum co-financing rate for studies related to projects, including preparatory, feasibility and evaluation studies would be maintained at 50\% for all projects. This modification might be especially important for Poland, as it increases the chances of execution with private participation of more motorway projects whose projected revenue streams are insufficient to make them financially feasible on a stand-alone basis.

In any event, it has to be considered that these rules are only a proposal and may be subject to changes.


\textsuperscript{154} According to the amendment proposed by the European Parliament in its draft resolution on the proposal for a regulation of the European Parliament and of the Council determining the general rules for the granting of Community financial aid in the field of the trans-European transport networks and energy and amending Council Regulation (EC) n° 2236/95 (COM (2004) 0475 – C6-0086/2004 – 2004/0154(COD)), the definition of cross-border sections of projects would cover also connections between seaports and their hinterland, which would make the whole A1 motorway eligible for the maximum co-financing rate of 50\% and not 30\% as it would be in the case of “ordinary” priority projects.
Pros and Cons of the mechanism

<table>
<thead>
<tr>
<th>Advantages</th>
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<tr>
<td>• if well structured, secures off-balance sheet treatment of the project according to the Eurostat criteria</td>
<td>• financing arranged by private partner is in principle more expensive\textsuperscript{155}</td>
</tr>
<tr>
<td>• allows combining private financing with EU funds</td>
<td></td>
</tr>
<tr>
<td>• allows regulation of demand at different times of the day</td>
<td></td>
</tr>
<tr>
<td>• applicable to TEN-T priority projects that are also susceptible to co-funding from the TEN-T budget line</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{155} This phenomenon is often used as an argument in favour of government participation in infrastructure projects. However, it does not take into consideration that the relatively lower interest rates that the financing institutions are willing to offer to the government are due to government’s ability to resort to taxation which reduces the default risk and does not mean the inherently lower economic costs of government-funded projects. Additionally, civil servants usually have less incentive to invest efficiently than private managers. Finally, there is another issue that often escapes notice. Namely, it is the growth of public debt what makes the financial costs for private sector higher and higher (so called crowding-out effect).
II.3.4. PPP FINANCING STRUCTURE

Current formulae for private infrastructure management and financing are normally based on project finance techniques. With this type of financing, sponsors cannot or will not take on all the risks associated with the project and prefer to design and arrange financing which will affect their solvency or balance sheet as little as possible. This means that the project itself has to generate sufficient revenues to meet financial commitments with a margin that will be wide enough to cover possible shortages caused by negative incidents and bring a satisfactory financial return for the sponsors.

Generally, it is advisable to leave to the concessionaires a wide margin of freedom in the definition of the financing structure. Finally, it is the output produced by the project, i.e. high quality of public services, what the administration is interested in. The financing structure is the element, which should be optimised by the concessionaires in collaboration with financing institutions. In the final result, such optimisation means more efficiency and lower costs for the administration, users and taxpayers. For this reason potential bidders and financing entities should be provided with sufficient information and time margin in order to be able to prepare feasible and efficient financing solutions. However it does not mean necessity of financial closure before submission of proposals. Leaving to the concessionaire the possibility of further negotiations of the financing package with all interested financing institutions after the award of concession may result in better conditions thanks to the increased competition between the financing entities (see section II.1.1 “More competition – higher Value for Money”).

Privately financed motorway projects usually use a highly leveraged capital structure, which means that they utilize relatively much borrowed money in relation to the amount of own capitals. Such a structure is desirable, because it can increase the sponsors’ return on their investment. On the other hand, the Administration will be interested in the project’s continuity and financial stability. Nevertheless, it is not advisable to impose any rigid requirements regarding the financing structure. The project lenders will take care of adequate covenants (e.g. loan service coverage ratio and other ratios, step-in-rights) that will assure the projects financial stability.

What is more interesting for the administration is the sponsors’ commitment to the project. For this reason it may be advisable to fix in the bidding documentation the required minimum capitalization ratio (own capital / investment) and minimum solvency ratio (resources disbursed by shareholders / total resources employed). However, it is possible to permit reducing the ratios fixed for the construction period and the beginning of operation as soon as the project risks are reduced (e.g. a few years after the start of operation, when traffic volumes become more stable). The purpose of
doing so is to free at least part of the resources of private sponsors when the risks of the project are significantly lower than in the beginning of the concession period and the sponsors’ commitment to the project is ensured. Freeing a part of resources of private sponsors is favourable to the administration. When the private companies have more capital to invest they will be more interested in investing it in new infrastructure projects.

As far as the participation of international financing institutions is concerned, it seems to be favourable to have their involvement in the projects. Where the private participation is still a relatively new form of infrastructure provision, the private sector can have its concerns about the risks that this kind of business involves in a given country. The involvement of IFIs ensures the commitment of the administration to the project and is an indicator of the project’s acceptable quality for potential sponsors and lenders. In this way, more companies are attracted to the project and the competition increases.
II.4. PROJECT CANDIDATES TO IMPLEMENT THE PPP STRATEGY

II.4.1. PROJECT SELECTION CRITERIA

Project candidates to be implemented according to the strategy and mechanisms proposed in chapter 3 of this report were chosen based on four criteria.

First of all, it is clear that due to underdevelopment of its road network Poland is experiencing serious congestion problems that may impede or at least slow down further development of the national economy. External costs (including traffic accidents and casualties) that are being constantly produced due the obsolescence of many roads, are an additional burden for the economy. Infrastructure development is an important tool that can be used for the regional development purposes and in fact there are many regions in Poland that need better infrastructure in order to make up for their development backlogs with relation to the most developed regions. Nevertheless, we think that for the time-being investment efforts should concentrate on the elimination of existing bottlenecks first and only afterwards on the connection of least developed regions. Therefore, we were looking for projects that might have the strongest influence on the Polish economy not only in the long term, but also in the short and mid term relieving the most urgent problems. According to this approach, all three chosen project candidates are supposed to unblock the connections between the major centres of economic activity in Poland, i.e. Warsaw, the Upper Silesia Industrial Region and Gdynia and Gdańsk ports.

Secondly, we took into consideration projects that permit financing based on real tolls (to the extent permitted by the Law in Poland), as the application of the user-pays-principle is the most effective way of freeing budgetary resources for other projects including those co-funded by the EU. In order to make a toll-based project feasible it is essential that the road has sufficient traffic. Therefore we were trying to choose motorway and expressway sections with especially intense traffic.

Thirdly, we limited the selection of projects only to those that appear in the GDDKiA investment plans. For this purpose we used the Motorway and Expressway Construction Timetable for the years 2007-2013 as an indicative list of projects that are planned to be executed in Poland beyond 2006. We found it highly undesirable to suggest addition, postponement, modification or reclassification of projects in a situation where instability of road development plans was seen as one of the drawbacks of the infrastructure provision system. Additionally, we tried to choose the projects the are being prepared already by the GDDKiA in order not to propose the projects whose preparation needs to be started from scratch which would cause a significant delay of the strategy implementation.
The fourth criterion is related to the use of EU Funds. In the selected projects different EU funds can be combined with private financing according to different mechanism including combination of EU co-funded sections with sections built with private financing as well as blending EU Funds or TEN budget resources with private financing within one project. All of the suggested projects belong to the TEN-T road network, which should make easier the use of the community support. In this regard especially road undertakings lying within the TEN priority projects were seen as the most suitable candidates.

Map II.4.1. Trans-European Transport Network – Roads in Poland.

II.4.2. PROJECT 1: A2 KONIN - STRYKÓW (ŁÓDŹ) - KONOTOPA (WARSAW) MOTORWAY

The project

The first of the suggested projects would be executed according to the mechanism proposed in the section II.3.1 of this report. Its scope would be split in two (or more) road sections: one whose execution is being finished currently by the GDDKiA using EU support and another, which is currently being considered to be launched as a construction and operation concession. Optionally, if it was a feasible solution, additional works that are functionally related to the main project might be appended to the scope of works to be performed by the concessionaire.

The project would particularly include:

- A2 Konin - Stryków (Łódź) section (103 km).
  - To be delivered by the State to the concessionaire as a payment in kind - a form of public support.
  - To be operated and maintained by the concessionaire.
  - To be covered by tolls.

- A2 Stryków (Łódź) - Konotopa (Warsaw) section (94 km).
  - To be built by the concessionaire.
  - To be operated and maintained by the concessionaire.
  - To be covered by tolls.

If it turned out to be financially feasible, i.e. if the project’s revenues exceeded significantly the project costs under fixed tolls and concession term it would be possible to extend the scope of the works including additional road sections. In the case of this particular project optional add-ons might include the natural extension of the A2 motorway in Warsaw (e.g. the Northern Warsaw bypass) and its links with other motorways and expressways, i.e.:

- S8 Konotopa – Powązkowska expressway (11 km)
  - To be built by the concessionaire.
- To be operated and maintained by the concessionaire.

- To be cross-financed from A2 revenues.

- Free for users.

• S8 Powązkowska – Piłsudskiego expressway (12 km)
  
  - To be built by the concessionaire.
  
  - To be operated and maintained by the concessionaire.
  
  - To be cross-financed from A2 revenues.

  - Free for users.

• S7 Northern Exit from Warsaw expressway (approx. 15 km)
  
  - To be built by the concessionaire.
  
  - To be operated and maintained by the concessionaire.

  - To be cross-financed from A2 revenues.

  - Free for users.

Following this way, the total length of the motorway in this project would reach 197 km, and optionally might be completed with a total of up to 38 km of urban expressways. The decision on inclusion in the project of one, two or all of these three additional expressway sections would depend on the results of a complete financial feasibility study. Such solution has two important advantages. Firstly, it solves the problem of short-distance traffic in the south of Warsaw, contributing in this way to an increase of social acceptability of the concession. Secondly, it channels traffic flow from the city of Warsaw to the motorway increasing this way the financial profitability of the project.
The concessionaire’s main responsibilities:

- raising equity and debt financing required for the implementation of the project;
- adjustment for toll collection, equipment of maintenance areas and all other works required for operation of the A2 Konin - Stryków (Łódz) section;
- design and construction of the A2 Stryków (Łódz) -Konotopa (Warsaw) section together with construction and equipment of its maintenance and service areas;
- design and construction of the S8 Konotopa – Powązkowska urban expressway section and S79 urban expressway section (Warsaw airport access) – if feasible;
- design and construction of the S8 Powązkowska – Piłsudskiego urban expressway section – if feasible;
- design and construction of the S7 Northern Exit from Warsaw urban expressway section – if feasible;
- design, construction and operation of service areas;
- obtaining (completing all legal requirements) all necessary permits for the motorway;
- operation, maintenance and insurance of all above mentioned motorway and expressway sections in accordance with the conditions established in the Concession Agreement (especially regarding quality of services);
- collection of tolls;
- handling over the motorway and expressway sections operated under the concession at its expiry to the road administration in accordance with the conditions established in the Concession Agreement.

The MTiB’s / GDDKiA’s main responsibilities:

- thorough preparation of the:
  - general design,
  - feasibility study,
in order to ensure proper protection of the public interest as well as sufficient competition for the project (including setting of tolls according to the Government’s long-term tolling policy):

- handling over built motorway section(s) to be operated by the concessionaire;
- acquisition of land necessary for the construction of the motorway and its transfer to the concessionaire;
- additional necessary public aid for the project in the construction period (including arranging for EU Funds);
- supervision and control of the concessionaire’s performance.

Supporting information on considered road sections

The A2 motorway (European Road E30) is an important element of the international transit route, connecting Western Europe with Belarus and Russia and a strategic route in the centre of Poland. It will connect three important economic centres: Warsaw, Łódź and Poznań. Being an alternative for the congested national road number “2”, it will allow travellers to save a lot of time and money. In the vicinity of Łódź it is going to intersect with the A1 motorway, an important priority TEN-T route, which is expected to be a stimulating factor for the economy of the region of Łódź. Moreover, after connection of A1 with A2 Polish motorways will start to form a real network.

A2 Konin - Stryków (Łódź) section

<table>
<thead>
<tr>
<th>Length:</th>
<th>103 km</th>
</tr>
</thead>
<tbody>
<tr>
<td>Planned construction period:</td>
<td>construction to be finished by the end of 2005</td>
</tr>
<tr>
<td>Current status:</td>
<td>under construction</td>
</tr>
</tbody>
</table>
Reference forecasts of the Average Daily Traffic in the corridor:\(^{156}\):

<table>
<thead>
<tr>
<th>Year</th>
<th>Average Daily Traffic</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>18.000 – 21.200</td>
</tr>
<tr>
<td>2015</td>
<td>24.200 - 29.100</td>
</tr>
<tr>
<td>2020</td>
<td>39.100 - 34.000</td>
</tr>
</tbody>
</table>

**A2 Stryków (Łódź) - Konotopa (Warsaw) section**

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Length:</td>
<td>94 km</td>
</tr>
<tr>
<td>Planned construction period:</td>
<td>2006 - 2008</td>
</tr>
<tr>
<td>Current status:</td>
<td>localization decision issued</td>
</tr>
</tbody>
</table>

Reference forecasts of the Average Daily Traffic in the corridor:\(^{157}\):

<table>
<thead>
<tr>
<th>Year</th>
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</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>19.800 - 22.100</td>
</tr>
<tr>
<td>2015</td>
<td>32.300 - 37.700</td>
</tr>
<tr>
<td>2020</td>
<td>40.000 - 48.000</td>
</tr>
</tbody>
</table>

---

\(^{156}\) Based on ADT forecasts according to Scott Wilson Kirkpatrick. Traffic volumes in the corridor assumed in the preliminary analysis of financial feasibility of the Project No. 1 include traffic volumes forecasted by SWK on A2 and 50% of traffic volume on the National Road No. 2. Given that both routes are considerably divergent in this section it must be assumed that up to 50% of the traffic on the National Road No. 2 is local/regional traffic (not likely to choose A2).

\(^{157}\) Based on ADT forecasts according to Scott Wilson Kirkpatrick. Traffic volumes in the corridor assumed in the preliminary analysis of financial feasibility of the Project No. 1 include traffic volumes forecasted by SWK on A2 and 50% of traffic volume on the National Road No. 2. Given that both routes are considerably divergent in this section it must be assumed that up to 50% of the traffic on the National Road No. 2 is local/regional traffic (not likely to choose A2).
Map II.4.2. A2 Konin - Stryków (Łódz) - Konotopa (Warsaw) motorway

Source: By the authors, based on GDDKiA graphics.

S8 Konotopa - Powązkowska section (Warsaw bypass) – (if feasible)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Length:</strong></td>
<td>11 km</td>
</tr>
<tr>
<td><strong>Interchanges:</strong></td>
<td>5</td>
</tr>
<tr>
<td><strong>Planned construction period:</strong></td>
<td>Q1 2006 - 2008</td>
</tr>
<tr>
<td><strong>Current status:</strong></td>
<td>awaiting construction permit</td>
</tr>
</tbody>
</table>
### S8 Powązkowska – Piłsudskiego section (Warsaw bypass) – *(if feasible)*

<table>
<thead>
<tr>
<th>Length:</th>
<th>12 km</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interchanges:</td>
<td>9</td>
</tr>
<tr>
<td>Planned construction period:</td>
<td>2007-2009</td>
</tr>
<tr>
<td>Current status:</td>
<td>preparation of documentation for localization decision</td>
</tr>
</tbody>
</table>

### S7 Northern Exit from Warsaw (Warsaw bypass) – *(if feasible)*

<table>
<thead>
<tr>
<th>Length:</th>
<th>approx. 15 km</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interchanges:</td>
<td>-</td>
</tr>
<tr>
<td>Planned construction period:</td>
<td>2008-2011</td>
</tr>
<tr>
<td>Current status:</td>
<td>preliminary studies</td>
</tr>
</tbody>
</table>

Map II.4.3. Urban expressway sections that can be included in the project.

Source: By the authors, based on graphics found at http://www.siskom.waw.pl/mapy.htm.
EU co-funding possibilities

The project consists of two main parts. The construction of the A2 section Konin - Stryków (Łódź) is being currently finished using conventional public funding with EU grants from ISPA and Cohesion Fund. The operation and maintenance of the section is to be commissioned to a concessionaire. According to the proposed mechanism, the construction, operation and maintenance of the second section - Stryków (Łódź) - Konotopa (Warsaw) - would be financed by the same concessionaire. This way, i.e. through division of the projects into two parts, EU funding is combined with private financing.

The above-described mechanism does not exclude the possibility that other sections that belong to the project might also include a EU co-funding component. In particular, if additional expressway sections are added to the scope of the project and the whole undertaking is not profitable for the private partner, public aid for the investment can be at least partially refunded from EU-funds, according to rules regarding the use of a particular Cohesion Policy or Structural Policy instrument that are in force in a given period (see Appendixes 1 and 2).

Preliminary analysis results\textsuperscript{158}

Assumed concession period is 30 years.

The resulting financial IRR is higher than the assumed minimum of 9,3% required to make the project financially feasible.

As a consequence it seems that no public support is required in this project.

Concession period can be used then as the main bidding variable.

\textsuperscript{158} Note: The analysis is based on a series of assumptions and estimations (presented briefly in the Appendix 5) that do not have to be accurate. It has been performed to check if the suggested solutions can have any prospects of being feasible. Any decisions on implementation of these projects require further detailed studies.
Table II.4.1. Project 1 – summary of results (preliminary analysis)^159

<table>
<thead>
<tr>
<th>Type of project</th>
<th>real toll</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total length</td>
<td>235 km</td>
</tr>
<tr>
<td>Toll section brought in by the State</td>
<td>103 km</td>
</tr>
<tr>
<td>Toll section to be built by the concessionaire</td>
<td>94 km</td>
</tr>
<tr>
<td>Free sections to be built by the concessionaire</td>
<td>38 km</td>
</tr>
<tr>
<td>Total construction cost</td>
<td>796 € million</td>
</tr>
<tr>
<td>Public support for construction</td>
<td>0%</td>
</tr>
<tr>
<td>Concession period</td>
<td>30</td>
</tr>
<tr>
<td>Average toll per veh-km</td>
<td></td>
</tr>
<tr>
<td>Toll section brought in by the State</td>
<td>0.07 €</td>
</tr>
<tr>
<td>Toll section to be built by the concessionaire</td>
<td>0.07 €</td>
</tr>
<tr>
<td>Free sections to be built by the concessionaire</td>
<td>0.00 €</td>
</tr>
<tr>
<td>Internal Return Rate</td>
<td>12.0%</td>
</tr>
</tbody>
</table>

^159 For an extended summary of results see: Appendix 6.
II.4.3. PROJECT 2: S8 WARSAW-PIOTRKÓW TRYBUNALSKI EXPRESSWAY

The project

The second of the suggested projects would be executed according to the mechanism proposed in the section II.3.2. It is an existing expressway modernization and operation contract with shadow-toll-based financing. It would be the first road modernization project in Poland to be financed entirely from shadow tolls and the first expressway to be built/modernized and operated as a PPP.

The suggested section is the S8 between Warsaw and Piotrków Trybunalski (European Road E67). First of all, this expressway appears to be extremely important for the Polish economy as it connects two major centres of economic activity: the Warsaw agglomeration and the Upper Silesia Industrial Region. Secondly, its current traffic as well as traffic forecasts indicate that if appropriate measures are not taken as soon as possible the road may become completely congested very soon. Existing traffic forecasts would even justify construction of a high capacity toll motorway on this section. However, it has been never considered in the Motorway Construction Programme. Construction of a toll motorway instead of expressway would require modification of the GDDKiA Motorway and Expressway Construction Timetable, and amendment of two Decrees of Council of Ministers: the 2004 Decree on the motorway and expressway network160 and the 2002 Decree on Toll Motorways161.

Additionally, a modernization of this expressway would help to improve traffic safety through reduction of the number of casualties.

The project would particularly include:

- S8 Warsaw - Piotrków Trybunalski section (132 km).
  - To be delivered by the State to the concessionaire as a payment in kind - a form of public support.
  - To be rehabilitated, upgraded (including construction of new interchanges and overpasses if needed to improve traffic safety), widened (to absorb the expected traffic growth) and equipped with installations reducing environmental impact by the concessionaire.

160 Rozporządzenie Rady Ministrów z dnia 15 maja 2004 r. w sprawie sieci autostrad i dróg ekspresowych, Dz.U. 2004 nr 128 poz. 1334.
161 Rozporządzenie Rady Ministrów z dnia 16 lipca 2002 r. w sprawie autostrad płatnych, Dz.U. 2002 nr 121 poz. 1034.
- To be operated and maintained by the concessionaire.

- To be covered by shadow tolls.

- Free for users.

If it turned out to be financially feasible, i.e. if the project’s revenues exceeded significantly the project costs under fixed tolls and concession term it would be possible to extend the scope of the works including additional road sections. In the case of this particular project optional add-ons might include the urban expressway link between the S8, S7, the city centre, the S2 – Southern Bypass of Warsaw and the S17 – Eastern Bypass of Warsaw:

- **S8 Salomea - Wolica-Nadarzyn urban expressway section (15 km).**
  - To be built by the concessionaire.
  - To be operated and maintained by the concessionaire.
  - To be cross-financed from S8 revenues.
  - Free for users.

- **S2 Konotopa – Puławskaja urban expressway section and S79 urban expressway section (Warsaw airport access) (20 km).**
  - To be built by the concessionaire.
  - To be operated and maintained by the concessionaire.
  - To be cross-financed from S8 revenues.
  - Free for users.

- **S2 Puławskaja – Lubelska urban expressway section (20 km).**
  - To be built by the concessionaire.
  - To be operated and maintained by the concessionaire.
  - To be cross-financed from S8 revenues.
  - Free for users.
• S17 Marki–Lubelska expressway section (22 km).
  
  - To be built by the concessionaire.
  
  - To be operated and maintained by the concessionaire.
  
  - To be cross-financed from S8 revenues.
  
  - Free for users.

This way the total length of the expressway covered by the shadow-toll in this project would reach 132 km, and optionally might be completed with a total of up to 77 km of additional urban expressways. The decision on inclusion of this additional expressway section in the project would depend on necessities and the results of a complete financial feasibility study. Such solution has two important advantages. Firstly, it solves the problem of short-distance traffic in the south of Warsaw, contributing in this way to an increase of social acceptability of the concession. Secondly, it channels traffic flows from the city of Warsaw to the expressway.

The concessionaire’s main responsibilities:

• raising equity and debt financing required for the implementation of the project;

• design and reconstruction of the S8 Warsaw - Piotrków Trybunalski section including construction of new interchanges and overpasses, widening and equipment with installations reducing environmental impact

• design and construction of the S8 Salomea - Wolica-Nadarzyn urban expressway section – if feasible;

• design and construction of the S2 Konotopa – Puławska urban expressway section – if feasible;

• design and construction of the S2 Puławska – Lubelska urban expressway section – if feasible;

• design and construction of the S17 Marki – Lubelska expressway section – if feasible;

• obtaining (completing all legal requirements) all necessary permits for the motorway;
• operation, maintenance and insurance of the above mentioned expressway section(s) in accordance with the conditions established in the Concession Agreement (especially regarding quality of services);

• handling over the expressway section(s) operated under the concession at its expiry to the road administration in accordance with the conditions established in the Concession Agreement.

The MTiB’s / GDDKiA’s main responsibilities:

• thorough preparation of the:
  
  o general design,
  
  o feasibility study,
  
  o bidding documentation, and
  
  o Concession Agreement

in order to ensure proper protection of the public interest as well as sufficient competition for the project (including setting of tolls according to the Government’s long-term tolling policy);

• handling over existing expressway section to be improved and operated by the concessionaire;

• acquisition of land necessary for the widening, construction of new road sections and its transfer to the concessionaire;

• additional necessary public aid for the project in the construction period (including arranging for EU Funds);

• shadow toll payments to the concessionaire (annually adjusted according to the concessionaire’s performance measured by means of quality indicators);

• supervision and control of the concessionaire’s performance.
Supporting information on considered road sections

S8 Warsaw - Piotrków Trybunalski section

<table>
<thead>
<tr>
<th>Length:</th>
<th>132 km</th>
</tr>
</thead>
<tbody>
<tr>
<td>Planned construction period:</td>
<td>2007-2010</td>
</tr>
<tr>
<td>Current status:</td>
<td>existing national road section</td>
</tr>
</tbody>
</table>

Reference forecasts of the Average Daily Traffic\textsuperscript{162}:

<table>
<thead>
<tr>
<th>Year</th>
<th>Average Daily Traffic</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>21.400 – 28.300</td>
</tr>
<tr>
<td>2010</td>
<td>33.200 – 39.500</td>
</tr>
<tr>
<td>2015</td>
<td>33.200 – 39.500</td>
</tr>
<tr>
<td>2020</td>
<td>33.200 – 39.500</td>
</tr>
</tbody>
</table>

\textsuperscript{162} Based on ADT forecasts according to Scott Wilson Kirkpatrick.
The S8 urban expressway Salomea - Wolica-Nadarzyn is to connect the S7 expressway (to Kraków), S8 expressway (to Piotrków Trybunalski and Wrocław, the main connection between the Upper Silesia Industrial Region and Warsaw) with the Southern Bypass of Warsaw (S2) and the urban street network.
The Southern Bypass of Warsaw (S2) will be an important urban expressway that will significantly improve traffic conditions in the capital city, absorbing the majority of transit on the West-East axis. According to preliminary studies, traffic related with Warsaw will present about 80% (20-30% - intraurban traffic; 50-60% incoming and outgoing traffic), intra-voivodship traffic – about 17% and long-distance traffic – about 3% of the total traffic on the S2.

The Southern Bypass of Warsaw will go along the corridor previously reserved for the A2 motorway. However being an urban expressway it will have more interchanges with the urban street network. A tight functional interrelation between the S2 and A2 - the urban expressway will channel most of the traffic from the southern part of Warsaw to the A2 - justifies bundling of the Southern Bypass of Warsaw with the A2 motorway project.

As the second section of the S2, Puławska – Lubelska will cross a densely populated residential quarter of Ursynów on the left bank and the Mazovia Landscape Park on the right bank of the Vistula river, special solutions limiting the impact of the expressway on the quality of life of inhabitants and natural environment are foreseen. Under Ursynów a 2,650 meter long tunnel is to be built. On the surface special pro-ecologic and pro-social measures are foreseen. In the landscape park a 1,600 m long overpass is going to be built. All these extraordinary pieces of infrastructure make the second section of the S2 especially costly.

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164 in Polish: Mazowiecki Park Krajobrazowy
### S2 Konotopa – Puławska urban expressway section including S79 urban expressway section (Warsaw airport access) – (if feasible)

<table>
<thead>
<tr>
<th><strong>Length:</strong></th>
<th>20 km</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Interchanges:</strong></td>
<td>8</td>
</tr>
<tr>
<td><strong>Planned construction period:</strong></td>
<td>Q3-Q4 2006 - 2008</td>
</tr>
<tr>
<td><strong>Current status:</strong></td>
<td>localization decision procedure</td>
</tr>
</tbody>
</table>

### S2 Puławska – Lubelska urban expressway section – (if feasible)

<table>
<thead>
<tr>
<th><strong>Length:</strong></th>
<th>20 km</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Interchanges:</strong></td>
<td>6</td>
</tr>
</tbody>
</table>
| **Other important structures:** | - Expressway tunnel under Ursynów residential quarter (2,65 km)  
- Wisła river bridge (1 km)  
- Viaduct over the Mazovia Landscape Park\(^{165}\) (1.6 km) |
| **Planned construction period:** | 2007-2010 |
| **Current status:** | preparation of the localization decision documentation |

### S17 Marki– Lubelska expressway section (Eastern bypass of Warsaw) – (if feasible)

<table>
<thead>
<tr>
<th><strong>Length:</strong></th>
<th>22 km</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Interchanges:</strong></td>
<td>8 (according to preliminary GDDKiA assumptions)</td>
</tr>
<tr>
<td><strong>Planned construction period:</strong></td>
<td>2008-2011</td>
</tr>
<tr>
<td><strong>Current status:</strong></td>
<td>&quot;environmental decision&quot; procedure</td>
</tr>
</tbody>
</table>

---

\(^{165}\) *in Polish: Mazowiecki Park Krajobrazowy*
Map II.4.5. Urban expressway sections that can be included in the project.

EU co-funding possibilities

One of the advantages of the use of shadow-tolls system over conventional public funding in this kind of projects consists in spreading of their total costs over their whole life. It means that the public funds that are at the disposal of the administration in a given period can be used for funding of more infrastructure projects and that some of these projects can be implemented in advance (in relation to a situation in which only the conventional public funding is employed). This is highly desirable given the positive impact of modern infrastructure on national economy.

However, if public payments for the private partner are spread over the whole life of the project that can exceed 20 years, the use of EU Funds in such a project becomes quite inconvenient. First, it would be necessary to break the annual payments into elements corresponding to investment costs that are eligible for EU funding and other costs (including operation and maintenance costs) that are not eligible. Second, it is difficult to presume that the project, the region or the whole country will be eligible for EU grants during such a long period of time, which means that after a
few years the totality of payments for the private partner would have to come from national public sources. Third, even if the eligibility of the project were maintained over a longer period of time, the EU funding would have to be arranged for in each programming period separately.

It is also possible to reduce the amount of annual payments from public sources and instead partially support the project with public funds during the construction period (see Figure II.4.1). This approach reduces the attractiveness of the use of PPP (although reduced, upfront public expenditures are still necessary), but on the other hand enables the use of EU funds and still reduces the overall national public expenditure on the project in comparison to both the conventional public funding and shadow-toll system without using EU Funds.

Figure II.4.1. Private partner’s cash-flow and public funding of the project with and without using EU funds in the construction phase.
Preliminary analysis results

Assumed concession period is 30 years.

The resulting financial IRR is higher than the assumed minimum of 9.3% required to make the project financially feasible.

As a consequence it seems that no public support is required in this project.

Concession period can be used then as the main bidding variable.

Table II.4.2. Project 2 – summary of results (preliminary analysis)

<table>
<thead>
<tr>
<th>Type of project</th>
<th>shadow toll</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total length</td>
<td>209 km</td>
</tr>
<tr>
<td>Road section brought in by the State to be rebuilt by the concessionaire</td>
<td>132 km</td>
</tr>
<tr>
<td>Free sections to be built by the concessionaire</td>
<td>77 km</td>
</tr>
<tr>
<td>Total construction cost</td>
<td>1.247 € million</td>
</tr>
<tr>
<td>Public support for construction</td>
<td>0 € million</td>
</tr>
<tr>
<td>Concession period</td>
<td>30 years</td>
</tr>
<tr>
<td>Average shadow toll per veh-km</td>
<td></td>
</tr>
<tr>
<td>Toll section brought in by the State to be rebuilt by the concessionaire</td>
<td>0.07 €</td>
</tr>
<tr>
<td>Free sections to be built by the concessionaire</td>
<td>0.00 €</td>
</tr>
<tr>
<td>Internal Return Rate</td>
<td>10.4%</td>
</tr>
</tbody>
</table>

Note: The analysis is based on a series of assumptions and estimations (presented briefly in the Appendix 5) that do not have to be accurate. It has been performed to check if the suggested solutions can have any prospects of being feasible. Any decisions on implementation of these projects require further detailed studies.

For an extended summary of results see: Appendix 6.
II.4.4. PROJECT 3: A1 TORUŃ – STRYKÓW (ŁÓDŹ) MOTORWAY

The project

The third recommended project would be executed according to the mechanism proposed in the section II.3.3.

The motorway section to be built using private financing will constitute a “missing link” between the northern section Gdańsk-Toruń (construction of the first phase started in July 2005 by the concessionaire GTC S.A.) and the southern section of A1 motorway (concession bidding currently in pre-qualification stage).

The project would particularly include:

- A1 Toruń – Stryków (Łódź) section (141 km).
  - To be built by the concessionaire.
  - To be operated and maintained by the concessionaire.
  - To be covered by tolls.

The mechanism would be a simple motorway concession with real tolls. The concessionaire would have to design, build, operate and maintain the motorway and it would be entirely covered by tolls. In the case of insufficient traffic, it would be possible to finance some part of preparatory and construction works with public aids, which afterwards might be financed with EU Funds.

The concessionaire’s main responsibilities:

- raising equity and debt financing required for the implementation of the project;
- design and construction of the A1 Toruń – Stryków (Łódź) section together with construction and equipment of its maintenance and service areas;
- obtaining (completing all legal requirements) all necessary permits for the motorway;
- operation, maintenance and insurance of the above mentioned motorway section in accordance with the conditions established in the Concession Agreement (especially regarding quality of services);
collection of tolls;

handling over the motorway and expressway sections operated under the concession at its expiry to the road administration in accordance with the conditions established in the Concession Agreement.

The MTiB’s / GDDKiA’s main responsibilities:

- thorough preparation of the:
  - general design,
  - feasibility study,
  - bidding documentation, and
  - Concession Agreement

in order to ensure proper protection of the public interest as well as sufficient competition for the project (including setting of tolls according to the Government’s long-term tolling policy);

- acquisition of land necessary for the construction of the motorway and its transfer to the concessionaire;

- additional necessary public aid for the project in the construction period (including arranging for EU Funds);

- supervision and control of the concessionaire’s performance.

Supporting information on considered road sections

The A1 motorway (European Road E75) is part of the priority TEN-T project No 25 on the sixth corridor linking the Baltic Sea with the Czech Republic and Slovakia. The section is of vital importance for Poland. First, it will decongest the connection between the ports of Gdańsk and Gdynia with the rest of the country and neighbouring countries in the South of Poland, which will help to the Polish economy to gain momentum for further development. Second, it will connect the
– existing at that time – sections of A2 and A1 motorways converting separated sections into a real network.

<table>
<thead>
<tr>
<th>Length:</th>
<th>141 km</th>
</tr>
</thead>
<tbody>
<tr>
<td>Planned construction period:</td>
<td>2010-2011</td>
</tr>
<tr>
<td>Current status:</td>
<td>Archaeological research until Q4 2006</td>
</tr>
</tbody>
</table>

Reference forecasts of the Average Daily Traffic in the corridor\(^{168}\):

<table>
<thead>
<tr>
<th>Year</th>
<th>Average Daily Traffic</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>15.900 – 21.600</td>
</tr>
<tr>
<td>2020</td>
<td>23.400 – 28.000</td>
</tr>
</tbody>
</table>

\(^{168}\) Based on ADT forecasts according to Scott Wilson Kirkpatrick.
EU co-funding possibilities

This project is a good candidate for the use of EU Funds. A1 forms a part of the priority motorway axis No 25 of the TEN-T Network. This implies that all preliminary studies will be eligible for an up to 50% funding from the TEN budget line. Additionally, it will be possible to fund from the TEN budget line up to 10% of total costs of the project. The total Community aid from this instrument may reach up to 20%, if the project is deemed complying with one of the following conditions:

- started before 2010, and
- implemented with the aim of eliminating bottlenecks and/or

Source: By the authors, based on GDDKiA graphics.
• filling in missing sections, if such sections are cross border or cross natural barrier, and contribute to the integration of the internal market in an enlarged Community, promote safety, ensure the interoperability of the national networks.

The proposal of the European Commission for a new regulation determining the rules for the granting of Community financial aid in the field of the trans-European transport networks in the new Financial Perspective 2007-2013 envisages some modifications of principles governing this type of Community assistance that are designed for improvement of the catalyst effect of the Community aid for Public Private Partnerships.

The maximum co-financing rate is to rise to 30% for certain sections of the priority projects and, in exceptional cases (cross-border sections), to a maximum of 50%. If the modifications envisaged by the European Parliament are approved, the A1 motorway will be eligible for the maximum TEN-T Community aid of 50% of the total project costs. This is due to the proposed inclusion of connections between seaports and their hinterland in the definition of cross-border sections of projects.

In any event, it has to be considered that the proposed new Regulation has not been approved yet and may be subject to changes.

The Community aid for TEN projects, EU Funds and corresponding national matching funds might secure sufficient profitability for the project to be executed as a PPP. From among the EU funds the Cohesion Fund would be, in our opinion, the best choice for this project. The Cohesion Fund is first and foremost destined for co-funding of large transport and environment infrastructure projects, whereas the European Regional Development Fund has much broader scope of application including different kinds of projects of regional and local influence. Moreover, the project contributes to the cohesion of the Common Market on a national and international level, which makes him a very good candidate for CF co-funding.

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Source: European Commission, DG Tren.
Preliminary analysis results\textsuperscript{170}

Assumed concession period is 30 years.

The financial IRR of 9.3\% which is assumed as the minimum required to make the project financially feasible can be only achieved with public support equal to 10\% of total construction costs.

The amount of public support (including support from the TEN-T line) can be used then as the main bidding variable.

\begin{table}[h]
\centering
\begin{tabular}{|l|l|}
\hline
Type of project & real toll \\
\hline
Total length & 141 km \\
Toll section brought in by the State & 0 km \\
Toll section to be built by the concessionaire & 141 km \\
Free sections to be built by the concessionaire & 0 km \\
\hline
Total construction cost & 694 € million \\
Public support for construction & 10\% \\
& 69 € million \\
Concession period & 30 years \\
\hline
Average toll per veh-km & \\
Toll section brought in by the State & n/a \\
Toll section to be built by the concessionaire & 0.07 € \\
Free sections to be built by the concessionaire & n/a \\
\hline
Internal Return Rate & 9.3\% \\
\hline
\end{tabular}
\caption{Project 3 – summary of results (preliminary analysis)\textsuperscript{171}}
\end{table}

\textsuperscript{170} Note: The analysis is based on a series of assumptions and estimations (presented briefly in the Appendix 5) that do not have to be accurate. It has been performed to check if the suggested solutions can have any prospects of being feasible. Any decisions on implementation of these projects require further detailed studies.

\textsuperscript{171} For an extended summary of results see: Appendix 6.
II.5. THE USE OF EU FUNDS IN PPP PROJECTS

II.5.1. GENERAL REMARKS REGARDING THE USE OF EU FUNDS IN PPP PROJECTS

Combining EU co-funding with private participation in not an easy task. On one hand, Poland is taking its first steps in the use of EU grants for infrastructure development and the first experiences are not always satisfactory. On the other hand, Public Private Partnerships require additional effort related to good project preparation, award and monitoring. Combination of these two can be even more difficult which finally may be discouraging for the administration. But on the whole such arrangements can contribute to expansion of the investment potential of the administration and allow building more public infrastructure that are necessary for further development of the country and social prosperity.

In order to avoid disappointments and ensure success of the strategy, it is important to make a proper choice of projects susceptible of the use of EU Funds, but also potentially attractive for the private sector. This issue has been already commented on in the section II.2.1, but it is worth mentioning that projects to be co-funded from EU Funds have to be socially profitable to be accepted by the European Commission, so that only projects with a high social rate of return are good candidates. However, it makes no use to finance all such projects with EU Funds and national public matching contribution. Although it can be tempting to stuff all socially profitable projects with a maximum possible EU contribution in order to achieve high absorption rates, two things cannot be neglected. Firstly, the EU Funds are scarce resources as all financial resources and their multiplying effects should be maximized. Secondly, the final objective of the administration is to build more and better infrastructure and not to absorb the maximum amount of funds at the least possible cost.

For these reasons financially profitable projects should be left for the execution by the private sector without any public support. Projects with high social return rate and susceptible to be economically exploited, i.e. generating revenues, but not enough to ensure sufficient financial rate of return for the sponsors should be executed by private sector with public support including EU grants. In spite of transitory difficulties experienced by Poland in the absorption of Funds, this should be done, even if execution of such projects in a traditional method would allow higher EU input. This way both the EU Funds and resources for national public contributions can be diverted to other socially profitable projects that are least attractive for the private sector. All in all, the idea is to build more infrastructure with the same amount of public funds, both national and European, thanks to attraction of private participation.
This way EU Funds are distributed among a higher number of projects what has two positive consequences. First, their effect on the national economy is greater. Second, in case of any problems with acceptance of a particular project by the EC the amount of funds that potentially become lost is lower\textsuperscript{172}.

The requirement for a successful implementation of this approach has been already mentioned several times in the first an in the present part of the report. It is an efficient pipeline of mature projects that can be financed by the private sector and/or EU grants, which in turn requires a significant reinforcement of the administration, both in terms of more qualified workforce and additional training.

\textbf{II.5.2. USE OF THE EU FUNDS IN THE PPP PROJECTS IN THE NEW FINANCIAL PERSPECTIVE 2007-2013 ACCORDING TO THE CHANGES PROPOSED IN THE EU LEGISLATION}

Legislative proposals of the European Commission on cohesion policy reform for the New Financial Perspective 2007-2013 include some modifications of the rules regarding the use of EU Funds in revenue generating projects, a category that includes toll motorways. Generally, all changes aim at the reinforcement of the additionality principle and simplification of the rules.

In the case of Public-Private Partnerships, the rate of mobilisation of private financing will be one of the criteria taken into consideration while modulating of the contribution rate just like it is nowadays.

The first important change concerns the definition of revenue-generating projects. For the purposes of the proposed Regulation laying down general provisions on the ERDF, the ESF and the CF\textsuperscript{173}, a revenue-generating project shall be any project involving an infrastructure the use of which involves fees borne directly by users (e.g. tolls) and any operation resulting from the sale or rent of land or buildings. In this way a substantial net revenue threshold of 25% of the total cost of the investment will be eliminated and all projects involving user charging will be treated the same way regardless of the revenue they bring.

\textsuperscript{172} This argument applies to all EU co-funded projects regardless of being executed or not with private participation.

Another change refers to the co-funding rate calculation method for revenue generating projects. As far as the ERDF is concerned the additional 40% hurdle calculated in relation to the total eligible cost of the project will be eliminated. The maximum Community contribution is to be calculated according to the same principles as in the case of publicly funded projects. It means that it may amount up to 75% of the total public expenditure. The above mentioned principle is going to be extended also on projects co-funded by the Cohesion Fund, which had a separate and different regulation regarding this issue in the Financial Perspective 2000-2006. The maximum contribution of the Community to such projects will be 85% of the total public expenditure. In any case, public expenditure on revenue-generating projects shall be calculated on the basis of the investment cost less the current value of the net revenue from the investment over a specific reference period. The calculation shall take account of the profitability normally expected of the category of investment concerned and of the application of the polluter-pays principle.

The draft Regulation does not include any specific provisions regarding PPP apart from the articles related to the revenue generating projects. Nevertheless, it confirms that combination of Structural Funds with private financing is a welcome solution. According to Clause 49, “to increase the multiplier effect of Community resources, it is […] necessary to take into account the […] mobilisation of private sources in the operational programmes through public private partnership”. Moreover, the draft Regulation recommends to cover Public Private Partnerships by the EU Funds programming in order to ensure their better coordination with the Funds, other existing financial instruments, the EIB and the European Investment Fund174.

It must be stressed that the proposed regulations have not been approved yet and may be subject to changes. It seems however unlikely that the EU opt to pull back from the idea of simplification of rules regarding the use EU Funds, especially in the case of revenue generating projects implemented with private participation. It is also worth mentioning that the proposed solutions regarding calculation of the amount of Community aid based on total public expenditures and co-funding of revenue generating projects are supported by the European Parliament as simplifying and reinforcing the additionality principle175.


For additional information on proposed new rules on the use of EU Funds in the New Financial Perspective 2007-2013 see appendix 2.
II.6. BASIC REQUIREMENTS FOR A SUCCESSFUL USE OF PUBLIC PRIVATE PARTNERSHIPS

Strong political support

Strong political support for the use of Public Private Partnerships is extremely important for their success. Firstly, it gives confidence to the private sector that PPP will not be abandoned as one of the elements of infrastructure provision system and that their investments are not exposed at risk. Secondly, it can stimulate the removal of existing administrative barriers and prompt the administration to act in favour of the implementation of necessary changes. Thirdly, it can support the idea of combining PPP with EU Funds.

On the contrary, if the policy towards concession system is not stable even PPP projects that are technically and commercially viable may prove to be difficult to finance because of political risk, i.e. the probability of actions or non-actions under the control of the government that adversely affect the project. Therefore, it is of crucial importance for the success of PPP projects that the government supports private investment in infrastructure.

A clear PPP strategy is necessary and a policy based on the recognition of the fact that private participation in infrastructure provision can bring more advantages than disadvantages. Such policy should be supported by a broad political consensus on the usefulness of PPP. There is no doubt that all countries that succeeded in the use of private participation in infrastructure provision (e.g. United Kingdom, Spain, Chile) have had such a policy backed by a political consensus. Neutral position on infrastructure concessions or - what is even worse - doubts on their virtues can lead only to indecision and squandering the chance of more dynamic development.

Legal, Economic and Political Stability

Public Private Partnership projects can be hampered not only by political, but also by many legal and economic risks. Therefore, it is much easier to promote PPP projects in a legally, economically and politically stable environment.

The legal framework for toll motorways has been quite changeable during last few years. Although some changes were positive, there are issues that some clarifications, e.g. the applicability of the new Act on PPP to different kinds of projects. There can be also legal changes that can be inconvenient for the private sector as they can affect the feasibility of their investments. It is
strongly recommended to avoid such situations and if once they happen to make sure that the financial equilibrium of the contract is recovered.

In any event, it is desirable to work out a stable and clear legal framework for PPP in order to make the concession market more attractive for private investors.

As regards the economic environment for Public Private Partnership, Poland being a Member State of the European Union, with its steady economic growth, suppressed inflation and lowering interest rates, can be deemed as a stable and “PPP-friendly” economy. However, to maintain this status economic reforms must be continued. This applies especially to the reform of public finances. As it has been already mentioned in section II.2.1, contention of budgetary deficit is one of important factors that facilitate private investments as it contributes to the reduction of the cost of credit. Another issue to be taken into account, is the exchange rate risk, which appears when the local financial market is not capable of providing enough financing and a project has to be financed with foreign debt, but toll payments or payments from the government are in local currency. In the particular case of Poland the exchange rate risk may be quite an obstacle, because of strong fluctuations of the price of PLN recorded in the last years. A chance to tackle all these problems is at the reach of the hand. With the access to the Economic and Monetary Union a broader financial market will become more accessible for Polish projects, the exchange rate risk will disappear and the cost of credit will decrease significantly. Nevertheless, this will require a consistent and firm implementation of policy aimed at fulfilment of Maastricht criteria.

Independent and efficient system of justice

It is favourable for private investments to make sure that the rights the investors can benefit from under the law can be enforced. Before taking decision on participating in a tender, potential sponsors assess whether the system of justice is independent and efficient enough and if it is possible to settle disputes through arbitration, including international arbitration. Whereas there are no doubts about the independency of the Polish court system its efficiency leaves much to be desired. According to the World Bank report Doing Business 2005\textsuperscript{176}, the execution of a debt from a non-paying debtor takes in Poland about 1000 days (compared to the average of 393 in Europe and Central Asia and about 226 in OECD countries) and it requires carrying out 41 procedures (compared to the average of about 30 in Europe and Central Asia and about 20 in OECD

countries) from the moment when the lawsuit is filed in court until the moment of actual payment. These results place Poland at one of the last positions in Europe and in the world and can be a discouraging factor for potential investors. An improvement in this area is a must.

**Possibility to recoup private investment - sufficient traffic**

Possibility to recoup private investment is an essential requirement for feasibility of PPP motorway projects. Incomes from operation of a motorway have to cover all investment costs and all other costs incurred during the operation period that are not covered by public contributions (including national public contributions and EU Funds). The incomes depend however on tolls (see following section), traffic intensity on the motorway and its growth.

The higher the traffic, the bigger the probability that the project will be able to generate sufficient revenues that will make the private investment feasible. Traffic growth rate is strongly sensitive to macroeconomic conditions and especially to available income and its fluctuations, what is one of the reasons for which economic stability is an important risk-reducing factor and one of the basic requirements for a successful use of Public Private Partnerships.

According to data published by the A4 Katowice - Kraków concessionaire, Stalexport Autostrada Małopolska S.A. and its owner, Stalexport S.A. average daily traffic intensity registered on the motorway amounted to about 17 thousand in 2001, 18 thousand in 2002, 19 thousand in 2003 and 20 thousand in 2004, which means that the traffic grew 5.5 – 6.1% yearly in this period, significantly faster than the GDP\(^{177}\). In September 2005 the average daily traffic intensity registered on A4 for passenger cars only was 10% higher than in September 2004. As far as A2 is concerned, according to the representative of one of the shareholders of Austrostrada Wielkopolska S.A., traffic density on A2 in 2004 was 22% higher than the intensity assumed in the bank business case. In the case of heavy goods vehicles these numbers have been boosted recently through exemption of vignette payers from tolls.

Regarding present traffic levels, in some corridors where motorways construction is planned, they are sufficient to develop financially stand-alone toll-financed motorway projects. There are however other ones where current traffic intensity hardly reaches 15,000 vehicles per day. Even with high traffic capture rates reaching 60-70% - as it is in the case of A4 motorway – it would be difficult to

\(^{177}\) GDP growth in Poland: 2001 – 1.0%; 2002 – 1.4%; 2003 – 3.8%; 2004 – 5.4%.
make them feasible. Nevertheless, if potential traffic is not sufficient in the first years of concession, public financial support of investment (including EU Funds) can be given in order to ensure financial feasibility of projects.

It must be also born in mind that toll motorways have been quite unattractive for users so far, because only relatively short sections have been in operation. Tolled roads benefit tremendously from the existence of a network, which makes the use of such a road much more attractive due to a significant improvement of overall journey time and quality. In the case of short toll motorway sections such improvement is hardly noticeable. When motorways in Poland start to form a network, further traffic growth is to be expected.

To sum up, a conclusion can be drawn that existing and future traffic levels and their growth give sufficient ground for the development of financially independent or – if need be - publicly supported PPP motorway projects.

Possibility to recoup private investment - legal support and social acceptance of infrastructure user charges

As explained above, the level of tolls is one of the factors that determine the level of incomes of the private partner and consequently a feasibility of the PPP project. However, first of all it is necessary to determine if tolls are applicable to PPP projects, according to the legislation in force and whether road users are willing to pay them.

For the good and for the bad, a single response does not exist. The degree of users’ tolerance to tolls depends on cultural factors rather than on legal ones. At the bottom of some passages of the Polish statutes, a whiff of distrust can be perceived by the legal observer. As it has been mentioned, in this field the 1994 Toll Motorways Act\(^\text{178}\) has the status of special legislation and, as a result, prevails with respect to the general legislation represented by the Public Procurement\(^\text{179}\) and the PPP Acts\(^\text{180}\). Article 1 is the best evidence:

\(^{178}\) Act on Toll Motorways and the National Road Fund (Ustawa z dnia 27 października 1994 r. o autostradach płatnych i o Krajowym Funduszu Drogowym, Dz.U. 1994 nr 127 poz. 627).

\(^{179}\) Act on Public Procurement (Ustawa z dnia 29 stycznia 2004 r. Prawo zamówien publicznych, Dz.U. 2004 nr 19 poz. 177).

\(^{180}\) Act on Public Private Partnership (Ustawa z dnia 17 czerwca 2005 o Partnerstwie Publiczno-Prywatnym, Dz.U. 2005 nr 169 poz. 1420).
1. This Act defines the conditions for the preparations for the construction of toll motorways, the terms for awarding concessions and for the conclusion of contracts for the construction and operation of toll motorways, referred to hereinafter as "motorways", and designates the responsible bodies.

2. The Council of Ministers shall designate by Order the motorways or sections thereof, which are to be built and operated on a fee basis.

3. In justified cases the Council of Ministers may by Order extend the provisions of the Act to cover, in full or in part, specified expressways.

4. The motorways and expressways, referred to in points 2 and 3 above, may be designated in the regulations if it will be possible to make use of an alternative generally accessible public road.

Great-capacity roads, that is, motorways, are the ordinary realm for tolls. The levy of user charges in expressways is seen as an exception ("In justified cases"). Anyhow, it is considered desirable to leave a free, non-tolled alternative route and the previous approval by Decree of the Council of Ministers is required as a preliminary condition.

One can think this is a matter of legal support, but this is even less than a conventional response. The answer could be closer to reality by recognising a certain reluctance of the Polish population to infrastructure user charges. But social dispositions can be changed and, in fact, they change.

INECO’s proposals have taken into account those implications and, as a result, the option for some priority road projects is directed to help to remove smoothly citizenship mentality in favour of tolls acceptance. The benefit principle, inserted into the public works concession institutional matrix, needs tangible outputs to work.

Let’s make some final considerations to attempt a conciliation of the Toll Motorways Act with the PPP Act. We uphold that user charges is one of the sources of revenues for the private partner envisaged by Article 4.7) of the PPP Act. Tolls are not explicitly named, but the historical roots of PPP contracts firmly confirm this conclusion. When tolls are going to be set up for any concession/PPP contract in road infrastructure, the requirements of the Toll Motorways Act come inevitably into force, including its Decrees.

With regard to social acceptability of tolls in Poland, it is true that certain rejection of tolls exists, but it is not as strong as it might seem at first glance. As it has been already commented on in the first
part of the study, other investigations\textsuperscript{181} indicate that there is certain aversion of road users to tolls and their level, especially on A2 sections, but on the other hand they are perceived as a permanent component of the road financing system.

On the other hand, traffic growth on motorways indicates that the negative attitude towards tolls is probably changing. High traffic growth rates (higher than the economic growth rate) presented in previous section may be interpreted as partially caused by a gradual improvement of users’ tolerance to tolls.

Although it may be sufficient for financial feasibility of projects, what was a real problem from economic and social point of view was a relatively stronger rejection of tolls among drivers of heavy goods vehicles. However this problem has been already solved – at least temporarily – through exemption from tolls of vignette-payers\textsuperscript{182}.

Additionally, it may be expected that due to gradual growth of available income, value of time Polish road users will increase too. Together with increasing traffic and congestion on alternative roads, toll motorways will become the only reasonable alternative, but also more affordable than it is nowadays and was in past. In other words, together with growth of social prosperity the ability to pay for a road and as a consequence the demand for high capacity roads and for safety will increase. If toll roads offer adequate service quality the willingness to pay for the use of motorways will increase as well. This emphasizes the importance of economic stability and necessity of an appropriate service quality regulation and enforcement framework (see sections II.2.3 and II.2.4).

\textsuperscript{181} PBS, Public attitude towards the need of bearing costs for using the road infrastructure in Poland by the individual users analysis, 2004.

\textsuperscript{182} Nevertheless, it must be stressed that this solution may be costly for the Polish Government and unsustainable in the long run. In INECO’s opinion flattening of toll structure through reduction of HGV tolls with compensation of lost incomes would be a better and more sustainable solution, which might bring similar effects.