PPP PROJECTS IN THE HEALTH CARE SECTOR IN GERMANY

Dr. Dietrich F. R. Stiller
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PPP PROCUREMENT
PAYMENT PROFILE FOR THE PUBLIC SECTOR

The public sector or the users only pay during the operation phase. The private sector raises funds via equity, mezzanine capital and debt. The returns on equity may depend on use, availability and compliance with performance parameters.

<table>
<thead>
<tr>
<th>Construction phase</th>
<th>Operation Phase</th>
</tr>
</thead>
<tbody>
<tr>
<td>Payment based on usage</td>
<td>Payment based on availability</td>
</tr>
</tbody>
</table>

In principle, no payment until facility is accepted.
## PPPs in the area of medical technology:

- Projects contracted 2008-2012
- Project
- Volume (mn EUR)
- Term
- Purpose

### ÖPP-Projekte der Medizintechnik

<table>
<thead>
<tr>
<th>Projektträger</th>
<th>Projektvolumen in Mio. Euro</th>
<th>Laufzeit in Jahren</th>
<th>Projektinhalt</th>
</tr>
</thead>
<tbody>
<tr>
<td>Klinikverbund &quot;Gesundheit Nordhessen&quot;</td>
<td>ca. 20</td>
<td>10</td>
<td>Radiologie-Partnerschaft</td>
</tr>
<tr>
<td>Universitätsklinik Hamburg-Eppendorf</td>
<td>ca. 3,5</td>
<td>5</td>
<td>Blutgasanalyse-Partnerschaft</td>
</tr>
<tr>
<td>Universitätsklinik Hamburg-Eppendorf</td>
<td>ca. 5</td>
<td>5</td>
<td>Partnerschaft in der Endoskopie</td>
</tr>
<tr>
<td>Universitätsklinik Hamburg-Eppendorf</td>
<td>ca. 4</td>
<td>10</td>
<td>Sonodiagnostik-Partnerschaft</td>
</tr>
<tr>
<td>Klinikum Emden</td>
<td>ca. 1</td>
<td>7</td>
<td>Sonographie-Partnerschaft</td>
</tr>
<tr>
<td>Klinikverbund &quot;Gesundheit Nordhessen&quot;</td>
<td>ca. 60</td>
<td>10</td>
<td>umfassende Medizintechnik-Partnerschaft</td>
</tr>
<tr>
<td>Klinikum Stuttgart</td>
<td>ca.14, optional: 4,5 für Gerätewartung</td>
<td>7</td>
<td>Radiologie-Partnerschaft</td>
</tr>
<tr>
<td>Evangelische Krankenhaus Bielefeld</td>
<td>nicht verfügbar</td>
<td>10</td>
<td>Radiologie-Partnerschaft</td>
</tr>
<tr>
<td>Universitätsklinik Hamburg-Eppendorf</td>
<td>ca. 5</td>
<td>6</td>
<td>Partnerschaft bzgl. einer Laborstraße</td>
</tr>
<tr>
<td>Medizinische Hochschule Hannover</td>
<td>ca. 20</td>
<td>10</td>
<td>Radiologie-Partnerschaft</td>
</tr>
</tbody>
</table>

Source: Partnerschaft Deutschland
**PPPs in the area of health care general:**

- (Projects contracted 2008-2012)
- Project
- Volume (mn EUR)
- Term
- Purpose

### ÖPP-Projekte im Gesundheitssektor

Projekte mit Vertragsabschluss 2002-2012

<table>
<thead>
<tr>
<th>Projekträger/Standort</th>
<th>Invest.-Vol. in Mio. Euro</th>
<th>Laufzeit in Jahren</th>
<th>Projektinhalt</th>
</tr>
</thead>
<tbody>
<tr>
<td>Klinikum Dortmund</td>
<td>18,5</td>
<td>20</td>
<td>Logistikzentrum Klinikum</td>
</tr>
<tr>
<td>Universitätsklinikum Essen</td>
<td>136</td>
<td>15</td>
<td>Protonentherapiezentrum</td>
</tr>
<tr>
<td>Universitätsklinikum Schleswig-Holstein</td>
<td>250</td>
<td>25</td>
<td>Partikeltherapiezentrum</td>
</tr>
<tr>
<td>Landkreis Esslingen</td>
<td>47</td>
<td>20</td>
<td>Gesundheitszentrum Rott</td>
</tr>
<tr>
<td>Land Nordrhein-Westfalen</td>
<td>80</td>
<td>25</td>
<td>Universitätsklinikum Köln</td>
</tr>
<tr>
<td>Landkreis Starnberg</td>
<td>13</td>
<td>30</td>
<td>Kreisaltenheim Schloss Garathausen</td>
</tr>
<tr>
<td>Klinikum Landshut gGmbH</td>
<td></td>
<td>30</td>
<td>Gesundheitszentrum</td>
</tr>
<tr>
<td>Hochtaunuskreis</td>
<td>196,1</td>
<td>25</td>
<td>Klinikneubauten der Hochtaunuskliniken</td>
</tr>
<tr>
<td>Klinikum Ansbach A6R</td>
<td>30</td>
<td>30</td>
<td>Wohnanlage mit Heizzentrale und Parkdeck</td>
</tr>
<tr>
<td>Universitätsklinikum München</td>
<td>15</td>
<td>15</td>
<td>Produktionsstätte für Radiopharmaka</td>
</tr>
<tr>
<td>Main-Taunus-Kliniken</td>
<td>50</td>
<td>20</td>
<td>Neubau der Abteilungen Innere, Geriatrie, Psychiatrie und ambulante Versorgung</td>
</tr>
<tr>
<td>Lahn - Dill - Kliniken</td>
<td>10</td>
<td></td>
<td>Planung und Errichtung eines Arztshauses inkl. Parkflächen und Betriebsführung</td>
</tr>
</tbody>
</table>

**Source:** Partnerschaft Deutschland
Share of health care projects in the German PPP market (2002 – 2013)

Based on number of projects: 5%

Based on investment volume: 15.6%

Source: Partnerschaft Deutschland
The Hospital Finance Act (Krankenhausfinanzierungsgesetz - KHG)

- Relevant for most hospitals
- With important exceptions

Dual system

- Public support (öffentlich Fördernng) for investment costs
- Revenues based on hospital and nursing charges (Pflegesätze), which may include an investment cost component, plus remuneration for non-inpatient treatment (vor- und nachstationäre Behandlung, ambulantes Operieren) – to be paid by users (patients and their insurances)

Hospital master plan (Krankenhausplan)

- A master plan established (and updated) by each federal state
- Only hospitals listed in the relevant master plan are eligible for public support in general
**Investment plan (Investitionsprogramm)**

- A master plan established (and updated) by each federal state
- Only new hospitals the construction of which is listed in the investment programme are also eligible for public support in relation to investment costs regarding construction and initial equipment

**Hospital and nursing charges (Pflegesätze)**

- Regulation by a Federal Ordinance (Rechtsverordnung des Bundes)
- Inclusion of investment costs only regarding the purchase of equipment (other than initial equipment) with an average useful life not exceeding 3 years

**PPPs represent a good alternative where public funds are not available or only after overly long waiting periods**

- The issue of public guarantees
- Formal (contract-based) guarantees vs. institutional guarantees
The most common concepts in health care include:

<table>
<thead>
<tr>
<th>Concept</th>
<th>Ownership of facility and equipment</th>
<th>Key functions of the private investor</th>
<th>Role of state party</th>
<th>Remuneration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inhabermodell (owner model)</td>
<td>Public</td>
<td>Planning, building, financing, operation of asset (but excluding medical services)</td>
<td>Use of the relevant asset to provide medical services</td>
<td>Fees for services and availability (including compensation for all key functions)</td>
</tr>
<tr>
<td>Nutzungsüberlassungsmodell (surrender-of-use model)</td>
<td>Details depending on contract. At least fixed assets are publicly owned, equipment may be owned by the investor</td>
<td>Rights of use in relation to the facility are granted to the investor, who shall make equipment available, procure upgrades and maintenance, and transfer actual use to the public operator</td>
<td>Use of the relevant asset to provide medical services</td>
<td>Fees for services and availability (including compensation for all key functions)</td>
</tr>
</tbody>
</table>

These concepts may also apply to rehabilitation, extensions or upgrades of existing facilities.

These concepts may be combined with other forms of co-operation (e.g. R&D).
LEGAL FRAMEWORK FOR PPPS IN GERMANY
GENERAL FLEXIBILITY IN THE HEALTH CARE SECTOR (I)

Absence of a general PPP legislation
- Sectoral PPP legislation for federal highways only
- Great flexibility in the health care sector to provide tailor made solutions

Applicability of general legislation
- Public procurement legislation
- Act Against Unfair Competition (Gesetz gegen Unlauteren Wettbewerb (UWG))
- General rules of civil and commercial law on contracts
- Rules governing subsidies
- Other rules of general application
- No general restrictions re type of contract
Public procurement legislation for Projects above the thresholds defined in Art. 4 of the Directive 2014/24/EU on Public Procurement includes:

- Act against Restraints in Competition (*Gesetz gegen Wettbewerbsbeschränkungen (GWB)*), Sec. 97 et seq.
- Regulation on the Award of Public Contracts (*Vergabeverordnung (VgV)*)
- Procurement Regulation for Public Works (*Vergabe- und Vertragsordnung für Bauleistungen (VOB/A)*)
- Procurement Regulation for Public Supplies and Services (*Vergabe- und Vertragsordnung für Leistungen (VOL/A)*)
- Procurement Regulation for Professional Services (*Vergabeordnung für freiberufliche Dienstleistungen (VOF)*)
Available types of procedure (§ 14 VgV):

**Open procedure (offenes Verfahren) (§ 15 VgV)**
- A one stage procedure without negotiations

**Restricted procedure (nicht offenes Verfahren) (§ 16 VgV)**
- A two stage procedure
- First stage: Invitation to participate (prequalification)
- Second stage: Option to limit number of participants due to objective criteria; invitation to eligible participating undertakings to submit a tender offer
**LEGAL FRAMEWORK FOR PPPS IN GERMANY**

**PROCEDURES FOR AWARDING CONTRACTS (II)**

### Negotiated procedure

*Verhandlungsverfahren*  
*(§ 17 VgV)*

- Prequalification stage optional
- After prequalification stage option to limit number of participants due to objective criteria; invitation to eligible participating undertakings to submit a tender offer
- Alternatively direct invitation to submit a tender offer
- In each case eventually contract negotiations

### Competetive dialogue

*Wettbewerblicher Dialog*  
*(§ 18 VgV)*

- First stage: Invitation to participate (prequalification)
- Second stage: Option to limit number of participants due to objective criteria; invitation to eligible participating undertakings to participate in a competitive dialogue
- ➔ Most common procedure for complex projects
SPV owned by the private investors as Borrower

Guarantees by the Sponsors (construction phase/operation phase)

Bank loans or notes

Optional: Mezzanine capital

Equity commitments / restrictions on dividends

Financial covenants

Project undertakings

Repayment schedule based on expected cash flow (fixed repayments vs sculpted repayments)

Comprehensive security package

Public guarantees / sureties (formal guarantees / sureties and liabilities with similar effect)

State aid issues

Completion / performance guarantees

Project finance
Forfaiting of revenues

- SPV owned by the private investors
- Guarantees by the Sponsors
- Forfaiting becomes effective upon
  - commissioning / acceptance
  - partial commissioning / acceptance
- Waiver of defences and set-off rights by the operator of the hospital vis-à-vis the finance parties
- State aid issues
- Right of recourse of the hospital operator vis-à-vis the SPV
- Light documentation
- Lower transaction cost
- Completion guarantees
- Performance guarantees
Article 106 (ex Article 86 TEC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.
Article 107 (ex Article 87 TEC)

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.
Areas where the issue of state aid needs to be considered include:

- Institutional guarantees based on the legal form of the hospital
- Contractual guarantees of public entities (e.g. Federal States and municipalities) for the debt of a hospital PPP or limited aspects of the project
- Other forms of contractual support (e.g. waiver of defences in relation to claims)

An orderly public procurement procedure will normally result in a market price and hence exclude state aid for the benefit of the private party.

- Provided that the support by the public is reflected in the price of the relevant goods and services.
However, public operators (Träger) of hospitals (other than the government and its subdivisions) are equally subject to state aid restrictions.

- Competition in the health care sector
- Separation of the government and public operators in many different legal forms that qualify as „undertakings“ (in contrast to mere providers of public services)
- The exception provided in Art. 106(2) TFEU does not fit to hospital services in general
- Trade between Member States affected?
Various options to comply with the TFEU:

- Exemption Decision for Services of General Economic Interest (SGEI) of 20 December 2011 and
- Communication from the Commission, European Union framework for State aid in the form of public service compensation of 20 December 2011
- De Minimus Aid Regulation (EC) 1407/2013: Limit: EUR 200,000 over a period of 3 fiscal years (in relation to the relevant group)
- Compliance with Commission Notice on […] State Aid in the Form of Guarantees
- Compensation for services of general economic interest (Art. 14 TFEU)
CONTRACTUAL STRUCTURE
EXAMPLE FOR A COMPLEX AND INNOVATIVE HEALTH CARE PROJECT

Private investor (SPV)

Ownership or control

Land use agreement

EPC Contractor

PMB1

Supplies and services

Security arrangements

Senior loans

Ownership / mezzanine finance

Guarantees

Shareholders

Medical equipment provider

Finance SPV

Refinance Lenders

Other Contractors

Public entity (landowner)

Public entity as operator of hospital (SPV)

Refinancing arrangements

Supplies and services

Security arrangements

EPC Contract

Comprehensive lease and operation agreement

PPP Projects in the Health Care Sector in Germany
Contract structure (selected elements):

**Construction phase**
- Construction obligations – technical specifications
- Supply of equipment – technical specifications
- Permits and approvals
- Technical changes
- Representation and warranties
- Inspection and supervision

**Commissioning**
- Hand-over and start of preliminary operations
- Final acceptance
- Documentation requirements
- Representation and warranties
- Penalties
CONTRACTUAL STRUCTURE
EXAMPLE FOR A COMPLEX AND INNOVATIVE HEALTH CARE PROJECT (II)

Operation phase
- Lease
- Term
- Availability guarantees
- Maintenance and replacements
- Modernisations

Lease payments and operational costs
- Indexation
- Set-offs and reduction of lease

General provisions
- Assignability
- Allocation of risks and liability
- Insurance
- Early termination
- Security
- Change of control
- Dispute resolution
Partner at SZA Frankfurt am Main Office

Dietrich F. R. Stiller is a German law qualified lawyer. He is a partner in the Frankfurt am Main office of SZA Schilling, Zutt & Anschütz, a German law firm with offices in Frankfurt am Main, Mannheim and Brussels, where he leads the finance team.

Dietrich’s practice focuses on privatization, PPPs and cross-border investment law, including investment protection for investors, project companies, lenders and borrowers in the context of domestic and international project finance and BOT structures as well as export finance and refinancing of distressed enterprises. His experience covers an array of different industries including traffic infrastructure (airports and toll roads), pipelines, health care, renewables or industrial facilities.

Dietrich advises clients from the early stages of project structuring up to the implementation of a project, including negotiations with joint venture partners, concession grantors and other stakeholders. This includes the implementation of a sustainable finance structure including political risk insurance, where appropriate, amendments to address changed circumstances during the lifetime of a project, refinancing and investment protection issues such as negotiations with host state governments or investment arbitration.

Dietrich studied at the University of Bonn/Germany and at the Yonsei University Seoul/Korea. He speaks German, English, Bahasa Indonesia and Korean. Before he joined SZA Schilling, Zutt & Anschütz in 2016, he was a partner at Clifford Chance for more than 20 years.
A BRIEF LOOK AT
SZA - SCHILLING, ZUTT & ANSCHÜTZ

SZA Schilling, Zutt & Anschütz is a German law firm with offices in Frankfurt am Main, Mannheim and Brussels (Belgium).

The firm advises domestic and international clients in all areas of commercial law, with a focus on corporate law, M&A, banking and finance, capital markets, litigation and arbitration, labor law, antitrust law, intellectual property, competition law, tax, real estate, restructuring, enterprise succession, trusts and foundations. The roots of Schilling, Zutt & Anschütz reach back more than 80 years.

The members of the finance team of the firm advise lenders, borrowers, sponsors or other project parties in all areas of finance law, including project finance, PPP structures, export finance, corporate finance, M&A finance, real estate finance, sales financing, refinancing of distressed enterprises and regulatory law, and including related areas of law such as investment protection. The team has experience in many different industry sectors, including energy, renewables, oil and gas, infrastructure, healthcare or industrial facilities.

Since many of the relevant projects and investments (as well as all exports) constitute cross-border transactions, we are working together, as far as foreign jurisdictions are concerned, on a case by case basis with a network of independent law firms, each of them a leading firm in the respective market and area as local counsel carefully handpicked for the specific project.
PPP Projects in the Health Care Sector in Germany

Thank you very much for your attention!