

Turkey Passes New Healthcare PPP Law

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The Turkish parliament recently passed Law No. 6428, known as the new Healthcare PPP Law, which regulates public-private partnership projects (or "PPPs") in the healthcare sector. The Healthcare PPP Law reflects the government's eagerness to facilitate the development of large-scale healthcare PPP projects which are urgently needed to expand and update Turkey's healthcare system.

The Healthcare PPP Law replaces Additional Article 7 of Law No. 3359, the Law on Healthcare Services, which introduced the build-lease-transfer PPP model into Turkey's healthcare sector in 2005. In addition to introducing changes to the healthcare PPP regulatory framework, the Healthcare PPP Law specifically addresses certain legal challenges encountered by healthcare PPP projects under previous legislation. Detailed provisions for the Healthcare PPP Law will follow under secondary legislation.

Addressing recent legal challenges to healthcare PPP projects

The Healthcare PPP Law was enacted following an environment of legal challenges to the current framework for healthcare PPP projects being undertaken by the Ministry of Health.

The Council of State, Turkey's highest administrative court, has issued stay of execution decisions for the Ankara Etlik, Ankara Bilkent and Elazığ healthcare PPP projects, effectively halting their progress pending resolution of this litigation. The disputes are based on challenges to the allocation of Treasury-owned land, free-of-charge, for services that are not directly related to the healthcare facilities in the above mentioned healthcare PPP projects. The Healthcare PPP Law, in response to the stay of execution decisions, includes a provision nullifying existing tender terms relating to allocation of land for commercial purposes. It also contains a provision applicable to future healthcare PPP projects for Treasury-owned land to be allocated, free-of-charge, to the project company to build commercial as well as healthcare facilities.

Furthermore, certain provisions of the Law on Healthcare Services that regulate healthcare PPP projects are also being challenged before the Constitutional Court on the grounds of unconstitutionality. Certain basic elements of the healthcare PPP framework (such as the tendering process and general scope of implementation agreements) are left to be addressed in secondary legislation. The unconstitutionality claim is based on the ground that the PPP framework requires an

act of parliament setting out the fundamental elements of the healthcare PPP regime. Executive authorities may then introduce any required secondary legislation for more detailed regulations.

The Healthcare PPP Law addresses the issue of unconstitutionality as well. It outlines the tendering process, the implementation agreements (including parties' rights and obligations in case of termination), payments to be made to project companies, the transfer of the facilities to the government at the end of the operation term, and the equity and collateral requirements. All of these used to be previously provided for in secondary legislation. With some exceptions, the Healthcare PPP Law is very similar, indeed sometimes identical, to the secondary legislation under the previous regime.

Other changes to the healthcare PPP projects regulatory framework introduced by the Healthcare PPP Law

An important aspect of the Healthcare PPP Law is the reduction of the implementation agreement from a maximum of 49 years to a maximum of 30 years (except for the investment period). This more closely resembles the Ministry of Health's practice as the term under most healthcare PPP projects had been reportedly set for 25 years.

The factors to be taken into account when determining lease payments are similar to those under the old legislation. The main exception is that the Healthcare PPP Law contains an adjustment mechanism for the project company's foreign exchange risk and not the change in the Central Bank's foreign currency basket as referenced under the previous legislation.

Previously, the equity part of the financing obtained by the project company was to be at least 20 per cent of the total fixed investment costs of the health PPP project. The Healthcare PPP Law maintains this minimum percentage, but contains the provision that the equity amount will be calculated over the periodic, not the total, investment costs. Periodicity is to be determined under the implementation agreement.

In the case of early termination of the implementation agreement, the Healthcare PPP Law provides that the Treasury may take over the outstanding financing obligations of the project company, including derivative instruments, for healthcare projects worth 500 million Turkish Lira (currently approx. US\$260 million) or more. Additionally, lenders are explicitly allowed to exercise step-in rights in case of an unremedied default by the project company. This is not structured via a traditional direct agreement between the lenders, project company and the government at financial close, but rather through an agreement between the lender and the government following the occurrence of an event of default.

The Healthcare PPP Law also aims to support domestic manufacturing by requiring that at least 20 per cent of the medical equipment used in the healthcare PPP project be of Turkish origin. The tender documentation would specify the exact percentage of, and criteria for, domestic manufacturing.

This feature is the fourth in a series looking at the PPP market in Turkey and an update to a previous article on [Healthcare PPPs](#). Earlier articles focused on the [ports sector](#) and the [airports sector](#).

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