

PPP in Ukraine: Legal Framework, Trends and Prospects

Legal Framework

Over the last few years, significant improvements have been made in Ukraine towards building a legislative and institutional framework with the aim of enhancing the country's investment attractiveness. Recent achievements in this area deal with a set of investment incentives introduced with the adoption of the so-called "investment nanny" law, commencement of large privatization, reconsideration of benefits for industrial parks. Successful reforms in the public-private partnership (PPP) area, which is an absolute must for sustainable development of the country, introduced best world practices into Ukrainian legislation and provided investor protection mechanisms.

Public-private partnership is generally defined as the contractual arrangement between a public entity or authority (either state or municipal) and a private entity – to provide a public asset or service, where a private party bears significant risk as well as management and operational responsibility. In Ukraine, PPP can be implemented in different forms, including through entry into concession, joint activity or asset management agreements.

The PPP framework legislation consists of the Law of Ukraine No. 2404-VI *On State and Private Partnership*, Law of Ukraine No. 155-IX *On Concession*.

Trying to support private partners in an intention to cooperate, the government has established offices in the Ministry of Infrastructure – SPILNO PPP Office, and in the Ministry of Economic Development – PPP Agency. Their goal is to develop PPP mechanisms and ensure successful implementation of scheduled projects.

Key Issues

In 2020, the World Bank Group presented the results of the assessment of the quality of regulatory frameworks for the preparation, procurement, and management of large infrastructure projects. Based on the relevant Benchmarking Infrastructure Development 2020 report, Ukraine established good regulatory practice in the preparation of PPPs but needs to improve in (i) the inclusion of PPPs in the national public investment system and medium-term budgetary framework; (ii) the development of methodologies for market assessments of potential interest from contractors, methodologies for identifying the technology available and opportunities for innovation, methodologies for social impact assessment. There are also many areas for development in the field of the PPP procurement process, including the need to stipulate the standstill period after the contract has been awarded and before the signing of the contract



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to allow unsuccessful bidders to challenge the award decision, and establish an independent administrative authority in charge of complaints review. Transparency also needs to be enhanced by the publication of the full text of PPP contracts and their further amendments.

It should also be noted that many of the areas identified for development have been addressed in recently adopted by-laws and draft laws which are at the development stage; however, some issues still need to be worked out. In addition, the development of a detailed legislative framework with respect to forms of PPP other than concessions should also be highlighted as a priority for lawmakers.

Available Remedies

The PPP framework provides for various guarantees and advantages both to private and public partners, such as:

- long-term contractual relationships (from 5 to 50 years),
- risk-sharing between partners,
- possibility of state support for private partners in particular projects. For example, through purchase of goods or services,
- access to some highly-competitive or highly-marginal operating businesses,
- guaranteed right of private partners to obtain a lease title to land plots and obligations of the public partners to obtain all required documents for the land lease,
- possibility of alternative dispute resolution and international arbitration.

Private partners can also use the unsolicited proposal option – a proposal to undertake the PPP at their own initiative, rather than in response to a government or municipal request. The private partners may initiate the projects that have already been included in the pipeline, but not developed, or propose totally new options.

Latest Legal Trends

In furtherance of reform of PPP legislation and based on the World Bank's recommendations, a set of subordinate legislation was adopted in 2020 regulating (i) the replacement procedure of private partners or concessionaires ("step-in-right"), (ii) the procedure for involving advisors in the preparation of a concession project, (iii) the procedure for submission by state partners of the annual report on the implementation of the PPP/concession agreement; (iv) the procedure for returning concession objects after the termination of concession agreements.

Moreover, many effective regulations were updated, so they are now aligned with the new approach to PPP regulation, such as contest procedure for determining the winner of the competition for PPP, and procedure of analyzing the efficiency of PPP.

Furthermore, on 20 May 2021, Parliament adopted in the first hearing the Draft



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Profile

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Law No. 5090 aimed at bringing into line the PPP and budget legislation, as well as ensuring the feasibility of providing state support for the implementation of PPP. By adopting the said changes, the long-term budget liabilities for PPP projects will be feasible. This Draft also enables allocation of funds from the State Road Fund as availability payments, to private partners for roads built in the course of PPP, which is essential for implementing pilot projects within the Great Construction Program.

Illustrative Case Studies

According to the Ministry of Economic Development, as of 1 January 2021, 39 PPP contracts were implemented in Ukraine, mostly in the area of water and waste management (29 concession agreements, 6 joint venture agreements, 4 other types of agreements).

The success story of PPP in Ukraine is represented by the two pilot concession projects of the Olvia and Kherson Sea Ports. On 26 June 2020, the concession agreement regarding Kherson Sea Port with the private partner Risoil-Kherson LLC was signed. The private partner will invest about UAH 300 million in the port's development and around UAH 18 million into the local infrastructure.

On 20 August 2020, the concession agreement regarding Olvia Sea Port was signed with the private partner — QTerminals. The sum of private investment will come to UAH 17.3 billion over 35 years of concession, and the annual concession payment will be at least UAH 80 million.

Future Plans

On 16 December 2020, the Cabinet of Ministers of Ukraine approved the list of priority investment projects for the period up to 2023, which includes around 100 items. Infrastructure projects on this list can be implemented within the PPP framework.

Roads. In 2020 the Cabinet of Ministers launched the national Great Construction Program aimed at using modern highways to connect the country. The six pilot road sections to be upgraded and maintained on the PPP basis were identified. All of them are included in the list of priority investment projects for Ukraine. The PPP procedure envisages that the private partner finances the rehabilitation and long-term operation and maintenance of the road. In turn, it receives availability payments — a contractually agreed upon amount, that is contingent on the KPI's fulfillment and output specifications. The program expects to be implemented in three phases by 2030. The first phase of six pilot projects is aimed at rehabilitating the existing road network and contains only brownfield projects, such as repairing the Kharkiv-Dnipro-Zaporizhzhya road; Boryspil-Poltava road; reconstruction, repairs and construction of a new bypass of the settlement along the Kherson-Mykolaiv road; repairing the Kyiv-Zhytomyr-Rivne road and the Yahodyn-Kovel-Luts'k road; reconstruction, overhaul and construction of a new bypass of the settlement along the Dnipro-Kyiv Rih-Mykolaiv road.



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It is expected that the invitation for potential investors to participate in these tenders will be announced in the fall of 2021.

Maritime Infrastructure. The project on the modernization of existing capacities of the Rail-Ferry Terminal in Chornomorsk, being the only terminal in Ukraine specializing in servicing railway and auto-ferry lines, has passed the feasibility study stage.

Another opportunity is the concession of the First and Container terminals in Chornomorsk port. The objective of the project is to create modern transship containers and general cargoes terminals by renovating existing facilities, updating/modernizing transshipment machinery. The project has passed the initial stage — pre-feasibility study (development of concept note).

The preparation of the next concession projects in the ports of the Berdyansk, Odesa and Izmail is under way. A preliminary feasibility study for the project in the Bilhorod-Dnistrovsky Sea Port has been developed and adopted. In addition,

the Ministry of Infrastructure is looking for financing of concession projects in the ports of Mariupol and Reni from private investors and for technical assistance and investment in the modernization of navigation locks on the River Dnipro in order to increase their capacity.

Airports. The four concession projects regarding the Rivne, Chernivtsi, Vinnytsia, and Kherson airports are at their initial stage.

Railways. In December 2020, the Ministry of Infrastructure initiated the market assessment research within the pilot project of the concession of railway stations in Kharkiv, Dnipro, Vinnytsia, Khmelnytsky, Mykolaiv, Chop, Kyiv to find out whether international or local investors are interested in such projects. The railway stations of Kyiv and Vinnytsia are expected to be the first potential concessions.

Other spheres for PPP. As an example of PPP mechanisms becoming more popular, in January 2021, a meeting on the prospects for the pilot PPP project in the field of healthcare on the basis of the Clinical Emergency Hospital in Lviv facilities was held.

Importantly, interested investors can initiate the implementation of other PPP projects in any area of economy or public services, either included in the list of priority investment projects or not.

Further Prospects

Recent reforms that have taken place in PPP regulations resulted in promotion of foreign and local investments, mainly in the area of infrastructure (ports, roads, airports, railways). The scheduled legislative changes regarding the medium-term budgetary framework for government support in PPP projects will only increase the attractiveness of this area.

The above first-of-a-kind projects vest additional responsibility on government agencies and require extra effort from the private side in the preparation of tender documentation and assess the risks related to the subject of PPP. The established PPP advisory offices show efficiency in this regard, though the involvement of a local counsel, who would prepare a bulletproof package of tender documents, will give an advantage in winning the bid.