

# Scientific and practical analysis of the main provisions of the Law of Ukraine «On public-private partnership»

## Науково-практичний аналіз основних положень Закону України «Про державно-приватне партнерство»

Oleksandra Karmaza, Daria Koucheret

### Key words:

*public-private partnership, development of public-private partnership in Ukraine, business, civil agreement.*

### Ключові слова:

*державно-приватне партнерство, розвиток державно-приватного партнерства в Україні, бізнес, цивільна угода.*

**1. Introduction.** The development of new and improvement of existing tools for improving the competitiveness of the state economy, attraction of investments, relations between the state and persons of private law as equal partners and so on is of interest to researchers and practitioners starting from the ancient times.

The importance of the development and support of public-private partnership (hereinafter – PPPs) is confirmed by staging events on international and national levels. In particular, during the 9-11 of May 2017 in Hong Kong at the International Forum of the United Nations Economic Commission for Europe UNECE (UNECE International Forum on people-first PPPs for the Sustainable Development Goals) on the topic of «Implementing the United Nations 2030 Agenda for Sustainable Development through effective, people-first Public-Private Partnerships» was discussed a number of issues due to PPPs [1]. On the 14th of February, 2017 in Kyiv city within the project of RI-LINK S2 UA was held roundtable discussion on PPPs and joint technological initiatives [2].

In passing, we note, that there is a positive trend towards formation of PPPs' agreements in Ukraine. In passing, on the state of the 1st of January, 2017 186 projects (154 signed concession agreements, 32 agreements on joint activities and 1 PPPs' agreement) were realized.

Projects were implemented due to: refuse disposal (112 projects, come out at 60.5% of total amount); collection, purification and distribution of water (37 projects – 20%), building and / or operation of highways, roads, railways, runways at airfields, bridges, road overpasses, tunnels and subways, sea and river ports and their infrastructure (16 projects – 8.6%), production, transportation and supply of heat (6 projects – 3.2%), production, distribution and supply of electricity (5 projects – 2.7%), property management (2 projects – 1.1 %) search, exploration of mineral deposits and their extraction (1 project – 0.5%), tourism, recreation, culture and sport (1 project – 0.5%), other (6 projects – 2,9%) [3].

**2. Brief Literature Review.** Improving the regulation of agreement-based (binding) relationships between entities of public and private law is problematized by researchers from ancient times and are still trending nowadays.

For example, A. Dmitriev and S. Huseeva have justified an approach to classification of innovations in PPPs [4], V. Budnyk has developed a methodical approach to reconciling the interests of participants in PPPs [5], Y. Ivanov and V. Tyschenko have suggested an authors approach to classification to the regions of Ukraine according to the level of development of knowledge economy and potential of PPPs [6], L. Gritsenko and I. Boyarko have established the algorithm for reconciling the interests of public and private investors while construction the portfolio of projects PPPs [7]. The formation and strengthening of PPPs' relations also are of interest to Bovis C. (2015) [8], Hoppe E. & Schmitz P. (2013) [9], Wiater P. (2015) [10], Roehrich, J.K., Lewis, M.A., & George, G. (2014) [11], Zaharioaie M. (2012) [12], Slack K., Savedoff W.D. (2001) [13], Buse K. (2004) [14].

However, despite the presence of many scientific papers on PPPs, norms and principles that regulate and define the vector of development of legal and economic relations between the state and private partners in Ukraine also require additional research to improve them.

**3. The purpose of the present study** is the disclosure of features of PPPs in Ukraine. **The main objectives of the study are the following:** to carry out scientific and practical analysis of the main provisions of the Law of Ukraine "On public-private partnership» [15]; to identify obstacles that occur in the implementation of the Law of PPPs and to identify solutions.

**4. Results.** It is well known that law and the economy as a social phenomenon interact and influence each other. Thus, the absence of law regulations, as well as their imperfections, puts on hold economic development, and vice versa – their presence and perfect facilitate the movement of the economy forward, lead to development and protection of social and economic relations in the state, and so on. In order to develop economic relations and the settlement of relations in the field of PPPs in Ukraine the Law of Ukraine "On Public Private Partnership" (hereinafter – the Law) was adopted.

In passing, we note that the "Constitution of Ukraine", the "Commercial and Civil Code of Ukraine", Laws of Ukraine "On concessions" and "On Lease of State and Municipal Property", "On peculiarities of lease or concession of the Fuel and Energy Complex that are state-owned", "On concession for construction and operation of highways", "On peculiarities of lease or concession facilities in the field of heating, water and sanitation, which are in municipal property" etc, are also the legal basis of regulating of PPPs in Ukraine. In addition, due to law regulations several subordinate Laws were adopted.

According to article 1 of the Law PPPs – is collaboration between public and private partners, based on the agreement in the manner established by Law of Ukraine, and which corresponds all features of PPPs.

In other words, the relationship between the parties is fixed in a legal document – agreement, which should have features of PPPs, established by the Law. For example, prediction of long-term relationship (from 5 to 50 years), transfer of risks to the private partner during the process of implementation of PPPs, invest in partnership objects by the private partner from sources not prohibited by the Law. Based on the content of features of PPPs, provided in the Law, concession agreement of joint venture, lease, leasing etc should be take in agreements of PPPs.

The most widespread in Ukraine and worldwide is public-private partnership agreements by which the private partner (concessionaire) acquires rights for construction (reconstruction, modernization) and / or management (operation) of the PPPs' object for some period for the agreed fee, carries operational and investment risks, undertakes to maintain, improve, upgrade the object. Ownership of the products produced according to concession and improving the object are owned by the concessionaire. There can be a concession to objects that already exist (renovation / modernization and operation), or can be provided for the construction of objects (the so-called «green field projects»). The concession helps to achieve balance of strategic control over the business on the basis of a civil agreement and as high as possible economic freedom for PPPs' objects.

PPPs' subjects are: public partner (the state of Ukraine, Autonomous Republic of Crimea, government agencies and local government) and private partner (legal entities, except state and municipal enterprises and individual entrepreneurs). However there can be some private partners in agreement and they would be jointly and severally responsible for the obligations under the agreement. However, the Law prevents a joint-stock form and other forms of PPPs which reduces the possibility of organizing their introduction.

PPPs' objects – are existing objects that are state or municipal property; created or acquired objects as a result of the agreement. Transferred PPPs' objects can't be privatized. Upon termination of the agreement, they return to public partner.

The article 3 of this Law provides some basic principles of PPPs: equality of partners before the Law; non-discrimination of partners' rights; congruence of partners' interests for achieving mutual benefit; providing of higher effectiveness of activity than in the case of such an activity provided by public state without the involvement of private partner; immutability of purpose and ownership of PPPs' objects; recognition of rights and duties by partners whose are established by the Law of Ukraine and are defined by terms of the agreement; fair distribution of risks between the partners associated with implementation of the agreement; determining of a private partner on a competitive basis, except in cases established by Law.

However, the list of principles is debatable. For example, the legal status of public and private partners is different because the state has the authority and can affect on conditions and implementation of agreements as it is guided by social necessity. So, the providing of equality of partners is questioned.

The principle of non-discrimination should be replaced by the principle of non-interference of the public partner in economic activity of private partner. In addition, a list of principles should be amended by adding the principle of civil control and the principles associated with the additional motivation and guarantee to ensure the interests of private partner, since the private partner carries out more serious risks than public partner.

The article 4 of the Law contains a non-exhaustive list of PPPs' fields. The only exceptions are doing business in the fields where the activities, according to the Law, can be provided only by state and municipal enterprises and institutions (such as national security, defense companies, etc.).

To implement PPPs the Law provides governmental support through guarantees, financing from the state and local budgets, private partner payments and other payments under the agreement; by purchasing by government partner a certain amount of goods (works, services) produced (performed, provided) by private partner under the agreement; etc. (Art. 18 of the Law). It is fair to say that the Law does not limit the possible sources of investment in PPPs' development. Applying of modern mechanisms for financing of capital projects is rational, in particular forfeiting and project financing. Evaluation of financing sources of PPPs shows that the crippling burden of the investment costs belongs to private financial institutions. An active involvement of PPPs requires legislative improvements to ensure the creditors' claims, including the use of different types of them while carrying out PPPs' projects: pledge of corporate rights in the project company, providing of requirements of the lender by concession, asset-based financing.

Please note that for foreign private partners who engage in PPPs Ukraine, the national legal regime of investment and other economic activity is established, except cases established by the Law and applicable international treaties of Ukraine (Art. 19 of the Law).

Thus, the main advantages of management of PPPs' projects are based on: 1) for public partners: attraction of private investments; diminution of costs from the state budget; engaging of experience of private companies; risk sharing; improvement of the effectiveness of infrastructure; effective management of state property; creation and saving of jobs; development of dialogue of "government business" type; maintenance of control and influence on the overall development strategy of the object; facilitation the integration of science, education and production; implementation of socially important projects, which was not possible under other conditions; 2) for private partners: access to previously closed fields of the economy (housing and utilities infrastructure, social field) and to new segments of market; attracting budgetary funds; guarantee of return of investments; borrowings under state guarantee; distribution and getting rid of a number of risks; positive image; getting feedback in dialogue of "government business" type.

In other words, the private partner: provides financing, provides an effective management of objects, as he has professional experience, introduces new effective methods of work, establishes effective relationships with suppliers and contractors, attracts foreign investors, guarantees flexibility and efficiency of decision-making, creates competition for highly skilled workers in the labor market. Public partner, acting in accordance with the Law on PPPs, provides the owner authority, controls the implementation of the project, provides tax and other incentives and guarantees, material and financial resources.

Analysis of provisions of the Law on guarantees of private partners' rights proves the following: some provisions of the Law are declarative, that is shown in a reference to "the procedure established by legal system"; the absence of some mechanisms for implementation of some guarantees – this is the case of, in particular, compensatory damages caused by authority; thirdly, the Law assumes the immutability of the conditions of civil and commercial legal system, that governs property rights and obligations of the parties, however conditions, specified in "tax, currency and customs legislation, legislation on licensing " also affect operating results of public partner. Accordingly, the resulting quality of this legislative provision is minimal; the basis of guaranteeing of rights of private partner, following the example of European countries, should be provided by an effective judicial protection of those rights (legal protection of private partners requires improvement). In addition, some incorrectness of the Law allows neglecting them to and enforcing other Laws.

**5. Conclusions.** Results of the research of basic provisions of the Law give cause to suggest that public and private partners combine powers in order to implement socially important projects in various fields of economic activity throughout the whole country (national level) or on some territories of Ukraine (regional or local level). Implementation of PPPs' projects meets the requirements of society, the public receives better products and services, construction and upgrading of infrastructure objects accelerates, is investments are attracting to economy, and so on.

However, the development of PPPs in Ukraine requires improving of existing regulation in following areas: providing of a common vision of PPPs at all levels of government; improving of current normative framework in order to remove the gaps in Laws and to provide a simple and transparent procedures for cooperation organization; bringing into accordance of the national legal framework with the provisions of EU legislation; provisions of Law should be flexible and allow to build cooperation in different formats "state – private partner"; elimination of corruption component in relations of PPPs; as the Cabinet Ukraine is both a regulator and controller of implementation of the agreements of PPPs; it would be wiser to establish a special body in the government that functions in foreign countries – Private Finance Initiative.

### Summary

The main provisions of the Law of Ukraine "On public-private partnership" that contribute to the advancement and development of relations in such fields in Ukraine as public-private partnership, socio-economic relations, attraction of investments in the economy etc. are explored in the article. Attention is focused on the provisions of this Law that are debatable. The new regulations to this Law are proposed, as well as ways to improve relations in Ukraine in the field of public-private partnership.

### Анотація

У статті досліджуються основні положення Закону України «Про державно-приватне партнерство», які сприяють розвитку суспільних відносин у таких сферах як державно-приватне партнерство, соціально-економічні відносини, залучення інвестицій в економіку тощо. Увага зосереджена на суперечливих положеннях цього Закону. Запропоновані зміни та доповнення до цього Закону, а також способи поліпшення відносин в Україні у сфері державно-приватного партнерства.

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**Oleksandra Karmaza,**

*Doctor of Law, Docent*

*University of Modern Knowledge, Kyiv, Ukraine*

**Daria Koucherets,**

*Doctor of Law*

*University of Modern Knowledge, Kyiv, Ukraine*