State Support under PPP

New Challenges in the Context of the UN Sustainable Development Goals

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In recent years, the attitude toward the Public-Private Partnership (PPP), its role in infrastructure development and in overcoming inequalities in the world is constantly changing. New challenges, in particular those related to the approval of the UN Sustainable Development Goals 2030, require the use of new approaches to the implementation of projects involving private business. Completely new models of public-private partnership are emerging, for example, the 'People First PPPs' actively promoted by the UNECE. All these circumstances break the longstanding understanding of the role of public authorities, private business and the society in the framework of PPPs in relation to ensuring sustainable development in the world and require the expansion of rights and responsibility to people of partners in PPP projects, including for the achievement of the national indicators of SDGs. One of the important tasks in this area is the improvement of approaches to State support under PPP. To resolve this task a revision / clarification of the forms of such support as well as its principles and conditions should be provided. This paper analyses the problems that exist in this area in the transition-economy countries based on the experience of Ukraine and contains the author's recommendations on how some of these problems could be resolved.

Keywords: Public-Private Partnership (PPP); State support under PPP; State aid; People First PPPs; State guarantees under PPP; Availability Payments.

I. Introduction

Public-Private Partnership (PPP) is a very important mechanism of infrastructure modernization. Its implementation has demonstrated a lot of positive results in many countries with different level of economic development. And many developing countries with huge needs in investments in infrastructure and poor public budgets are now thinking about attracting private investors based on PPP. At the same time we can observe a simplified approach to implementing this mechanism in the real life in some of these countries. When inviting a private business to invest in infrastructure the public authorities are happy to transfer them a part of their own risks & responsibilities and understand that business should return the investments during a term of PPP contract. But their decisions about implementation of a project as PPP are mostly based on its commercial attractively and there is no interest in projects that need State support.[1] As a result, one of the most important features of PPP such as public interest and necessity to provide socially significant services (their availability, quality, reliability, etc) goes into the background.

Such attitude to State support contradicts with the essence of PPP and its internal logic. The projects considered for implementation based on this mechanism should in the first turn be important and demanded by the society. Their main goal is to eliminate the most serious problems existing on certain

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1 Government support — in accordance with UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects — <https://www.uncitral.org/pdf/english/texts/procurem/pfip/guide/pfip-e.pdf>.

territory, which the public authorities are not able to solve on their own. For example, ensuring the availability and quality of vital services with an orientation, especially for the poor, who are not able to provide themselves comfortable living conditions (individual systems of energy, heat and water supply, sanitation, transport, etc), ensuring opportunity for the population to get education, medical, cultural and sports services. Only in this case we can say that PPP is applied in the most efficient way for the society and a country and that attracting business for modernization of infrastructure is justifiable in terms of public interest.

Implementation of such projects in developing countries where needs in infrastructure are critical almost always faces high risks for the private partner, including those related to the actions of the State / local authorities in the medium and long term perspective. If appropriate risks are not taken into account when structuring a project as PPP, it will not take place. Accordingly, the existing problems on the territory will only worsen.

Therefore, the decision of a public authority to implement a project in the form of PPP should not be based solely on the assessment of the commercial attractiveness of the project, as it often happens, but on understanding of the importance of the project in terms of addressing the most serious problems of the territory, the impact of its implementation on the quality of life of the population and the conditions for doing business. If the project is really in demand by the society and it is not possible to implement it differently than by attracting the private business, it is necessary to understand the conditions under which the business is ready to participate in its implementation and to envisage activities that will make it recoupable for the business in medium- or long-term perspective.

The inability to ensure the recoupment of the project that has a high priority for the territory solely at the expense of consumer fee for the services provided within it cannot be a reason for refusing to implement it. If we follow this principle, most of infrastructure projects planned in the countries with economies in transition will require a State support. And the poorer the country is, the larger the support should be. It should be clear for the public authorities responsible for infrastructure development who need to think about and design mechanisms of State support under PPP.

II. New Trends in the PPP Development

An important event for the formation of a new trend in PPP development was the approval of the Sustainable Development Goals (SDGs) until 2030 by the United Nations, which in fact defined the minimum requirements for standards of quality of life and the environment for all countries of the world.

Naturally, the farthest from these standards were the poorest countries. Therefore, the achievement of the SDGs will require the concentration of significant efforts of the world community on these countries, in particular, on ensuring their institutional development, economic reforms, eradicating corruption, and improving the judicial system. But most of efforts and financial resources will be required to create in these countries a new environmentally friendly infrastructure that will enable providing a high quality of life for the population that will result in a decrease of social tension and conflicts, managed migration and provide overall prosperity.

It is not realistic to think that it could be possible to develop the infrastructure critical for achieving SDGs in the countries with economies in transition using only public resources of budgets of the respective countries (cities). According to the assessment of international organizations (OECD, UNECE, WB etc), the gap in the annual investment needs of the developing economies in such infrastructure will amount approximately US$3 trillion annually. In these conditions, attraction of the private business (international corporations and companies from the developed economies) for modernization of the infrastructure in developing countries, and, first of all, in the poorest of them is becoming urgent. The private business has the necessary funds. At the same time, today it is very cautious about investing in poorest countries. Firstly, there is no certainty that it will be possible to return the funds invested there — payable demand in such countries is low, there are no mechanisms for guaranteeing return on investment, including using public budgets. Secondly, the process of consideration and approval of proposals submitted by business in such countries, as a rule, is very long and is accompanied by significant corruption risks.

In order to overcome these risks and ensure private business investments mainly in those projects, implementation of which is important for achieving

SDGs, today the international community actively promotes the improvement of the legal and institutional environment in these countries, develops new approaches and introduces new models of private business participation in infrastructure modernization, including through the use of Official Development Assistance.

In the framework of this activity a new PPP generation was born in UNECE — 'People First PPPs' model. 'The PPP model that is SDG compliant is a new form of PPP model, referred to here as the third-generation PPP. These new PPPs are positioned to achieve sustainable economic and social development through PPP programs with an emphasis on its function of promoting social equity and sustainable development.

Similar to the first-generation and second-generation PPP models, the third-generation PPP also has its own significance. PPP is no longer merely a tool of government procurement of public services or promoting regional economic development, instead the emphasis is on the ultimate goal of development, which is to meet the needs of people. The priority of people elevates the operational principles and objectives of the PPP model to a new level'.[2]

The peculiarity of this model is its orientation towards a wider range of criteria — those that create 'value for people', rather than simply based on the value for money. In its turn, 'value for people' involves improving the quality of life of communities, especially those that are struggling with poverty, for example by creating stable jobs. Consequently, the projects that are implemented using the 'People First PPPs' model shall address the critical problems facing the humanity.

Naturally that implementation of projects that could be deemed as People First PPPs in most cases is impossible without a State support, especially in developing economies. So, the importance of design and implementation of mechanisms of the State support under PPP is increasing today.

III. Why and in which cases State support under PPP is necessary

The above information witnesses about the need to develop mechanisms of State support under PPP, especially in developing economies that are not prepared for this institutionally as well as mentally.

While creating and implementing State support mechanisms under PPP it is important to understand why and under what conditions they should be applied, particularly in the countries where the resources of public budgets are extremely limited and therefore any financial obligations of public authorities in projects involving private business are perceived extremely carefully.

A detailed consideration of this issue is not included in the subject matter of this article. At the same time, we shall note that, in our opinion, it is very important to foresee the possibility and determine the mechanisms of such support in cases when:

- implementation of an infrastructure project is necessary to ensure a certain minimum level of quality of life for the population, mostly the poor, and, it is not possible to ensure commercial payback of such project;
- political situation in the country is unstable, social tension in the society is high, the standard of living of the population is low;
- implementation of an infrastructure project can generate additional revenues to public budgets (both direct and indirect), which will be sufficient to ensure the reimbursement of funds invested by a private partner in a certain time period.

Even if one of these conditions exists, State support under PPP may be considered as appropriate. If all three conditions are present, then it is necessary to provide it. Otherwise, the most important infrastructure projects will remain 'on paper'. The critical infrastructure in terms of SDGs in emerging economies will only worsen. Accordingly, the gap in the quality of life of people and the level of well-being, as well as in conditions for doing business in the poorest and economically developed countries, will increase. Competitiveness of business in less developed countries will continue to decline; the inequality between people living on different territories, including in the same country, will increase. Bad roads, lack of reliable heat and electricity supply, low quality of water, absence of necessary medical and educational services will increase the degradation of rural and re-

2 Economic Commission for Europe Committee on Innovation, Competitiveness and Public-Private Partnerships Working Party on Public-Private Partnerships First session Geneva, 21—22 November 2017. Item 5 of the provisional agenda Draft Proposal for Guidelines on Transformative PPP Implementation and Sustainable Development. — ECE/CECI/WP/PPP/2017/CRP.14

mote regions. Business and active population from these territories will move either to large cities, or leave the country, creating migration problems in economically developed countries.

As a result, instead of approaching the achievement of the Sustainable Development Goals, the world will continue to distance itself from them. In particular, this concerns SDG 10 — the tendency to increase inequality will become sustainable, which will negatively affect all other SDGs.

IV. Objectives and Forms of State Support under PPP

There are various forms of State support under PPPs that can be defined differently in national legislations. Among them: provision of State or local guarantees; payments from the State (local) budget to the private partner, incl. availability payment; tax and customs privileges; granting of an exclusive right to provide certain services; obligations of the State (local governments) for the construction of related infrastructure, important for achieving the project's payback; purchase of goods (services) produced (performed) using an infrastructure object transferred to PPP; obligations to sell goods (services) required for the implementation of PPP, etc. The choice of the form of State support depends on the objectives for which such support is provided.

What can these objectives be?

Based on our reasoning in the first place they should be the following:

- creating conditions for attracting a private partner for the implementation of a socially significant infrastructure project (ensuring the commercial attractiveness of the project or reducing/mitigation the risk of its implementation to the level that is acceptable for the private business);
- encouraging the private business to participate in the implementation of infrastructure projects of a certain focus or in a specific area in the countries with an underdeveloped PPP market and high risks of attracting private businesses into long-term infrastructure projects.

The first and the second are related, but not the same.

In the first case, we are talking about supporting a specific project that is important for a given territory, but not recouped in the traditional sense of the word (without State intervention). In this case, the decision on State support for such project and its scope is made based on the economic and social significance of the project, as well as the opportunities for public authorities (mainly budgetary ones) to provide such support.

The second position refers to the so-called 'program support', which is based on the strategies and plans for the country's socio-economic development. In this case, the decision on State support is made on the basis of the criteria established in such programs and strategies, which shall be met by the project applying for State support. One of such programs, in the framework of which it makes sense (and is allowed) to provide State support, in our opinion, could be a Strategy of Country Development oriented at SDGs. In this case, as a criterion to select projects for the provision of State support, one should consider their impact on the achievement of certain indicators of this Strategy and, accordingly, the national SDGs indicators.

V. State Guarantees and State Support under PPP

Very serious risks of PPP projects in the emerging economies are related to the inability or unwillingness of the public authorities to fulfil their obligations under PPP contract. It can happen either due to the lack of legitimate mechanisms to ensure the implementation of public authorities' obligations, or in connection with 'political expediency'. In order to reduce such risks to an acceptable level for the private businesses, it should be understandable — how and based on what mechanisms the State will act if a public partner violates the obligations stipulated by the contract. Otherwise private business is unlikely to undertake the implementation of the project. To mitigate this risk many countries, for example Ukraine, propose to use the State guarantees as a mechanism of the State support under PPP.

It should be noted that in economically developed countries with a high legal and corporate culture in terms of fulfilling contractual obligations, ensuring the risks of a private partner may not require State guarantees. At the same time, in the developing economies, where the level of business confidence in the State is low, guaranteeing the fulfilment by the State of certain obligations of the public partner under the PPP contract is in many cases a prerequisite for attracting a private partner. The State guarantees under PPP can resolve this problem. But it should be understandable that State guarantees as a form of State support under PPP is not the same as traditional State guarantees.

In the general sense, a traditional State guarantee is a way of ensuring that the State fulfils obligations of a borrower (resident of the country) to the creditor (in full or in part). In fact, the traditional State guarantee ensures the State's obligation to partially or completely fulfil the obligation of the person to whom such a guarantee is provided to third parties. Providing State guarantees on loans significantly reduces credit risk, and therefore helps to attract loans at reduced interest rates.

The State guarantee in the case of PPP has different goal. It should serve as a mechanism for risk sharing in the PPP project. In this case, the State actually assumes responsibility for certain risks of the PPP project, which, according to PPP contract, are classified into the responsibility of the public partner. Typically, these are risks that cannot be managed by a private partner, but which are under State control.

In view of the above, approaches to providing State guarantees in the general (traditional) sense and in the case of PPPs are fundamentally different.

In the case of traditional State guarantees, the State almost does not affect the recipient of a guarantee regarding the fulfilment of its guaranteed obligations. Therefore, in this case, it should provide such guarantees only for projects that are strategically important; carefully scrutinize potential beneficiaries of the guarantee regarding their ability to meet their obligations; receive a payment for the provision of such guarantees and be able, in the event of a guarantee case, to cover at the expense of the recipient the guarantee of its losses.

In the case of providing State guarantees for PPP projects, there is a completely different situation. Here, the State takes responsibility for a public partner who is the party of PPP contract. In this case State guarantee provides to a private partner as proof of the fulfilment of public partner's obligations under the PPP contract. That is, in the event of a warranty case under the State guarantee provided under the PPP, the State (the public partner) should be liable and not the private partner.

Accordingly, if in the general case traditional State guarantee is usually granted for the entire amount of borrowed funds, the State guarantee on PPP projects only partially covers the risks of the project. This guarantee should clearly define the risks that the public partner owns under the PPP contract, and establishes the amount of financial obligations if these risks materialize.

To implement such approach for State guarantees as one of forms of State support under PPP in Ukraine the draft Law on changing to the Budget Code of Ukraine have been prepared and is on consideration of the Parliament now.[3] The new type of State guarantees under PPP was defined in this draft Law, namely 'guarantee obligation in the framework of the implementation of public-private partnership' — obligation of the guarantor to fully or partially fulfil the financial obligations of public partner to a private partner or a lender under an contract concluded in the framework of public-private partnership, including a concession, in the case of non-fulfilment by the public partner of its obligations under such contract secured by State or local guarantees.

It should be noted that in Ukraine the State guarantees under PPP are one of the PPP State support mechanisms.[4] Although, in our opinion, this is not entirely correct. For example, if a private partner under a PPP contract is provided with a partial State guarantee, the basis for which is the change in the conditions stipulated by the contract, through the fault of the public partner or the State directly (for example, the reduction of tariffs in comparison with the level envisaged by the contract, the adoption by the public authorities of decisions that limit opportunities of private partner for the implementation of the project in the option planned in the contract and leading to significant losses etc), it is not logical to consider it as 'State support'. These are the usual obligations of one of the contract parties. In this regard, in the future, it makes sense to exclude mechanism of the State guarantees under PPP from the category of 'State support under PPP' if in fact they are not support of the State.

3 Draft Law of Ukraine 'On Amendments to the Budget Code of Ukraine regarding the creation of conditions for infrastructure modernization through projects under public-private partnership, including concessions' — <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=63632>.

4 Article 18 of the Law of Ukraine 'On Public-Private Partnership' — <http://zakon.rada.gov.ua/laws/show/2404-17>.

VI. Availability Payment and State Support under PPP

Availability payment is the basis for the formation of most models for the implementation of People First PPPs. Again, in our view, the mechanism of this payment should not always be considered as a mechanism of State support under PPP as it exists now in many jurisdictions, for example, in Ukraine.

Availability payment could be formed in different ways. Namely, they could be provided:

– at the expense of public budgets (in case if services that provided in the framework of PPP are free of charge for their customers but public authorities have to provide them);
– solely from additional revenues to the budget generated by the PPP project;
– at the expense of the customers payment to the public partner for the services actually provided by the private partner under the PPP contract.

In our opinion, in the last two cases availability payment should not considered as a mechanism of the State support under PPP. PPP model based on such availability payments is in some essence 'concessionary'. In this case reimbursement of costs invested by private partner in the project (construction or modernization of the infrastructure facility) is actually ensured at the expense of consumers of services either directly from their payment to State/municipality, or indirectly arising from project implementation.

The model in which payment for services is received by a public partner and then transformed into 'availability payment' to a private partner, based on the performance indicators of the services provided by the private partner (free of charge on his behalf) differs from the concessionary model only by the following:

– the public partner has the opportunity to more significantly influence on the quality and reliability of the services provided by the private partner, rather than in the case of concluding a concession contract (for example, through consolidated and professional representation of the interests of consumers of these services);
– the private partner is delegated with less risk, in particular, it is not responsible for the risk of demand and the risk of changing the tariff policy, which in some cases the public partner can manage better than the private one. As a consequence, the cost of the project is decreasing, and its attractiveness for private business is increasing.

It should be noted that in structuring PPP project this way, 'State support' in the sense of 'providing an additional resource to a private partner at the expense of the State / local budget' may not be required at all. Additional budgetary funds (in comparison with those that existed before the implementation of the project) are not paid to the private partner. Moreover, in some cases, when using such a model, the public partner will be able to receive additional income from the project implemented by the private partner, without spending any budgetary funds on it (for example, if the collected payment for services exceeds availability payment). So, in many cases it is not logical to consider the projects structured based on 'availability payment' as those to which the State support is provided.

A similar situation may take place in the case when such payment is formed solely at the expense of additional revenues generated by the PPP project. In such projects, the reimbursement of the costs of a private partner is also carried out at the expense of the services provided to the society. But, unlike the previous one, in this case the public partner (or the State) receives income not from services (or not only from services) directly provided by private partner during utilization an infrastructure object (for example, not from fare for using roads), but primarily from other services (or only from other services) that become available to the population or business residing in a particular area, due to the implementation of this project (for example, taxes from a new business arising near the roads, or an increase in attractiveness and, appropriately, revenues from existing business etc, meaning, from those revenues that would not appear if the project had not been implemented).

Formally, ensuring of conditions for these additional (indirect) budget revenues is not and cannot be the subject of a PPP contract, but a detailed analysis of the impact of the project on their receipt should be considered and justified while assessing the feasibility of implementing the project as a public-private partnership. Based on this analysis, the public partner can predict with a high degree of certainty the future revenues to the budget, some of which (or in a certain period — even all) will be redirected to the private partner in the form of 'availability payment'.

In this case, such project can also be considered as profitable for both private and public partners and as the project that does not require the attraction of additional funds from the State (local) budget other than those that the project itself generates.

A different situation arises when the project is extremely important for the territory, but it cannot ensure the revenues to the appropriate budget of funds that could ensure ‘availability payment’ from the budget (even in the future). It means that in any case, in order to ensure the payback of this project for a private partner, the State (local) budget shall spend on it implementation the revenues received from other activities that are not related to the implementation of this project. Here we can for sure talk about the State support under PPP. In this case, the decision to support such project should be made based on the consideration of the population’s demand for this project, public interest and the cost of such State support.

VII. State Support under PPP and EU State aid Regulation: Legal Aspects

There are other problems in applying State support under PPP including based on understanding that the all measures in its framework should be consistent with the host country’s international obligations under international agreements. In particular, countries — EU members and those that took obligations to harmonize their legislation to EU State aid Regulation like Ukraine need to check relevance of their national legislation to EU State aid Regulation.

Today in our country we have a lot of discussion on the issue of necessity of considering State support under PPP as State aid in the understanding of the EU regulation. Until now we cannot give an unequivocal answer — should the PPP State support be attributed to State aid in terms of the EU legislation? Expert opinions on this issue are different. This question is very complicated and requires a detailed study of lawyers, especially taking in account that PPP projects are innovative in their essence, including the forms of State support offered for their implementation. Moreover, it is unlikely that it will be possible to reach a unanimous opinion on this issue for all the cases of using State support under PPP without having studied in detail the specifics of the projects for which this support is provided.

At the same time, in our opinion, in most cases, the State support under the PPP provided for the implementation of socially important projects in developing countries that are characterized by serious infrastructural problems should not be considered in the context of the EU regulation of the State aid (or at the worst shall be considered as compatible).

Arguments for such conclusion are presented below, including Table 1 (on the next page).

State aid is defined as:

> an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities. Therefore, subsidies granted to individuals or general measures open to all enterprises are not covered by this prohibition and do not constitute State aid (examples include general taxation measures or employment legislation).[5]

To be State aid, a measure needs to have these features:[6]

- An intervention by the State or through State resources:[7] ‘there has been an intervention by the State or through State resources which can take a variety of forms (eg grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc)’;
- Distorting competition: ‘competition has been or may be distorted’;
- Negative impact on trade between Member States: ‘the intervention is likely to affect trade between Member States’.

At the same time,

5 <http://ec.europa.eu/competition/state_aid/overview/index_en.html>.

6 <http://ec.europa.eu/competition/state_aid/overview/index_en.html>.

7 In some countries, State aid is considered narrower than in the EU. For example, in Ukraine, only State intervention by attracting the State or local resources can be a subject of State aid. In accordance with the Law of Ukraine ‘On State aid to Business Entities’, the State resources are ‘movable and immovable property, state budget funds, other funds that are subject to the right of state ownership, land and other natural resources that are the objects of the property rights of the Ukrainian people, budgets of funds of compulsory state social insurance, which are subject to state supervised or managed or administered by the authorities’; the local resources - ‘movable and immovable property, funds of local budgets, other funds, land, natural resources owned by territorial communities of villages, towns, cities, districts in cities, objects of their joint property, which are in the management of district and regional councils, property’.

despite the general prohibition of State aid, *in some circumstances government interventions is necessary for a well-functioning and equitable economy*. Therefore, the Treaty leaves room for a *number of policy objectives for which State aid can be considered compatible*.[8]

VIII. State Support under PPP and EU State aid Regulation: Economic Expediency

It is more interesting to consider the correlation of State support under PPP and EU State aid from the economic point of view. After all, legal regulation should provide 'rules of the game' that correspond to certain economic and social principles and stimulate business to the 'right behaviour' from the point of society view. In the case of EU State aid Regulation we talk about developing competition and the elimination of inequality.

Today the most important global goal is the elimination of inequality.

It is not by chance that overcoming inequality is one of the UN Sustainable Development Goals, namely – SDG 10 'Reduce inequality within and among countries'. In particular this SDG specifically includes the following tasks:[9]

- Facilitate orderly, safe, and responsible migration and mobility of people, including through implementation of planned and well-managed migration policies (target 10.7);
- Implement the principle of special and differential treatment for developing countries, in particular least developed countries, in accordance with WTO agreements (target 10.a);
- Encourage Official Development Assistance and financial flows, including foreign direct investment, to States where the need is greatest, in particular LDCs, African countries, SIDS, and LLDCs, in accordance with their national plans and programs (target 10.b).

SDG 10 is focused mainly on preventing inequalities in the living conditions of people both within the country and between countries. But, after all, the living conditions of people in a given territory depend on its attractiveness for business, which is provided by the availability of infrastructure both directly for doing business and for people who are engaged in this business (its owners and staff). Therefore, achieving this goal is impossible without ensuring infrastructure development in depressed and underdeveloped territories.

The lack of State support for implementation of number of infrastructure projects based on PPP in countries with economies in transition will almost certainly lead to the fact that business is not ready to take part in appropriate projects. As a result, the infrastructure problems of the territory will be aggravated, and the conditions for doing business and for living will deteriorate. All this will provoke the migration of capital and peoples, the closure of local business or its transfer to more favourable places. Inequality within and between countries (poor and rich) will increase, and business and territory competitiveness will decline.

On the other side, the provision of State support under PPP will provide an opportunity to modernize (create) critical infrastructure to ensure an acceptable quality of life for people and running a business. As a result, the logistics costs of business will decrease; the territory will be more attractive for business. All this will not only preserve the existing business, but also create the conditions for the creation of new companies. The market will become more competitive. Depressive and economically undeveloped territories will have the opportunity for development. Competition will strengthen.

IX. Some Approaches to the State Support under PPP: Example of Ukraine

Needs of Ukraine in attracting private business in life-support infrastructure are extremely high today. In recent years, investments in infrastructure at the expense of public budgets were very low, and the possibilities for providing State support were very limited (for example, in 2016, approx. US$130-140 million were spent from the State budget for government support for the implementation of State investment projects, nothing – in the framework of PPP). At the same time, the infrastructure is constantly ag-

8 <http://ec.europa.eu/competition/state_aid/overview/index_en.html>.

9 <https://sustainabledevelopment.un.org/sdgs>.

Relevance of the State aid Features and State Support under PPP

Features of the State aid	State support in the framework of PPP
An intervention by the State or through State resources	State support under PPP almost always falls under this characteristic, especially if we consider such an intervention in the broad sense of the word
'An advantage on a selective basis' ('to specific companies or industry sectors, or to companies located in specific regions)	This characteristic (feature) is not inherent to State support in the framework of PPP. First of all, State support under PPP measures (its form and boundary volumes) must be determined by the public partner before the competition and described in the tender documentation for choosing a private partner for PPP implementation. Conditions of such State support will be familiarized in advance for all business entities that are interested in the implementation of a PPP project. And bidders can compete with each other in their bids, including needs in State support (the less demand it is, the better for a public partner). Such an approach cannot be called as selective. It is competitive. Then in the case of PPP we also can't talk about benefits for a business entity that it could receive from participation in a PPP project comparatively with entities that operate in the same market in traditional understanding if PPP is structured 'the right way'. State support under PPP should be provided to the extent necessary for a business to recoup its investments on the same terms that it has when implementing commercial projects with a similar level of risks. Consequently, in this case we can't talk about advantages for a private partner as result of providing State support under PPP
Distorting competition (has been or may be distorted)	In our view, this characteristic is also not applicable to State support under PPP. Firstly, a significant part of PPP projects is implemented on the natural monopolies markets, which are subject to State regulation. Since there is no competition there, it is not possible to destroy it. At the same time, in the case of PPPs, there is competition among private operators who want to enter the market with an important for the society project. As for competitive markets, even if the private partner who wins PPP competition will be in better conditions than other companies that operate in the relevant market; its advantages are balanced with the very serious obligations provided in the relevant PPP agreement. As a result, the risks of a private partner in a PPP project are much higher than the risks of other companies operating in the same market. In addition, any company operating in the market where PPP project is planned to be implemented potentially can be a private partner in a PPP project. To win the competition, business company must offer the best conditions for the implementation of the project based on public interest
Affect trade between Member States	In principle it is possible that in some cases the provision of State support under a PPP may have a negative effect on the trade between the Member States

ing; many objects were destroyed as a result of the conflict in the east of the country. There are no more or less reasonable estimates of the need for financing infrastructure development. There is no long-term strategy for socio-economic development in the country. There is no national infrastructure plan.

At the same time, in August 2017, the National Report 'Sustainable Development Goals: Ukraine'[10] was prepared and presented. The most priority tasks in developing infrastructure critical for SDGs and set indicators for their achievement until 2030 have been identified in this report.

Among them, for example:

- To bring the level of the urban and rural population with access to drinking water of guaranteed quality up to 100% (today this indicator is 50% for the rural population and 90% for the urban population);
- To reduce the discharge of polluted wastewater into water bodies in almost 3 times (today 16% of

10 <http://www.un.org.ua/en/publications-and-reports/un-in-ukraine-publications/4205-2017-national-baseline-report-sustainable-development-goals-ukraine>.

wastewater is discharged untreated, which is approximately 875 mln cubic meters per year);
- To increase the share of energy produced from renewable energy sources in 3.5 times (today it is 5%);
- to reduce in 10 times the proportion of the rural population living at a distance of more than 3 km from paved roads (today it is 5% of the population of Ukraine, which is approximately 2.5 million people);
- To increase in 7 times the proportion of public roads of State importance with hard surface that would correspond to regulatory conditions (today it is only 10% of all such roads);
- To increase the share of incinerated and recycled waste in the total amount of their creation in almost 2 times (currently, only 30% of waste in Ukraine is disposed of);
- To restore in full the destroyed infrastructure of the Donetsk and Lugansk regions.

As we can see, the tasks, on the one hand, are financially capacious and require significant investments and, above all, private business. This is reflected in the National Report too. In particular, it is planned to increase the number of PPP projects implemented up to 45 by 2030 (today there are only 2 small projects) and increase the inflow of foreign investments in almost 6 times.

The implementation of almost all projects aimed at creating the infrastructure critical for SDGs national indicators, cannot be provided for on a commercial basis. As of 2016, per capita GDP in Ukraine was US$2.185,73. The average living expenses per person for 58,3% of the country's population were below the subsistence minimum. The share of food expenses in the total household expenditure was 54,6%. In such conditions, it is problematic to ensure return on investment in the creation / modernization of such infrastructure without a State support. Accordingly, it will not be possible to count on attracting private business to solving the existing infrastructural problems.

On the other hand, the need to provide State support to private business in the implementation of infrastructure projects is negatively perceived by the society. In Ukraine, historically, on a subconscious level, it has been felt that attracting private business to the infrastructure is always extremely beneficial for it. Moreover, this opinion is prevalent not only among the population, but also among the most senior civil servants. It is also reflected in the legislation. For example, the current concession legislation does not imply the possibility of providing State support to the concessionaire at all. Moreover, concession payments are mandatory for all projects. And the attractiveness of concession projects for a country in most cases is evaluated in terms of the size of concession payments. Firstly, it indicates a lack of understanding of the meaning of the PPP mechanism, and secondly, implies that any concession projects must be 'super-profitable' for the concessionaire.

In our opinion, this approach is one of the reasons that for almost 19 years since the adoption of the law on concessions, Ukraine has not implemented a single project, not only involving the creation of new infrastructure facilities, but even their somewhat significant modernization. Among the concessionaires almost 200 projects implemented during this time have not been a single foreign company.

At the same time, it should be noted that the Law on Public-Private Partnership, adopted in 2010 and substantially updated in 2016, provides for the use of a number of forms of State support under PPP, which include availability payment.

To be fair, it should be noted that, to date, none of the forms of State support provided by the Law on Public-Private Partnership has been applied in practice. Possible mechanisms for the implementation of State support for PPP are still being discussed (developed). A consensus on approaches to their formation has not yet been developed. Moreover, during this way many problems have arisen that need to be resolved.

One of the most serious problems for the formation and implementation of such mechanisms is the unresolved issue regarding the correlation of State support under PPPs and EU State aid Regulation.

However, today the Law 'On State aid to Economic Entities'[11] does not cover the State support to economic activity connected with the provision of the services of general economic interest (SGEI) in part of compensation of reasonable costs for provision of those services.

There is an official Explanation of the Antimonopoly Committee of Ukraine regarding the services of

11 Article 3, part 2(2) of the 'On State aid to Economic Entities'.

general economic interest[12] on this issue that explains that the compensation of reasonable costs for the provision of SGEI shall not be considered as the State aid to economic entities if the following cumulative features are in place:

- Economic entity that receives the compensation factually fulfils the obligation on providing the SGEI and those services have been clearly defined;
- The compensation calculation methodology has been defined in advance in objective and transparent manner;
- Compensation does not exceed the amount necessary for the covering the costs incurred due to fulfilment of the obligations in providing SGEI;
- Economic entity that provides SGEI is to be chosen on the competitive basis of public procurement procedure, or the level of compensation is to be defined on the basis of the analysis of costs typical for the economic entity that could provide such services with consideration of certain revenue and reasonable income.

Otherwise is should be considered as a State aid.

All these features are inherent for PPPs.

Also, the draft Law 'On concessions', which was adopted in the first reading and prepared for the final consideration by the Parliament of Ukraine, provides for excluding State support under PPPs from the scope of application of the Law of Ukraine 'On State aid to Economic Entities'. But the final decision on this issue has not yet been made.

X. Conclusions

The implementation of PPP projects, which implies the provision of State support, is necessary to create critical infrastructure for achieving the SDGs in developing economies. Having clear and understandable mechanisms for providing such support will make it possible to overcome inequalities between countries and within individual countries, create favourable conditions for business competition, regardless of its place of origin (residences of developed or developing countries)

At the same time, the uncertainty about the possible affiliation of State support under PPP to State aid in the understanding of the EU regulation in a number of countries that have recently joined or declared their desire to join to the European Union, slows down the process of formation of such mechanisms and creates considerable difficulties in their application in practice. As a result, the attractiveness of these countries for investment in infrastructure projects from private businesses is declining. It creates grounds for increasing the inequality of these countries correspondently to other countries of the European Union, provokes social tensions and conflicts. This state of affairs creates migration that leads to serious problems for developed EU countries too.

Legislation should reflect economic relations in the society and provide the right incentives for sustainable development for all countries of the world, both economically developed and developing. Models and approaches that work well in economically developed countries not always could be or even should be implemented and be useful in developing countries. Based on this, in our opinion, the harmonization of legislation of countries such as Ukraine to the EU legislation should be implemented gradually, taking into account the needs of ensuring the sustainable development and economic capabilities of the country, as well as an institutional capacity of public authorities. The 'copy-paste' approach should be avoided. Improving legislation should be based on the interest of people and necessity to build a well-functioning and equitable economy in all countries of the world and in the poorest countries in the first turn.

The current approaches to the State support under PPP, the definition of its forms and principles of provision are out-of-date now. They should be reviewed in the context of the UN ambitious program to achieve the Sustainable Development Goals, especially for developing countries.

In particular, in our opinion, it is necessary to ensure a correlation between the decision to grant the State support under the PPP and influence of appropriate project on the achievement of national SDGs indicators.

It is also important to exclude from the list of forms of State support under PPP those forms that are actually needed for ensuring the responsibility of the State on the fulfilment of public partner's obligations

12 The Letter of the Antimonopoly Committee of Ukraine of 20 March 2018 No4-pp/ дд.

under the PPP contract (the State guarantees under PPP), as well as those that establish the mechanisms of payment for services provided by infrastructure upgraded by private partner, namely, availability payment provided for the expense:

- Additional revenues to the budget that will be generated by the PPP project;
- Customer's payment to the public partner for the services actually provided by the private partner under the PPP contract