

Ukraine

The Ukraine Continues Development of PPP Regulation, But Still Needs Improving Institutional Capacity

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I. Current Situation

Since May 2016 when the new version of Law of Ukraine “On public-private partnership” (hereinafter – PPP Law) introducing a number of positive norms for the private business has become valid,¹ the process of legislation development in this area considerably accelerated.

New secondary legislation acts have been adopted: the Resolution of the Cabinet of Ministers of Ukraine regulating the use of Step-in-Rights procedure;² methodic recommendations of the Ministry of Economic Development and Trade of Ukraine on evaluation of proposals for PPP implementation and decision making on expediency or in expediency of a project implementation on PPP conditions.³

The first document stipulates:

- requirements to initiation of Step-in-Rights procedure by the lender,
- procedures for consideration of the lender’s Step-in-Rights proposal by the public partner and decision making on using Step-in-Rights procedure,
- procedures for the conduct of competition concerning the selection of new private partners applying the simplified procedure.

The second document provides explanations and clarifications regarding the previously adopted new procedure for conducting the efficiency analysis as regards PPP implementation.⁴

One of the most important clarifications is the requirement concerning the body responsible for conducting the efficiency analysis to mandatorily prepare the conclusion upon results of the efficiency analysis of the PPP implementation, both in the case of a positive decision and in the case of a negative decision on the submitted proposal. Moreover, in the event the public authority decides on the inexpediency of implementing PPP for the considered project, it shall additionally include to its opinion the rationale for such a decision. The rationale, in particular, should contain the information on:

- possible negative social-economic and/or ecological results of the project implementation;
- risks of the public partner that may arise because of the implementation of the project on the PPP conditions and lead to negative fiscal consequences for the country/territory;
- the impossibility to ensure the return on investment of a private partner in the framework of a PPP contract (except for in the case of unsolicited proposals);
- violations of rights and obligations of the public partner as a consequence of the implementation of the PPP contract in the proposed legal form;
- the existence of another alternative mechanism for implementing the project, which is more effective than attracting a private partner;
- discrepancies in the information specified in the proposal for the PPP implementation to the legislative norms (if this discrepancy significantly affects the organisational and legal mechanism for implementing the project as PPP).

The adoption of this document has strengthened the position of the private business that initiates infra-

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1 I Zapatrina and A Shatkovska, ‘Recent Developments in PPP Legislation in Ukraine’ (2017) 1 European Procurement & Public Private Partnership Law Review, 78-81.

2 Resolution of the Cabinet of Ministers of Ukraine dated 26.04.2017 No.298.

3 Order of the Ministry of Economic Development and Trade of Ukraine dated 29.11.2017 No. 1735.

4 Resolution of the Cabinet of Ministers of Ukraine dated 16.11.2016 No.815.

structure projects to implement them in the form of PPP. Such a norm will allow avoiding situations when the public authority, instead of analysing the submitted proposal and preparing a conclusion, simply informs the initiator of the project that the submitted proposal is not interesting.

II. Improvement of Concession Legislation

As of today the work on the improvement of the concession legislation, started in summer 2016, with the support of the EBRD is being continued.⁵ The new draft Law on Concessions and the relevant amendments to more than 30 laws of Ukraine, prepared by the Ministry of Economic Development and Trade of Ukraine jointly with the EBRD consultants has already been approved at the meeting of the Government of Ukraine on 24 December 2017 and will soon be registered in the Parliament.

The preparation for this draft law has lasted a year and a half and was accompanied by serious discussions on a number of conceptual issues.

One of the main points among them was the issue of whether to consider a concession as one of the PPP forms, or to consider it as a separate mechanism for attracting private business to invest in infrastructure projects.

The first position has won. The draft law implements a model in accordance with which:

- concession is one of the PPP forms, whose the distinctive feature is the reimbursement of the private partner's investments mainly (not less than half) at the expense of the consumers' fees for services;
- there is a single procedure for initiating infrastructure projects planned to be implemented with the participation of a private business on PPP conditions, regardless of the contractual form planned to be applied to the implementation of such a project;
- the suggestion to use the concession form for the implementation of the project should be justified in the proposal for the implementation of PPP, submitted to the relevant public authority;
- the final decision on the form of the project implementation on PPP conditions (concession or other form of PPP) shall be taken by the body authorised to conduct the required analysis of the ef-

iciency as concerns the PPP implementation, based on the evaluation of the relevant proposal and reflected in the conclusion adopted based on the efficiency analysis;

- if a decision is taken in favour of implementing a project in the form of a concession, the new law on concessions shall be applied to its subsequent preparation and implementation. If the project is planned to be implemented in another form – the Law of Ukraine “On public-private partnership” shall be applied.

The second important conceptual position that was discussed in the drafting process was the issue of financial relations between the public and private partner within the framework of a concession.

In the current concession legislation of Ukraine the concessionary payments are an obligatory attribute of the concession contract;⁶ State support for projects implemented under concession contracts is not allowed. It was changed in the draft law.

In addition, for today, objects transferred to a concession can be burdened by financial obligations of State (municipal) enterprises that manage them, which is not logical at all. In order to avoid such obligations and at the same time allow the public partner to receive one-time financial assistance from the concessionaire in order to solve the problems related to the obligations of enterprises that exploited these facilities prior to the transfer to a concession, it is envisaged to use fixed fees in concession contracts.

As of today, the selection of a private partner for all projects implemented on PPP conditions – both concessions and not – is carried out by means of competition. The new draft law on concessions establishes the conditions under which concessions are awarded on the basis of direct negotiations.

In addition, it is envisaged to use the competitive dialogue procedure, which is absent in the current legislation.

Another novelty of the draft law is the possibility of transforming the lease agreement into a concession contract using the procedure of direct negotia-

5 I Zapatrina and A Shatkovska, ‘Recent Developments in PPP Legislation in Ukraine’ (2017) 1 *European Procurement & Public Private Partnership Law Review*, 78-81.

6 The legislation provides for certain possibilities for the temporary exemption of the concessionaire from concession payments, but it is practically impossible to apply them.

tions. Such process can be initiated by the lessee of the object of State property in case it is interested in its modernisation (reconstruction). The decision to conduct such a transformation shall be taken by the Government upon consideration of the proposal on PPP implementation initiated by the lessee.

Among the amendments to other laws of Ukraine, envisaged by the draft law, I would like to draw attention to the amendments to the Budget Code envisaging:

- the introduction of a new type of State guarantees in the framework of State support for PPPs, which, unlike the existing ones, guarantees the fulfillment by the State partner of its obligations under a PPP contract;
- the introduction of long-term budgetary obligations for PPP projects.

It is yet not clear which of these amendments and proposals will be adopted by the Parliament of Ukraine. At the same time bringing up these issues embedding them in a broad public discussion will promote a deeper understanding to the public authorities in terms of international standards in the field of PPP and approaches to the implementation of socially important projects involving private business.

III. The Practice of Applying Legislation in the Field of PPP

International experience shows that good PPP legislation, of course, is important for attracting private business to the infrastructure sector. But it does not always lead to the emergence of successful PPP projects. Without a strong political will and developed institutions, the best legislation will not bring the desired effect.

The experience of Ukraine fully confirms this.

Today, the current PPP legislation in the country is not perfect, but quite attractive for the private business. This is especially true for non-concession projects. At the same time, no project boom has yet been witnessed.

For almost two years that have passed since the introduction of the new version of the Law of Ukraine “On public-private partnership”, not a single proposal has been prepared by the central authorities for PPP implementation in respect to State owned objects. According to the information from the open media, the situation is the same at the local level.

At the same time, starting from summer 2017, the private business has expressed its interest in the possibility of submitting unsolicited proposals for the implementation of projects on PPP conditions.

In November 2017, the Ministry of Fuel and Energy of Ukraine has adopted a decision on the implementation of PPP for the Project “Energy Bridge: Ukraine-European Union”, the proposal for the implementation of which had been submitted on the initiative of a consortium consisting of Polenergia International S.àrl, EDF Trading Limited and Westinghouse Electric Sweden AB.

In the period from September to November 2017 representatives of private business have submitted unsolicited proposals to the Ministry of Infrastructure of Ukraine,⁷ the Ministry of Internal Affairs of Ukraine and Kyiv City State Administration,⁸ and the Ministry of Justice of Ukraine.⁹ Unfortunately, until now no decision on these proposals has been adopted, despite the fact that the time stipulated for this by the law has already passed.

The main reason for this is low institutional capacity of the relevant ministries on PPP issues and its almost complete absence at the local level.

Actually only the central PPP unit located in the Ministry of Economic Development and Trade is an active player on the PPP market and doing all the best for improving the legislation and promoting PPPs in Ukraine at present. Other bodies responsible for the implementation of PPP projects in various economic spheres are not yet ready for resolving such complex tasks.

In the 2015 World Bank Assessment “Public-Private Partnership in the context of Public Investment Management in Ukraine”,¹⁰ it was underlined that there is a strong need for capacity building at all lev-

7 Project “Modernization of the port infrastructure of Kherson and Skadovsk trade ports and increasing of efficiency of their use”, initiated by the Group of Companies “Sodruzhestvo”.

8 Project “Creation of system of video recording of traffic violations in the automatic mode” in Ukraine and in Kyiv, correspondingly.

9 Project “Construction of a new Lviv detention center facility and a hospital institution as part of the investment project for the transfer of Lviv penal facility”.

10 N Biletska, J-H Kim, M Darcy, M Dunne and I. Zapatrina, *Public-Private Partnerships in the Context of Public Investment Management in Ukraine* (The International Bank for Reconstruction and Development 2016), available at <<http://www.worldbank.org>> Last accessed on 30 March 2018.

els in Ukraine: *“The fundamental problem does not lie with the 2010 PPP Law but instead with the fact that the PPP model is still little understood in Ukraine. The problems are exacerbated by the lack of knowledge about overall PIM planning and early identification of potential projects.”*¹¹

In particular, the situation at the local level was critically acknowledged: *“The GoU seeks to facilitate PPPs at the local government level but this requires institutional support. There are no PPP units at the local level. If a Municipality wants to carry out an infrastructure project it needs to prepare and implement the project itself with little or no PPP experience, in the absence of standard documentation and most probably without the budget to engage external advisers.”*¹² At the same time, in accordance with the current legislation local authorities can adopt all decisions regarding PPPs in case money from the State budget is not involved in the appropriate project implementation.

The situation described in the World Bank Assessment on these issues remains the same.

At the same time neither the current PPP Law, nor the Concession Law Draft has specified any requirements as to the qualification of persons that are responsible for PPP/concession preparation, evaluation and implementation. We have completely another situation with the Public Procurement Law that has strict demands concerning members of tender committees at the central and local level, e.g. to have appropriate training every 2 years and to obtain an appropriate certificate.

In recent years, there have been no achievements in the preparation of detailed guidelines for the application of the current legislation in the field of PPPs.

The recommendations of the World Bank on this issue have not also been taken into account: *“Guidelines on project appraisal with a Step-by-Step Guidebook should be developed to support the new legislation and the publication of these can act as a spur for a major effort in capacity building across Ukraine’s public administrations. This new system should incorporate PPP as part of the system – a means of implementing certain projects – rather than as a separate system.”*¹³

As a result, it is more relevant for Ukraine today to develop the institutional environment in the sphere of PPP and to strengthen the responsibility of the public authorities for enforcing legislative requirements when considering proposals for the implementation of PPPs and preparing projects for implementation rather than further development of legal regulation. The lack of progress in strengthening of the institutional capacity of public authorities related to PPP issues will not only prevent private business from taking advantage of modern legislation to launch important infrastructure projects for the country, but also destroy its yet cautious interest in investing in socially important projects in Ukraine.

11 N Biletska, J-H Kim, M Darcy, M Dunne and I. Zapatrina, *Public-Private Partnerships in the Context of Public Investment Management in Ukraine* (The International Bank for Reconstruction and Development 2016), 29.

12 N Biletska, J-H Kim, M Darcy, M Dunne and I. Zapatrina, *Public-Private Partnerships in the Context of Public Investment Management in Ukraine* (The International Bank for Reconstruction and Development 2016), 23.

13 N Biletska, J-H Kim, M Darcy, M Dunne and I. Zapatrina, *Public-Private Partnerships in the Context of Public Investment Management in Ukraine* (The International Bank for Reconstruction and Development 2016), 61.