

Country Report

Ukraine

Recent Developments in PPP Legislation in Ukraine

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I. Current Situation

The demand for modernisation (creation) of modern reliable infrastructure is extremely high in Ukraine. Without overcoming the infrastructural gap it has no sense to talk about economic development and investment attractiveness of the country. It is also critical for dealing with social tension in the society and resolving the military conflict in the east of the country.

In accordance with the World Bank 2011 Public Finance Review,¹ the demand of Ukraine in infrastructure development will exceed US\$ 100 billion over the next 10 years. In 2015, the Ministry of Economic Development and Trade of Ukraine evaluated and estimated the needs for infrastructure modernisation amounting up to US\$ 8 billion annually.² At the same time, according to the data of the State Statistics Committee of Ukraine³ the capital investments into engineering infrastructure of the country in the recent years constitute approximately US\$ 2 billion per year (in 2014 – about US\$ 2.3 billion, including US\$ 179

million in pipeline and ground transportation, US\$ 56 million in medical infrastructure; in 2015 – about US\$ 1.99 billion, including US\$ 318 million in pipeline and ground transportation, US\$ 93 million in medical infrastructure).

Foreign investments in total infrastructural investments equalled

- in 2014 2.5%

- in 2015 about 3%

while the State Budget contributed

- in 2014 1.25%

- in 2015 2.5%

and local budgets

- in 2014 2.65%

- in 2015 5.22% to the total capital investments. The investments were made mainly at the expense of own funds of enterprises and partly by attracting loans.

Under these circumstances, the task of attracting investment towards Ukraine in form of PPP becomes extremely urgent.

II. Novelties in Legal Regulation of PPPs in Ukraine

2016 has become a turning point in the PPP development in Ukraine. On 25 May 2016, the new version of the 'Law of Ukraine on Public-Private Partnership' (hereinafter – PPP Law) has become valid; on 16 November 2016, the Cabinet of Ministers of Ukraine has adopted the new procedure of conducting the efficiency analysis of PPP implementation and introduced amendments to the procedure of stimulating competition as concerns the private partner selection for PPP projects.⁴ In the nearest future, it is planned to adopt the governmental resolution concerning a 'step-in' rights procedure under PPP contracts.

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DOI: 10.21552/epppl/2017/1/18

1 World Bank, *Ukraine: Public Investment Management Assessment* (2011), vii-ix.

2 The Strategy Paper for Economic Development 'A Way to Prosperity' (July 2015) is available at <<http://www.me.gov.ua/News/Detail?lang=en-GB&id=5945218a-bba3-428a-b5fb-74450bbf8f17&title=AivarasAbromavius-ForAGrowthOfEconomyUkraineShouldIncreaseALevelOfEconomicFreedom>> Last accessed on 7 February 2017.

3 Official site of the State Statistics Committee of Ukraine, available at <<http://www.ukrstat.gov.ua>> Last accessed on 7 February 2017.

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

Below is a brief outline of the main progressive novelties in the legislation, which create an attractive environment for business participation in infrastructure projects.

1. Project Initiation

Proposals for implementation of public-private partnership could be prepared by State or local executive agencies (local self-governance agencies) or entities qualifying for the position of private partners (unsolicited proposal).

Proposal for PPP implementation shall consist of the Concept note and a Feasibility Study. Such proposal shall be approved (or rejected):

- for State property and municipal property (in case it is planned to attract funds from the State budget for PPP implementation) within three calendar months after submission of a proposal;
- for municipal property at the next meeting of the local authority (village, settlement, city, district or oblast councils).

In the first case a decision on PPP implementation shall be taken by the line ministry based on conclusion of ministries of economy and finance, where as in the second case the decision-making lies with the relevant local council.

2. Private Partner Selection

The private partner for the PPP project shall be selected on a competitive basis only.

There are no advantages in the tender process for a private partner – PPP project initiator. At the same time documented expenses incurred by this entity for preparation of the corresponding proposal and for development of land tenure documents, and their expert appraisal shall be reimbursed by the winner of the competition. Maximum level of reimbursement could be 2.5% of the total PPP project costs.

3. PPP Contract

The PPP contract may include elements of different contracts (concluded in form of a mixed contract) re-

sulting in more options for selecting the most convenient and efficient cooperation model for both the public and private partner.

State or municipally owned company with 100% of its authorised capital held by the State or local community may take part in the PPP contract on the side of the respective public partner.

The winner of the competition may establish a legal entity to become the private partner in the PPP contract. At the same time, the winner is required to hold, directly or indirectly, more than 50% of the legal entity's authorised capital and to be fully liable for the performance of obligations under the PPP contract.

4. Ownership

According to the new version of the PPP Law the objects created or acquired by the private partner in pursuance of a PPP contract may be owned by the private partner as well. Such property shall be transferred to the public partner according to the procedure and within the time period specified in their joint PPP contract, but not later its termination or expiry date. At the same time, the PPP contract may specify that the property created or acquired in pursuance of the terms and conditions of the contract and owned by the private partner may not be pledged provided for joint operation, lease, or other operation or possession without consent of the public partner.

The PPP contract may provide for the public and private partners' joint shared ownership of the property created or acquired. The procedure of determining the share in the property created or acquired in joint shared ownership of the public and private partners, as well as conditions and procedures for disposal of a share in joint shared property shall be governed by the provisions of the PPP contract.

5. Step-In Rights

In case the private partner fails to perform the obligations under PPP contract the lender may offer the public partner to replace the private partner in the PPP contract, the procedure of such replacement shall be regulated by the Government Resolution. Appropriate regulation will be adopted soon.

6. Land Plots for PPPs and Necessary Permissions

According to the PPP Law the public partner shall ensure that, upon the private partner's demand, the latter is provided with the land plots required for the due performance of the PPP contract in accordance with the procedure specified in the Law and referred to as such in the specific contract.

Should the competent authority decide on the implementation of PPP, land tenure projects on land lot allotment, other land tenure documentation required under the law for the land lot to be provided for use, and documentation about land lots required for the private partner to implement such a partnership, this shall be developed at the time of commission of the public partner.

The public partner shall agree upon the required land tenure documentation with appropriate public or self-government bodies in the manner prescribed by law and, in cases stipulated by law, receive a positive conclusion of the public land management expert commission in the manner prescribed by law. The procedure and conditions of acquisition by the private partner having the right to use land lots shall be specified in provisions of the tender documents concerning the private partner selection for concluding PPP contracts.

If a PPP contract includes objectives related to the use (operation) or management of power lines, communications, pipelines and other linear communications, laying and operation of which have been established to be subject to servitude, such servitude may be implemented on behalf of the public partner by the private partner. Existence of such servitudes shall be stated in provisions of the bidding concerning the private partner designation and the contract concluded under the public-private partnership.

7. State (Municipal) Support

The State (Municipal) support for PPPs can be provided in the following forms:

- by guarantees provided by the State (City Council);
- through funding from the State or local budgets and other sources in accordance with local programs;

- by making other payments to the private partner as provided for under the public-private partnership contract, "availability payment" etc.;
- by the public partner's purchase of a certain amount of goods (works, services) manufactured (performed, rendered) by the private partner under the PPP contract; and
- by supplying the private partner with goods (works, services) required for the implementation of the public-private partnership.

8. Dispute Resolution

Disputes arising under PPP contracts involving non-residents or companies benefitting from foreign investments shall be resolved according to the procedure prescribed by the law, or may be reviewed by an international arbitrage at the venue specified in the contract.

9. Guarantees for Private Partners' Rights

State agencies and self-government bodies and their officials have no right to interfere in the activities of private partners related to PPPs, except as prescribed by law. Should State or self-government bodies make decisions that violate the rights of private partners, the damage caused to them as a result of such decisions shall be reimbursed in full. The same should be done if the PPP contract is terminated due to the public partner's breach of its obligations under this contract.

If prices for goods (works, services) offered by the private partner are subject to State regulation, they shall include the return on investments made by the private partner (investment component) unless a different procedure for recovery of investments is provided for in the PPP contract. The amount of the investment component shall ensure that the private partner's investment costs are recovered during the PPP contract's effective period. If such prices are not economically justified and no appropriate reimbursement is provided, the private partner, if permitted by the PPP contract, may refrain from the contract or suspend, unless otherwise specified by the law, its investment obligations performance until the prices are approved of at an economically justified level and/or until the investment and/or income com-

ponent is included in the prices, or until the PPP contract is amended on the terms proposed by the private partner as regards the amount and period of its investments.

III. Improvement of Concession Legislation

The legislation that regulates private business participation in infrastructure is continuously improved. With the support of the European Bank for Reconstruction and Development the new Concessions Law is being drafted in Ukraine. This Law shall replace the current laws of Ukraine: "On concessions" dated from 16 July 1999; "On Concession for construction and operation of highways" dated from 14 De-

cember 1999; "On peculiarities of renting or concession facilities in the areas of heating, water and sanitation that are in communal ownership", dated from on 21 October 2010; "On peculiarities of lease or concession of fuel and energy complex, state-owned" dated from 8 July 2011. The new legislation aims at removing the existing contradictions between them and the PPP Law and at bringing the concession legislation of Ukraine in compliance with the EU Concessions Directive.⁵ It is supposed that the new draft law will be available for discussion to the relevant market players in a few months.

5 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.