Ukraine

PPP for Recovery: Is There a Need to Change the Legislation?

*Bruno de Cazalet and Iryna Zapatrina**

I. History of PPP/Concession Regulation in Ukraine

Ukraine has a long and complex history of regulating public-private partnerships (PPP). The first legislation in this area, the Law of Ukraine 'On Concessions' (Concession Law), was adopted in 1999. While progressive for its time, its practical implementation revealed numerous challenges, leading to frequent amendments. Between 2002 and 2018, the Parliament considered and approved 11 draft laws modifying the original legislation.

That same year, Ukraine enacted the Law 'On Concessions for the Construction and Operation of Roads', which was subsequently amended five times: in 2003, 2009, 2014, 2015, and 2018. Additional sector-specific PPP laws followed, including the 2010 Law 'On leasing or concession of communal heat supply, water supply, and sewerage facilities' and the 2012 Law 'On state-owned fuel and energy facilities'. Each of these laws was amended twice – the former in 2013 and 2019 and the latter in 2014 and 2019.

In 2019, these laws were repealed with the adoption of the new Law of Ukraine 'On Concessions'[1] (2019 Concession Law). Developed with the support of experts from the EBRD and the World Bank, this law incorporated best international practices. Despite undergoing parliamentary debate, it did not lose most of its substance. Notably, during its drafting, Ukraine's experience negotiating concession agreements for the seaports of Kherson and Olvia was taken into account.

In 2010, Ukraine adopted the Law 'On Public-Private Partnership'[2] (PPP Law), marking the first attempt to regulate non-concession PPP projects. However, the initial version of the law was poorly received and saw little practical application. In contrast, the Concession Law and its sector-specific counterparts were clearer, simpler, and more accessible to businesses and public authorities. Since 2010, Ukraine has launched hundreds of concession projects, primarily small-scale ones. Unfortunately, most have been unsuccessful, with many either suspended or abandoned shortly after initiation.

Despite its shortcomings, the PPP Law remains in force, having undergone numerous amendments since 2010. Nine were minor, mostly terminological, introduced through amendments to other sectoral laws. However, the PPP Law was significantly improved on two occasions: first in 2016, with the adoption of the Law of Ukraine 'On Amendments to Certain Laws of Ukraine Regarding the Removal of Regulatory Barriers to the Development of Public-Private Partnership and the Stimulation of Investments in Ukraine,' and again in 2019 through the Transitional Provisions of the 2019 Concession Law.

After changes made in 2019, the PPP Law, although it requires some improvements, is largely aligned with international standards and is regarded as progressive by most international PPP experts, including the authors of this article. However, experience in applying this law is very limited. We are not aware of any non-concession projects in Ukraine, and no publicly available information confirms such cases. According to the latest data from the Ministry of Economy of Ukraine[3] as of 1 January 2025, 200 contracts have been signed under PPP terms broadly (PPP encompasses concessions and other types of public-private partnership contracts as defined un-

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* Bruno de Cazalet, Doctor at Law, Honorary Member of the Paris Bar. Iryna Zapatrina, Doctor of economics, Professor, Research Fellow, KU Leuven; founder of the Academy of Public-Private Partnership, Kyiv, Ukraine.

1 The Law of Ukraine "On Concessions" [Закон України «Про концесії»]. <https://zakon.rada.gov.ua/laws/show/155-20#Text> accessed 10 March 2025.

2 The Law of Ukraine "On Public-Private Partnership" [Закон України «Про державно-приватне партнерство»] <https://zakon.rada.gov.ua/laws/show/2404-17#Text> accessed 10 March 2025.

3 The state of PPP implementation in Ukraine [Стан здійснення ДПП в Україні] - Official site of the Ministry of Economy of Ukraine <https://me.gov.ua/Documents/Detail/9fc90c5e-2f7b-44b2-8bf1-1ffb7ee1be26> accessed 5 March 2025.

der the 2010 PPP Law). Of these, 22 are currently being implemented (nine concession contracts, six joint activity contracts, and seven classified as other contracts). Meanwhile, 167 contracts are inactive (114 not implemented, 53 terminated or expired), and 11 have been suspended due to the ongoing armed aggression of the Russian Federation.

Just before the war, on 15 February 2022, significant amendments were made to the Budget Code of Ukraine[4] regarding introducing long-term commitments within PPPs and concessions. These changes gave public authorities the right to provide government support for PPPs/concession implementation in forms provided by the PPP Law and 2019 Concession Law. Further amendments of the Budget Code from 16 January 2025 specified that such government support – financed through the state or local budget via operational readiness payments or other contractual obligations – must be contingent on the project's inclusion in the state or regional public investment portfolio. Each PPP project must be incorporated separately, following procedures established by the Cabinet of Ministers of Ukraine.

It is also worth noting that after the adoption of the 2019 Concession Law and the revision of the PPP Law, 16 by-laws (12 resolutions of the Cabinet of Ministers of Ukraine and four orders of the Ministry of Economy of Ukraine) were introduced to facilitate their implementation. Many of them were developed with support from the World Bank, which also prepared a comprehensive six-volume Handbook on Public-Private Partnerships in Ukrainian[5] and English.[6] This resource aims to enhance the institutional capacity of public authorities in initiating, preparing, evaluating, procuring, and implementing PPP projects, including concessions, by incorporating best international practices and aligning with Ukraine's current legal framework.

As a result, the legal framework for PPP was well-established before the war, paving the way for the widespread launch of infrastructure projects through this mechanism. The war significantly altered these plans.

On 1 July 2022, amid expectations that the war in Ukraine might soon end, members of Parliament introduced Draft Law No. 7508, titled 'On Amendments to Certain Legislative Acts of Ukraine to Improve the Mechanism for Attracting Private Investments through Public-Private Partnerships to Accelerate the Restoration of War-Damaged Infrastructure and Support Post-War Economic Reconstruction'[7] (New Draft Law).

The primary objective of this New Draft Law was to streamline the preparation and implementation of PPP projects for rebuilding war-damaged infrastructure and constructing new facilities essential for Ukraine's post-war economic recovery. Specifically, the proposed changes aimed to:

- Introduce an electronic procurement system for PPP projects aligned with EU standards.
- Enable full implementation of PPP projects based on budgetary payments, ensuring that the state retains demand risk while effectively financing infrastructure through instalment-based payments.
- Simplify procedures for preparing PPP projects, particularly those related to post-war infrastructure restoration, new construction projects supporting economic restructuring, and 'small' projects with budgets up to €5.3 million.
- Ease the overall process of preparing PPP projects at both state and local levels.

Notably, despite the draft law's title and stated purpose, most provisions related to post-war recovery were confined to its Transitional Provisions. Meanwhile, its authors took the opportunity to substantially rewrite the entire PPP Law and the recently adopted yet practically untested 2019 Concession Law.

On 6 October 2022, the draft law passed its first reading and was adopted as a basis. Following extensive debates and substantial revisions, a comparative table was published on the Parliament's website on 19 July 2024, indicating its readiness for a second reading.

In its revised form, the New Draft Law still primarily focuses on overhauling the legal framework for

4 Budget Code of Ukraine [Бюджетний кодекс України] <https://zakon.rada.gov.ua/laws/show/2456-17#Text> accessed 10 March 2025.

5 Manual on Public-Private Partnership in Ukrainian <https://me.gov.ua/Documents/Detail/2bc79196-a3b2-41a9-86e2-f55f9a8f5c9c> accessed 10 March 2025.

6 Manual on Public-Private Partnership in English <https://me.gov.ua/view/0957d9a5-f282-4737-8aa2-956d827b5a01> accessed 10 March 2025.

7 Draft Law on Amendments to Certain Legislative Acts of Ukraine on Improving the Mechanism for Attracting Private Investments Using the Public-Private Partnership Mechanism to Accelerate the Restoration of War-Destroyed Facilities and the Construction of New Facilities Related to the Post-War Restructuring of Ukraine's Economy <https://itd.rada.gov.ua/billInfo/Bills/Card/39902> accessed 10 March 2025.

Public-Private Partnerships and concessions rather than addressing the requirements and consequences of the war. Moreover, in this version of the draft, responsibility for setting specific conditions for launching PPP projects during the wartime period has been shifted to the Cabinet of Ministers of Ukraine. As a result, the law's current title no longer accurately reflects its content.

As of March 2025, the New Draft Law has yet to be considered by Parliament, with ongoing discussions over its provisions leaving its future uncertain.

Given this situation, a detailed analysis of its provisions would be premature. Firstly, its content may still change. Secondly, it remains unclear whether it will be adopted at all.

Nevertheless, it is worth considering whether Ukraine's PPP legislation requires significant revisions to ensure that this mechanism can be effectively utilised for infrastructure reconstruction after the war.

II. Challenges in PPP Regulation in Ukraine on the Eve of War

As we already mentioned, Ukraine had fully updated its regulatory PPP framework before the war, paving the way for active project preparation. The new legislation was widely praised by PPP experts, and the government and international institutions had high expectations for its role in infrastructure development.

In 2019, tenders were launched for concession projects in the seaports of Kherson and Olvia, with preparation support from the International Finance Corporation (IFC) and the European Bank for Reconstruction and Development (EBRD). These efforts resulted in two major concession agreements:

- On 26 June 2020, the Kherson Port Concession Agreement ($53 million USD) was signed with the Risoil-Kherson LLC consortium.
- On 20 August 2020, the Olvia Port Concession Agreement ($654 million USD) was signed with QTerminals W.L.L. of Qatar.

Unfortunately, the war abruptly halted the implementation of these projects, preventing a real-world test of the effectiveness of the new legislation.

At that time, discussions about regulatory challenges primarily focused on the following issues that limited the feasibility of implementing socially oriented and small municipal PPP projects.

1. Complexity of Small-Scale PPP Project Preparation

The legal procedure for launching PPPs was overly burdensome for initiators of small-scale PPPs. This problem was supposed to be solved by introducing a simplified regime for initiating small PPP projects with a contract value below a certain threshold within the PPP Law. This regulatory gap was expected to be resolved through further legislative refinements, but the war disrupted these efforts.

2. Limited Scope for Long-Term Budget Commitments in the Framework of PPP

A significant challenge in Ukraine's PPP and concession framework is the inability to secure long-term budget commitments for projects across various industries. Under the Budget Code, public partners can assume long-term obligations in the framework of PPP only if expenditures for their fulfilment — both in the current and future budget periods — are strictly covered by actual revenues from the special fund of the state budget. This limitation means that for state-owned assets, government support can only be provided through this part of the state budget, in particular, through such special budget funds as the State Road Fund, the State Fund of Inland Waterways, the State Fund for Decarbonization and Energy Efficient Transformation which can be used for a limited type of projects. To provide the possibility to take long-term budget commitments from a wider range of budgetary sources and, as a consequence, to broaden the scope of government support for PPP and concession projects, amendments to the Budget Code are necessary.

3. Inability to Provide State Performance Guarantees

Another critical issue is the lack of possibility of providing state guarantees for private partners in PPP projects. Under the current Budget Code, state guarantees are designed to secure a borrower's (resident entity's) obligations to a lender, reducing credit risk and enabling access to loans at lower interest rates. This is a good approach for purely commercial projects. However, this approach is unsuitable for PPPs, as it fails to account for specific risks inherent in PPP and concession projects. These include demand risks (eg, lower-than-expected traffic on a toll road) and political or regulatory risks (eg, government-imposed restrictions affecting project performance), which may be assigned to the public partner. Such risks can impact the private partner's ability to meet its obligations to creditors, making the guarantees that do not consider the public partner's liability for such risks unattractive for private businesses engaged in PPPs.

To resolve this issue, amendments to the Budget Code are needed to introduce state performance guarantees that ensure the public partner/grantor fulfils its obligations under PPP and concession agreements. This would significantly enhance the financial security and attractiveness of PPP projects for private investors.

Before the war, budgetary restrictions on government support for PPP implementation were the most significant obstacle to the further development of PPP in Ukraine. Today, resolving this issue has become even more urgent.

Given the country's current economic challenges and weakened consumer demand, future PPP projects in Ukraine must primarily be structured as non-concession PPPs. Private investors will be unwilling to assume demand risks in such an uncertain environment. That is why, to ensure the successful reconstruction of Ukraine's infrastructure, it is essential to:

- expand government support mechanisms for PPPs, including through the use of donor funds.
- enhance the effectiveness of such support in attracting private investment.

Unfortunately, despite the pressing need for reform, it was not covered by the amendments to the Budget Code from 16 January 2025, and no legislative initiatives addressing these issues have been introduced yet.

III. Lessons from the Initiative to Draft a New Draft Law

The desire to improve legislation is always commendable, as progress depends on continuous development. However, is it beneficial to constantly revise legal regulations without first assessing how effectively the existing framework functions?

In our view, the answer is no. In fact, frequent and unnecessary legal changes can be harmful.

Stability is one of the key requirements for major investors and lenders in the PPP and concessions. Unnecessary or premature amendments can undermine confidence, especially when these rules are altered without clear justification.

We acknowledge that the war and the urgent need for infrastructure and housing reconstruction warrant adjustments to PPP implementation and project evaluation processes. However, this does not require a complete overhaul of the existing legal framework. Ukraine's current PPP and 2019 Concession laws are largely aligned with international best practices and remain well-suited for the country's recovery efforts.

In our view, a more balanced approach would be to:

- introduce a separate law to temporarily simplify certain procedures and prioritise government support for projects crucial to post-war reconstruction,
- preserve the existing legal framework, which was carefully designed over time, while incorporating necessary adaptations to reflect wartime realities with the addition of a few improvements necessary for EU harmonisation purposes and updating with international best standards.

If any modifications to the PPP and 2019 Concession laws are needed, they should be targeted and specific rather than extensive revisions or complete rewrites. Different lawyers, consultants, and organisations may always propose refinements to the legal text, but improving its wording alone is not a valid reason for legislative changes. The focus should remain on practical effectiveness, ensuring the law provides a stable and predictable foundation for attracting private investment.

Besides, any significant legislative changes require a corresponding revision of by-laws that regulate the implementation of the corresponding laws. The preparation and adoption of such sub-laws is a long and labour-intensive process that can delay the practical application of new legislation.

According to the Indicative List of Subordinate Regulatory Legal Acts necessary for implementing the provisions of the New Draft Law,[8] if this draft is adopted, 14 new resolutions of the Cabinet of Ministers of Ukraine and six new orders of the Ministry of Economy of Ukraine shall be prepared and approved, as well as 10 existing resolutions of the Cabinet of Ministers and three existing orders of the Ministry of Economy shall be amended before the new framework can be applied to PPP/concession projects. Each of these documents will take at least six months to draft and approve. In such circumstances, accelerating private sector involvement in infrastructure renewal becomes unrealistic. Instead, the process will face significant delays. Additionally, constant changes in legislation will deter potential investors from participating in PPP projects in Ukraine.

The New Draft Law also fails to address the objectives outlined as the rationale for its preparation (see Section 1 of this article):

1. Implementation of an Electronic Trading System (ETS) for PPP Projects According to EU Standards

Clause 1 of the Transition Provisions of the 2019 Concession Law stipulated that the provisions governing the use of ETS would come into force on the day the ETS became operational for conducting concession competitions, competitive dialogues, and publishing documents related to direct negotiations with lessees of state property transferred under concession. However, this implementation was set to occur no later than 1 October 2020. In December 2020, an amendment postponed the final implementation date to 1 September 2021. To date, however, the ETS has yet to become operational.

The New Draft Law introduces several innovations regarding the organisation of the ETS system. Unfortunately, they apply exclusively to concessions. The use of the ETS is neither mandated nor even considered for awarding non-concession PPPs, making it obligatory only for concessionaire selection while excluding private partners under other PPP agreements.

Why should the ETS and electronic processing of PPP awards be limited to concessions while excluding non-concession PPPs? There is no clear justification for this distinction.

This omission is particularly surprising given that Ukraine's Public Procurement Law relies on an electronic procurement system, now mandatory under the EU Concessions and Public Procurement Directives, at least for all communications related to public tenders. Procurement of non-concession PPPs shall include at least electronic communications. It is also important as electronic support for the tendering process reduces its cost, speeds up the tendering process, and, overall, limits the risk of corruption and human interference.

The electronic platform and the handling of the tender procedure are EU requirements which, as far as the concession is concerned, only apply to the communication aspects of the selection procedure and not to the evaluation procedure itself. Consequently, the approach taken in the New Draft Law raises concerns regarding EU harmonisation. It does not align with EU regulations mandating electronic selection procedures for all public contracts, at least for communications, nor does it comply with Ukraine's own public procurement rules. As a result, this inconsistency will be viewed as a significant drawback in aligning Ukrainian legislation with EU regulations.

2. Full Implementation of PPP Projects Based on Payments from the Budget

The current PPP Law defines the conditions for government support and outlines its possible forms. However, the existing challenges in this area cannot be resolved solely by amending the PPP and Concession laws. Instead, changes to the Budget Code are required. Under Ukrainian law, such amendments must be enacted through a separate legislative act.

3. Simplification of the Overall Procedure for Preparing PPP Projects at the State and Local Levels

In our view, there is no need to simplify the overall procedure for preparing PPP projects. The processes

8 An indicative list of subordinate regulatory legal acts necessary for the implementation of the provisions of the draft Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Improving the Mechanism for Attracting Private Investments Using the Mechanism of Public-Private Partnership to Accelerate the Restoration of War-Destroyed Facilities and the Construction of New Facilities Related to the Post-War Restructuring of the Economy of Ukraine" in the event of its adoption as a law <https://itd.rada.gov.ua/118d1a91-142a-4a05-a953-c62419cf4636> accessed 10 March 2025.

for initiating projects, evaluating them, and conducting tenders to select private partners, as outlined in the PPP Law and the 2019 Concession Law, are already straightforward and well-defined. These procedures do not present any significant difficulties.

The real challenges in this area stem from overly detailed requirements imposed by by-laws on the preparation of concept notes, feasibility studies, and the selection of advisers. Simplifying these by-laws would be a more effective solution. However, instead of streamlining them, many of their provisions have been incorporated into the New Draft Law, which will have the opposite effect of what was originally intended.

4. Simplifying the Procedure for Preparing Small-Scale PPPs

Simplifying the procedures for initiating small-scale PPPs and reducing the documentation requirements for PPP proposals is a pressing issue. However, this should be addressed through targeted amendments to the PPP Law and the 2019 Concession Law rather than by entirely rewriting the existing legal framework.

5. Harmonisation with EU Regulation

The New Draft Law prepared for the second reading still contains several provisions incompatible with EU regulations on concessions and public procurement. This misalignment could create challenges in harmonising Ukrainian legislation with EU directives.

One of the main concerns in this process is the procedure for awarding non-concession PPPs, which deviates from national public procurement legislation. The EU does not recognise non-concession PPPs as distinct from traditional public procurement. As a result, it does not permit any method of awarding non-concession PPPs that differs from national public procurement laws, except in the case of concessions, where operational risk borne by the concessionaire justifies an alternative approach. In this context, aligning with public procurement rules while making adaptations only where necessary would be a simpler, clearer, and more effective approach to EU harmonisation.

Efforts to improve Ukraine's PPP legislation are ongoing, and it is possible that some of the comments and suggestions in this article will be considered in the finalisation process. However, given that major changes to PPP regulations could slow down the use of this mechanism for infrastructure restoration in Ukraine, it would be beneficial to reassess the New Draft Law in terms of its original objectives.