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ETAPY ROZWOJU I REGULACJA PRAWNA MODELI PARTNERSTWA PUBLICZNO-PRYWATNEGO

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Adnotacja. Artykuł poświęcono badaniu istniejącego obecnie w Ukrainie problemu niskiego poziomu regulacji partnerstwa publiczno-prywatnego (PPP) w sektorze dróg transportowych Ukrainy. Badanie opiera się na poszukiwaniu i analizie międzynarodowej praktyki stosowania różnych modeli oraz podkreślaniu różnych etapów rozwoju PPP. Autor zbadał zarówno poglądy krajowych naukowców na ten temat, jak i zalecenia Międzynarodowego Instytutu AMPG International dotyczące poprawy regulacji PPP, zwiększenia jego skuteczności, wprowadzenia nowych narzędzi i modeli zarządzania procesami PPP. Podczas badania autor ujawnił brak niektórych narzędzi PPP i warunków ich wdrażania, a także możliwość poprawy modelu PPP w Ukrainie.

Słowa kluczowe: partnerstwo publiczno-prywatne, modele, najlepsze praktyki światowe, etapy rozwoju.

STAGES OF DEVELOPMENT AND LEGAL REGULATION OF PUBLIC AND PRIVATE PARTNERSHIP MODELS

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Abstract. The article is devoted to the study of the current problem of low level of regulation of public-private partnership (PPP) in the sector of Ukrainian transport routes. The study is based on the search and analysis of international practice of applying different models and highlighting different stages of PPP development. The author analysed both the views of domestic scientists on this issue and recommendations of the international institute AMPG International on improving PPP regulation, increasing its efficiency, introducing new tools and models for managing PPP processes. During the study, the author identified the lack of certain tools and conditions for PPP implementation, as well as the possibility for improving the PPP model in Ukraine.

Key words: public-private partnership, models, best world practices, stages of development.

ЕТАПИ РОЗВИТКУ ТА ПРАВОВЕ РЕГУЛЮВАННЯ МОДЕЛЕЙ ДЕРЖАВНО-ПРИВАТНОГО ПАРТНЕРСТВА

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Анотація. Стаття присвячена дослідженню наявної на тепер в Україні проблеми низького рівня регулювання державно-приватного партнерства (ДПП) у секторі транспортних шляхів України. В основу дослідження покладено пошук та аналіз міжнародної практики застосування різних моделей та виділення різних етапів розвитку ДПП. Автором досліджено як погляди вітчизняних науковців на це питання, так і рекомендації міжнародного інституту AMPG International стосовно покращення регулювання ДПП, збільшення його ефективності, впровадження нових інструментів та моделей управління процесами ДПП. Під час дослідження автором виявлено відсутність деяких інструментів щодо ДПП та умов їх реалізації, а також можливість для покращення моделі ДПП в Україні.

Ключові слова: державно-приватне партнерство, моделі, кращі світові практики, етапи розвитку.

Formulation of the problem in its general form and its connection with important scientific or practical tasks. The economic development of the state, the development of private entrepreneurship and the improvement of relations between private structures and public institutions depends on the availability, inter alia, of developed tools for regulating various sectors of the economy, which include the country's transport routes. Many of the functions that

the state has to perform are burdensome themselves due to the lack of certain state economic, financial and resource opportunities. For these purposes, there are many mechanisms for solving this type of issue, one of which is, in particular, public-private partnership (PPP).

According to the Kyiv School of Economics, as of 19 May 2022, the total amount of direct documented damage (caused by Russia's war) to Ukrainian infrastructure is almost USD 97.4 billion – equal to UAH 2.9 trillion (thousands of kilometers of roads, airports, railway infrastructure, bridges and crossings, ports and port infrastructure were destroyed). The destruction of these facilities costs for about USD 42.6 billion.

During a visit to Washington on 22 April 2022, the Prime Minister of Ukraine invited the International Finance Corporation to join the reconstruction of transport infrastructure and emphasized intention to continue PPP projects. He also underlined necessity of the concession projects implementation for airports, railway stations, seaports and roads. In other words, we see an urgent need to rebuild transport infrastructure, as well as sustained support from the Government of Ukraine for the development of tools that will attract private investments to projects of transport routes reconstruction.

Given the growing activity of Ukrainian authorities, the intention of global financial institutions to participate in PPP projects, it is important to study at what stage of PPP development is Ukraine and analyse which of the worldwide models of PPPs is appropriate for the construction of new and reconstruction of destroyed and damaged transport routes in Ukraine. Therefore, it is needed for Ukraine to regulate the model of PPP operation in such a way that PPP projects become interesting for private partners.

As O. Bryginets, O. Svoboda, O. Shevchuk, Yu. Kotyukh, and V. Radych stated: “In addition to Ukraine, government agencies in other countries support PPP projects implemented by the state. A new global trend in the field of PPP participation of private capital in the process of public services provision is visible, for example, in the field of transport, digitalization of management processes in education, healthcare, housing, agriculture, urban and rural development, human capital development, trade and others” (Bryginets, Svoboda, Shevchuk, Kotukh, Radich, 2020: 42).

Analysis of recent research and publications, which initiated the solution of this issue and which the author relies on, not previously solved parts of the general issue, which the article is devoted to. Issues of legal regulation in the field of PPP at the present stage was the subject of research of the following scientists and experts: I. Bila, N. Petryshyna, B. Vynnytsky, M. Lendiel, B. Onishchuk, P. Segvari, O. Shevchuk, T. Gubanova, K. Palazhchenko, V. Danylyshyn, O. Stefankiv, O. Tszizhma and others.

However, the problematic issues of PPP model regulation in Ukraine remain not discussed and need further research.

The aim of article is reviewing of the stages of PPP development in the world in comparison with Ukraine and analyse foreign models of legal regulation of PPP. Also, it is designed to outline the problematic issues of harmonious development of models of PPP participants within the reconstruction and construction of transport routes in Ukraine.

Setting objectives. The objective of the article is critical review of the existing approaches to the legal regulation of PPP models as well as the stages of PPP development in the world in comparison with Ukraine, developing of new approaches to the regulation of PPP models in Ukraine.

Research methods. General and special methods are used to perform research objectives: analysis and synthesis – clarifying the object of study; generalization – revealing the theoretical and methodological foundations of the implementation of PPP models; comparative method and systematization – studying the regulatory and legal development of PPP models at the global level; system method – revealing the conceptual basis of models and stages of PPP development; logical, dialectical, method of generalization, complex and systemic approaches – improving the existing PPP models with new changes to the legislation with the introduction of conditions for the implementation of these PPP models; modelling method – development of possible ways to improve PPP legislation to increase the involvement of private partners in PPP.

Presentation of the main research material with full justification of the scientific results.

Rapid technological progress, increased trade, economic development of the world's leading countries, lack of many products and services, low demographic growth requires rapid and effective solutions of the country's leadership. Ukraine – with its natural resources, suitable location, access to the sea and large volumes of agricultural and metal products, as well as access to various modes of transport, including sea, air and rail transport – can become Europe's logistics hub with progressive legal framework in respect of transport routes. Given the rapid development of states, and the relatively slow development of the PPP tool, it has historically been formed in three stages.

As O. Shevchuk and Ye. Chorny stated: “As of now, the development of PPP is also in the sphere of strategic interests of Ukraine. Noting the reduction and obvious deficit of budget funding for public infrastructure in Ukraine, the number of projects implemented by using PPP is increasing” (Shevchuk, Chorny, 2021: 127).

According to I. Bila and N. Petryshyna: “Most countries within the world are only at the first stage of PPP development – the formation of the political foundation for PPP tool, separation and introduction of basic concepts of PPP, establishment of PPP services market, bidding of priority projects” (Bila, Petryshyna, 2012: 36). We believe that Ukraine is on the second stage of PPP development, we see creation of PPP structures, formation of legal framework, development and expansion of projects with the inclusion of new facilities, management, writing and publishing practical methodological guides on PPP topic.

The experience of implementing investment projects together with private investors took place in Ukraine even in Soviet times for the implementation of the GOELRO plan, construction of a number of machine-building

enterprises etc. Among the most famous PPP projects in independent Ukraine in the field of transport are the well-known concessions of the ports of Olvia and Kherson. The biggest problem in these projects was the extremely long period of transferring concession facilities to a private partner due to various reasons, including land issues and time-consuming process of transferring a special permit for sand mining (in the case of the Kherson port concession). Various state bodies had a power to transfer the land plots included in the concession transfer territory and consisted of 29 separate land plots – it was the reason of different bureaucratic procedures. The right to extract sand had to be obtained in the general order – on a competition basis. Thus, the procedure of transferring property to concession (as a form of PPP) lasted for more than 1.5 years following the moment of winning the concession tender by the private partner. Before the start of the war, a similar interesting project was planned between the AMPU and the agricultural trader Kernel, which was designed for the reconstruction of existing and construction of new berths, as well as the expansion of access roads. Thus, we notice some activity of the public and private partners in the field of transport routes of Ukraine, but in order to increase this activity, it is important to properly regulate the PPP model of Ukraine with a clear structure of decision-makers and convenient tools for private partners to avoid time consuming procedures of property transfer. Also, it is possible for Ukraine to reach the third stage of PPP development. This requires the results that are available in successful PPP countries, namely the UK, Australia – the state must develop sustainable models of PPP, which must gain popularity and eliminate legal shortcomings that hinder the development of PPP.

V. Danylyshyn, O. Stefankiv, O. Tszhima and B. Vynnytskyi follow a similar structure regarding the stages of PPP development in the world, noting the stages of state development in a somewhat other format: “1) countries-“pioneers” regarding the use of PPPs: Great Britain, France ; 2) “middle” countries – countries with a medium level of PPP practice: Spain and Portugal; 3) countries- “newcomers” – countries with PPP initiation: Luxembourg, Sweden, Belgium, Greece” (Vynnytsky, Lendel, Onyschuk, Segwari, 2008: 146). In terms of this structure, we believe that Ukraine can be called a “middle-class” country.

The National Transport Strategy of Ukraine for the period up to 2030 (Strategy) indicates that among others there are the following issues and objectives for the development of transport routes within Ukraine: ineffective legal regulation of attracting investments to the transport sector, including PPP; construction of terminals at the expense of their owners and PPP stakeholders; creation of international joint ventures, transport operators on the basis of PPP. The most popular question is the source of funds to address the above issues. The strategy indicates that the source of financing should be attracted from investment funds, primarily from international financial institutions, private investors and PPP projects. Thus, we see a clear direction of development of the transport sector of Ukraine with a certain source of funds and resources for its implementation. In turn, the main indicator of the success of public policy in the field of PPP should be the growth of PPP-based contracts and investment in transport infrastructure of the state. This can be done through the introduction of foreign experience in Ukraine on relevant PPP models, which are allocated by international bodies, institutes and scientists.

The Green Paper of the European Commission (2004) proposes to distinguish PPP models as: 1) contractual relations – partnership between the state and the private partner on a long-term basis; 2) as a method of financing – funds of private partners may be added to state funds; 3) as a cooperation of public and private institutions based on the creation of a single enterprise – the state partner is responsible for pricing, defining and achieving objectives, and private partners implements its expertise at different stages of PPP (design, construction, financing, etc.); 4) as a way of sharing risks. Taking into account mentioned classification, two models of PPP are combined in Ukraine: the legislation defines it as a tool of cooperation, and as a method of contractual relations.

World practice also use other PPP models classification. The Canadian PPP Board defines models based on the distribution of private and public partner risks in the following order: 1) privatization, which is subject to the full transfer of risks to the private partner during the transfer of the asset. However, it should also be emphasized that Ukrainian legislation does not recognize privatization as a form of PPP, but defines in Art. 7 of the Law of Ukraine “On PPP”, that the property of PPP cannot be the property for, and vice versa, property designed for PPP cannot be privatized; 2) concession – granting by the state partner to a private partner the right to create, build, manage the property of concession, providing socially significant services and transferring to the private partner most of the operational risk; 3) design-construction-financing-maintenance-operation – the private partner designs, finances, builds and operates a new facility; 4) construction-financing, design-construction and operation-maintenance – these models are often used in combination with other ones. A clear classification of PPP models is also provided by the APMG-International World PPP Examination Institute. Depending on the source of funds, the institute distinguishes between PPPs paid by the user of the infrastructure (“user pay PPP” if the attendance of the PPP facility is quite high) and PPPs paid by the state (“government pay PPP” when the property is less visited). Only the “government pay PPP” model is used within Ukraine, which provides long-term state guarantees for funding, for the development of which the Verkhovna Rada passed Draft Law of Ukraine “On Amendments to the Budget Code of Ukraine to Settle Budgetary Relations Within the PPP, Including Concession Agreements”, which is awaiting the signature of the President of Ukraine.

An interesting issue in the context of PPP regulation is the institutional support for project implementation. In this regard, it is important to distinguish between the countries of the Anglo-Saxon legal system (Britain, Australia) and the countries of the Romano-Germanic legal system (Philippines, which has mixed legal system, but still with elements of Romano-Germanic). Britain, the world’s most successful PPP player, has PPP legislation in the form of policies adopted by the Treasury, which adopts various guides and statistics and PPP project results.

Other government bodies are responsible for implementing PPPs in their areas of responsibility. This concept seems very logical – Treasury can most effectively evaluate the effectiveness of the PPP project in comparison with other forms of project implementation (value for money). Ukraine, in turn, has a detailed legal framework of PPP and all related procedures, which is justified by the need for the state to control various processes and avoid corruption risks, as well as possible challenges of PPP agreements.

In accordance with the Resolution of the Cabinet of Ministers of Ukraine “On Amendments to the Procedure for Analysing the Efficiency of PPP Implementation”, the assessment of efficiency (value for money) of state property is carried out by the authorised body, and in case of its absence – the Ministry of Economy. However, we believe that the risks of the Ukrainian model of performance evaluation may be the corruption component – usually the authorized body may not be interested in attracting private investments for the development of the facility. Thus, the transparent assessment of the analysis of the effectiveness of state-owned facilities at the level of the Ministry of Economy with the involvement of the authorized body that manages the facility in the role of consultant may be the right direction for productive PPP projects implementation.

Ukraine’s adoption of the experience of PPP contractual relations that is successfully used in Britain may be attractive for potential private partners as well. PPP contracts in Britain are private law agreements governed by contract law. Such agreements contain arbitration clauses and the disputes under them can be resolved in foreign arbitration courts. According to Art. 19(2) of the Law of Ukraine “On PPP” such arbitration may be used to resolve disputes (if the founder of a private partner is a legal entity with foreign investments). Given the state of Ukraine’s judicial system and restrictions of contractual relations, we believe that it should be possible for parties governing the PPP agreement under foreign law (for instance, law of England and Wales, as previously provided in para 7 and Final Provisions of the Law of Ukraine “On Privatization of State and Municipal Property”), as well as using foreign arbitration as a tool for resolving disputes even if the private partner is not a legal with foreign investments. The tool of regulating the contract under foreign law will allow to attract more foreign private partners in PPP projects in Ukraine. Dispute resolution in foreign arbitration will allow the parties to be more confident in the effective settlement of the dispute.

Finally, the attractive idea of APMG International, which is widely used in the Netherlands, Canada and Jamaica, is setting up internal government commissions to oversee PPP procedures and approve PPP projects. It is proposed to include representatives of relevant ministries thereto (in Ukraine, such representatives may be officials from the Ministry of Economy, Ministry of Infrastructure, Ministry of Finance etc.), financial institutions, legal advisers, and economists. Moreover, the experience of the Philippines in regard to setting up PPP commissions within local authorities is illustrative, since commissions can be effective also at the local level if they are given a wide range of political and administrative decision-making rights. The reform of decentralization and the establishment of united municipal communities clearly requires the reliable platform for progressive decisions. Thus, we believe that legislation amendments regarding the establishment of PPP commissions in the united municipal communities is also one of the priority areas for further development of PPP in Ukraine.

Conclusions from this study and prospects for further research in this area.

Analysis of scientific materials, international experience and Ukrainian legislation, as well as existing developments of leading international financial organizations and institutions in the field of research provides grounds for the following conclusions.

We consider it is necessary to make the following amendments to the legislation framework of Ukraine on the regulation of the PPP model:

- in order to avoid corruption risks, the assessment of the analysis of the effectiveness of state-owned property should be transparent, take place only at the level of the Ministry of Economy with the involvement of a body that manages the object in a role of consultant;
- in order to increase the attracting of private partners to PPP projects, regulation of PPP contracts should be done by the parties – it should be allowed to govern PPP contracts under foreign law, as well as it should be broader use of foreign arbitration within the legal framework;
- in order to establish correct selection of PPP projects, it is needed to establish government commissions, which will oversee PPP procedures and approval of PPP projects at the state level with the involvement of private sector representatives;
- successful PPPs at the local and regional levels are possible in case of the establishment of PPP commissions within local authorities, which will have a wide range of political and administrative decision-making rights.

The implementation of the above amendments will give impetus to attract private partners to attractive PPP projects within Ukraine in the transport sector, as well as raise the level of PPP development in Ukraine. The proposed amendments will also make it possible to fix the issues stated in the Transport Strategy of Ukraine. Finally, these amendments will trigger Ukraine to become a highly rated PPP player within the globe instead of the current position of the “middle country”.

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