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REFORMA MECHANIZMU NORMATYWNO-PRAWNEGO ZABEZPIECZENIA PARTNERSTWA PUBLICZNO-PRYWATNEGO W UKRAINIE W CELU SKUTECZNEJ REALIZACJI PROJEKTÓW W SFERZE TRANSPORTOWEJ

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Adnotacja. Artykuł poświęcono badaniu ustawodawstwa w sferze partnerstwa publiczno-prywatnego (PPP) w Ukrainie oraz przyczyn rozwoju i niepowodzeń tego instrumentu w zakresie wykorzystania w sferze transportowej.

Autor zbadał prace krajowych naukowców, zalecenia Międzynarodowego Instytutu AMPG International dotyczące poprawy warunków realizacji projektów PPP, zwiększenia jego przydatności, analizy przyczyn niepowodzeń i sposobów rozwoju PPP. Podczas badania autor ujawnił niedoskonałość wsparcia instytucjonalnego w zakresie PPP i warunków ich realizacji. Autor dochodzi do wniosku, że konieczne jest uregulowanie przepisów ramowych w taki sposób, aby większość tego samego typu projektów PPP mogła być realizowana zgodnie z typową dokumentacją. Autor proponuje również zmianę przepisów w zakresie wprowadzenia przejrzystości całej procedury PPP i wyeliminowania niektórych wymagań dotyczących projektów PPP.

Słowa kluczowe: partnerstwo publiczno-prywatne, regulacje ramowe, przyczyny rozwoju, rodzaje spadków, organy w sferze PPP.

REFORMING OF THE MECHANISM OF REGULATORY AND LEGAL REGULATION OF PUBLIC-PRIVATE PARTNERSHIP IN UKRAINE FOR THE EFFECTIVE IMPLEMENTATION OF PROJECTS IN THE TRANSPORT SPHERE

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Abstract. The article is devoted to the study of legislation in the field of public-private partnership (PPP) in Ukraine and the reasons for the development and failures of this instrument in the transporting sector.

The author studied the works of native scientists, recommendations of the international institute AMPG International on improving the conditions for the implementation of PPP projects, increasing its applicability, analysis of the failures triggers, and ways of PPP development. During the study, the author identified issues related to institutional support in the field of PPP and the conditions of their implementation. The author comes to the conclusion that it is necessary to regulate the framework legislation in such a way that the majority of similar PPP projects could be implemented according to the standard documentation. The author also proposes to amend the legislation in terms of introducing transparency of the entire PPP procedure, to exclude some requirements for PPP projects.

Key words: public-private partnership, framework regulation, reasons for development, types of failures, PPP bodies.

РЕФОРМУВАННЯ МЕХАНІЗМУ НОРМАТИВНО-ПРАВОВОГО ЗАБЕЗПЕЧЕННЯ ДЕРЖАВНО-ПРИВАТНОГО ПАРТНЕРСТВА В УКРАЇНІ З МЕТОЮ ЕФЕКТИВНОЇ РЕАЛІЗАЦІЇ ПРОЕКТІВ В ТРАНСПОРТНІЙ СФЕРІ

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Анотация. Стаття присвячена дослідженню законодавства у сфері державно-приватного партнерства (ДПП) в Україні і причин розвитку та провалів цього інструменту щодо використання у транспортній сфері.

Автор дослідив праці вітчизняних науковців, рекомендації міжнародного інституту AMPG International стосовно покращення умов реалізації проектів ДПП, збільшення його застосовності, аналізу причин провалів та способів розвитку ДПП. Під час дослідження автором виявлено недосконалість інституційного забезпечення у сфері ДПП та умов їх реалізації. Автор приходить до висновку про необхідність врегулювання рамкового законодавства таким чином, щоб саме більшість однотипових проектів ДПП могли реалізовуватись за типовою документацією. Також автор пропонує змінити законодавство в частині запровадження прозорості усієї процедури ДПП та виключити певні вимоги щодо проектів ДПП.

Ключові слова: державно-приватне партнерство, рамкове регулювання, причини розвитку, типи провалів, органи у сфері ДПП.

Statement of the problem in general and its connection with important scientific or practical tasks. Due to the urgent need to attract large amounts of financing and development of private entrepreneurship, the need to build new and rebuild destroyed or damaged infrastructure, large losses of the state due to the military aggression of the Russian Federation, in particular, in the field of transport infrastructure, the state transport policy requires the introduction of completely new principles of interaction between private and public entities. Undoubtedly, the state is not able to perform functions that are not inherent and should delegate some of them to private entities. Such delegation and interaction are possible through, in particular, the implementation of the PPP mechanism.

As of 9 September 2022, according to the World Bank, the needs for the restoration and reconstruction of the social and industrial sectors and infrastructure amount to USD 349 billion, which is 1.5 times higher than Ukraine's GDP in 2021.

"According to the study, the damage caused by Russian aggression [to infrastructure] reaches USD 26.1 billion. The need for restoration is \$73.8 billion. These calculations were made jointly with the World Bank and are based on their methodology. This allowed to clarify the assessment of damage and losses and identify priority needs. For us, of course, it is the restoration of transport links with all liberated cities and regions, the uninterrupted operation of the railway, land and sea transport corridors for the needs of the national economy and the world..." – said the Minister of Infrastructure of Ukraine Oleksandr Kubrakov.

Considering the activity of representatives of the Government of Ukraine and intention of the world's leading financial institutions to assess the losses and priorities of the transport industry, it is important to study the reasons for the failures of the practical implementation of the PPP mechanism with a projection on the needs of private partners, including Ukrainian and foreign investors, along with minimizing the risks for public partners. Therefore, PPP in Ukraine should be improved in such a way that investment projects with the use of this mechanism become attractive for attracting financing and investments of private partners.

As noted by Bryginets, Svoboda, Shevchuk, Kotyukh, Radich: "Apart from Ukraine, government agencies of other countries support PPP projects implemented for the performance of part of the state functions. A new global trend in the field of PPPs is the expansion of private capital participation in the provision of public services, for example, in the field of digitalization of management processes in transport, education, healthcare, agriculture, urban and rural development, etc." (Bryhinets, Svoboda, Shevchuk, Kotyukh, Radich, 2020: 42).

The analysis of recent studies and publications initiated the solution of this problem and the author relies on, unresolved parts of the general issue the article is devoted to. The issues of legal regulation in the field of PPP at the present stage have been the subject of research by the following scientists and experts: Belkin, Bila, Petryshyna, Vynnytskyi, Lendyel, Onyshchuk, Segvari, Shevchuk, Hubanova, Palazhchenko, Danylyshyn, Stefankiv, Tsizhma and others.

The purpose of the article is to review the reasons for the development and failures of PPP projects in Ukraine and to analyse the world best practices of improving the regulation of requirements and recommendations for the implementation of PPPs for the successful and harmonious development of these projects within the construction and rehabilitation of transport routes in Ukraine.

Statement of the problem. The purpose of the article is to provide an analytical review of existing approaches to the legal regulation of PPP implementation in Ukraine and around the world, developing new approaches to improve the PPP legal framework in Ukraine.

Research methods. To perform the tasks of the study, general and special methods are used: analysis and synthesis – to clarify the object of study; generalisation – to reveal the theoretical and methodological foundations of the causes of failure and success of PPP projects; comparative method and systematisation – to study the regulatory development of regulation of requirements and recommendations for the implementation of PPPs at the global level; systematic method – to reveal the conceptual foundations of the PPP project cycle; logical, dialectical method, integrated and systematic approaches – to improve the existing legal acts on PPP implementation by new amendments to the legislation with the introduction of conditions for improving the regulatory climate for PPPs in Ukraine; modeling method – to develop possible ways to improve the PPP legislation for wider involvement of private partners in PPPs.

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

High inflation in Ukraine and abroad, rising production costs due to high energy prices, the need for rapid economic development of the world's leading countries. Despite said challenges we have another challenges: disruptions in supply chains and logistics problems, shortages of many products and services, low demographic growth – these are only a small part of the issues that the world community is facing today. Ukraine – with its abundance of natural resources, convenient location, sea and river ports, railways and a significant number of airports, large

volumes of production in the agricultural and metallurgical sectors, can become a European logistics hub with proper regulation of legal relations on the development of transport routes.

Thus, Ukraine can help to solve a number of global issues rather than only ensure the budget deficit in Ukraine, of course, using right policy both in Ukraine and globally. Given the rapid development of countries and their methods of regulating various investment attraction instruments, and the slow development of the PPP instrument in Ukraine, it is important to analyse the reasons for the failure of such projects in Ukraine.

As Shevchuk and Chornyi noted long before the introduction of martial law: "...now the development of PPP is also in the sphere of strategic interests of Ukraine. Given the reduction and obvious shortage of budget funding for public infrastructure in Ukraine, the number of projects implemented using PPP mechanisms is increasing." (Шевчук, Чорний, 2021: 127) Now, following the introduction of martial law on 24 February 2022, these issues have become even more acute.

According to the global PPP examination institute APMG International's information set out in its PPP Certification Guide, successful PPP management is achieved by preventing the risks of project failure or minimising their consequences (i.e., through effective risk management). This means that the project must meet the following requirements:

- The right project has been selected (i.e., the project with the best VfM (value for money), and properly prioritised in relation to other potential projects;
- PPP is relevant to the project selected (i.e., it is considered that the implementation of the project under PPP is likely to provide better value for money than traditional methods of project implementation);
- The project has been appraised, prepared, structured and managed in a manner that minimises adverse impacts on project cost, schedule, scope and quality.

These requirements are clear, understandable and have a practical dimension of the necessity and justification of the PPP instrument use. It is important to compare these requirements with those available in the current legislative framework in Ukraine. Firstly, there are no such criteria as such – instead, the Law of Ukraine "On PPP" operates with the concepts of PPP principles, which to some extent overlap with the requirements set out in the said guide, and highlights the following:

- equality of public and private partners before the law;
- prohibition of any discrimination against the rights of public or private partners;
- coordination of interests of public and private partners to obtain mutual benefits;
- ensuring higher efficiency of involvement of the private partner;
- invariability of the purpose and form of ownership of property that are in state or municipal ownership or belong to the Autonomous Republic of Crimea, transferred to the private partner, during the entire term of the PPP agreement;
- recognition by public and private partners of the rights and obligations stipulated by Ukrainian legislation and the PPP agreement;
- fair distribution between the public and private partners of risks; and
- selection of a private partner on a competitive basis.

Analysis of the above requirements-principles for PPP projects provided by the current Ukrainian legislation, we have to state that such principles as "equality of public and private partners before the law" and "prohibition of any discrimination of the rights of public or private partners" do not make any sense to be specified in the specific legislation on PPP, since Articles 21 and 24 of the Constitution of Ukraine directly indicate that not only public and private partners are equal before the law, but also "all people are free and equal in dignity and rights...". Yet according to Article 8 of the Constitution of Ukraine, the provisions of the Constitution are the norm of direct action and have the highest legal force. Thus, these requirements-principles of PPP are not meaningful at all.

The Draft Law "On Amendments to Certain Legislative Acts of Ukraine on Improving the Mechanism for Attracting Private Investment through the PPP Mechanism to Accelerate the Restoration of War-Damaged Facilities and the Construction of New Facilities Related to the Post-War Reconstruction of the Ukrainian Economy" No. 7508 (Draft Law 7508) supplements some requirements:

- compliance of the PPP project with the Sustainable Development Goals of Ukraine, approved in accordance with the procedure established by law, taking into account the UNECE Methodology for assessing PPPs for the benefit of people in the interests of achieving the Sustainable Development Goals;
- ensuring environmental sustainability, prevention of man-made and environmental disasters in the implementation of PPP projects;
- ensuring economic efficiency in the implementation of PPP projects;
- ensuring accessibility of socially important services for socially vulnerable groups in the implementation of PPP projects;
- transparency and availability of information on PPP projects;
- compliance by public and private partners with anti-corruption legislation.

Undoubtedly, most of the above requirements are progressive and necessary (for example, compliance with anti-corruption legislation or environmental sustainability in PPP projects, etc.) However, we would pay attention to some other requirements – given that the current Law of Ukraine "On PPP" already defines the requirement "to ensure higher efficiency of activities than in the case of implementation of such activities by the public partner without involvement of a private partner", we do not see the need to supplement the list with a requirement such as

"ensuring economic efficiency in the implementation of PPP projects", since the said principle of ensuring higher efficiency of activities than in the case of the absence of PPP includes ensuring economic efficiency, the so-called "VfM – value for money", which is emphasised by the global PPP examination institute APMG International, as described above.

Taking into account that the Ukrainian legislator has regulated most of the necessary basic principles and requirements for the success of PPP projects, it is important to identify the types and causes of PPP project failures in Ukraine, which are the subject of our study.

The classification of failures is defined by the global PPP examination institute APMG International in its PPP certification guide. Thus, the institute distinguishes the following types of PPP project failures:

- by the moment of failure: 1) before the signing of the contract at commercial closing (e.g., cancellation of the project and the tender procedure; lack of appropriate bids or when the contract is not signed after the decision to sign it); and 2) after the signing of the contract (i.e., during the contract term).
- by the consequences caused at the stage of preparation and holding of the tender: 1) the project process is suspended and the project is redefined (either completely, with a change of the project subject matter and re-evaluation, or partially, with a change of a number of project features in relation to the commercial terms/structure of the contract); and 2) the project process is completely terminated, at least in the form of a PPP.
- by the degree of failure: 1) full contract failure: the government has to rescue the contract or re-tender it; and 2) project failure in part: a partial loss of VfM and failure to achieve the initial projected VfM of the project contract.
- by the source of failure: 1) contract as a source – absence of certain mechanisms and conditions in the PPP contract (contingency mechanism); 2) PPP tender organisers as sources (incorrect project identification and evaluation, incorrect project structuring and tender conduct); 3) PPP project as a source (complexity of the project does not allow to find a proper team to prepare the PPP project in the country); and finally, 4) political leadership of the state as a source (lack of stable and consistent policy that leads to the use of PPP instrument to circumvent certain restrictions or rights).

The abovementioned failures are common in Ukraine, but no less important issue that causes the failure of PPPs is the proper management of PPP projects. In this regard, there are the following legislative gaps: 1) lack of certain standards for the PPP project identification process; 2) unclear and complicated institutional structure (the Ministry of Infrastructure holds the PPP Project Office "Spilno", and the Ministry of Economy, in its turn, has its own PPP Agency); 3) lack of transparency of the entire PPP project selection process (lack of publications on websites, draft contracts, commercial terms and conditions for attracting a private partner, etc.); 4) shortage of professional teams for the selection of PPP projects at the local level (for example, there is an extremely large number of projects to attract private partners for the development of urban infrastructure, which includes building and maintenance of roads, railway projects, air transport infrastructure, etc.)

The Organization for Economic Cooperation and Development (OECD), which accounts for more than 62% of world GDP, has recognised Ukraine as a potential member of the organisation following Ukraine's application was adopted on 5 July 2022 at the conference on Ukraine's recovery in Lugano. This was reported on the website of the Cabinet of Ministers of Ukraine on 5 October 2022.

In this regard, it is impossible not to pay attention to the section on infrastructure and finance of the guide "Assessment of Ukraine's Investment Policy Framework: Overview", which indicates that the authorities recognise that greater involvement of the private sector is required in Ukraine, so they are working to address infrastructure issues. However, it is pointed out that little PPP experience and lack of experience in managing PPP transactions are still present. Legal framework issues are also mentioned, as it is confusing and complicates the preparation and obtaining decisions of different authorities. This problem was outlined in 2015, but even after the adoption of many legislative changes to PPP legal framework in 2017, 2019 and 2020, these problems still exist.

It is crucial to pay attention to the steps that the OECD expects from Ukraine in the context of improving PPPs in the infrastructure sector. In particular, it is expected to develop and implement legislation to enable prompt and effective application of PPP legislation, as well as to improve the regulatory framework for PPPs to strengthen guarantees for private investors. In addition, according to the OECD, it is important to strengthen the PPP unit within the Ministry of Economy of Ukraine and provide it with resources to provide technical support to officials working in the PPP area.

Shemayeva also highlighted that it is not clear which body should be a key stakeholder in the PPP project management (Шемаєва, 2018: с. 23). In particular, it was noted that a significant number of problems arising in the implementation of PPP projects are caused by shortcomings in legislation and most of these problems relate to projects implemented at the state level with the participation of central executive authorities (more than 80%). Thus, there are clear problems in this context.

The strengthening the PPP unit of the Ministry of Economy of Ukraine, as was suggested by OECD, need the state having a stable vision of which the central executive entity should coordinate and manage the processes in PPP projects. In Ukraine, unfortunately, there is no clear and unified vision in the context of which body should be responsible, for example, for PPP projects in the field of transport infrastructure – the Ministry of Infrastructure or the Ministry of Economy. Thus, despite the recommendations of the OECD about strengthening Ministry of Economy's unit, the first large-scale PPP and concession projects (concessions of the ports of Olvia and Kherson) were implemented instead by the team of the Ministry of Infrastructure.

Also, the PPP examination institute APMG International highlights the lack of framework regulation as a problem of unsuccessful PPP projects in different countries (which is applicable to Ukraine as well). The rationale for the importance of addressing this issue is as follows: the absence of a proper PPP framework often leads to inconsistencies in the work of different agencies, lack of transparency in the PPP appraisal and bidding process, and inability to plan for the long term and create new PPP programs.

As stated in the World Bank PPP Handbook, the development of clear PPP framework conditions reflects the government's commitment to the PPP mechanism. Such terms and conditions also describe the methods of project implementation, helping to ensure proper management of the PPP instrument and thereby promoting efficiency, accountability, transparency, integrity, fairness, and helping to strengthen private sector interest and deepen the level of public support for PPPs.

Given that PPP projects are quite comprehensive, most of the leading organisations in this field recommend standardising processes and documents to save time and efforts in the preparation and execution/structuring of tasks. It is also important to ensure consistency of PPP procedures to meet all the necessary conditions for the success of PPPs.

The Draft Law No. 7508 mentions standard bid documentation, but this rule applies only to projects for the reconstruction of Ukraine, and, moreover, these are only draft amendments to the legislation rather than the current rules. Undoubtedly, standard tender documents should become a new reality for PPP projects in Ukraine, except only for projects of significant value – for example, projects of USD 300 million or more. However, this issue of determining a specific threshold for exclusion of a PPP project from the framework rules is rather an economic one and is not the subject of our study.

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

The analysis of scientific works, international experience and Ukrainian legislation, as well as legislative initiatives, works of leading international financial organisations and institutions in the field of the issue provides grounds for the following conclusions:

We consider it necessary to make the following changes to the legislation and legislative initiatives to address the causes of failures that exist:

- to exclude such requirements for PPP projects as equality before the law of public and private partners and prohibition of any discrimination of the rights of public or private partners, as these requirements are regulated in other norms of direct effect;
- refrain to change the requirement of "ensuring higher efficiency of activities than in the case of implementation of such activities by the public partner without the involvement of a private partner" to the requirement of "ensuring economic efficiency in the implementation of PPP projects", and refrain adding the latter, since the essence of this provision of the Draft Law 7508 is already regulated by the current legislation;
- to regulate the standards for the PPP project identification process and improve the conditions for transparency of the PPP project selection process at the legislative level;
- to establish at the legislative level the clarity of the institutional structure of bodies in the field of PPP, defining the key stakeholder in the PPP area;
- to implement framework legislation and framework types of documentation for different types of PPP projects, establishing a threshold for exceptions to such general standard procedure, if necessary.

The implementation of these changes will certainly be an impetus not only to eliminate the causes of failure of PPP projects in Ukraine in the transport sector, but will also accelerate Ukraine's accession to the OECD, which in turn will undoubtedly be a strong signal for potential projects in Ukraine, including in the field of PPP.

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