

PPP IN THE CONTEXT OF PUBLIC MANAGEMENT IN UKRAINE



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This article is devoted to the researching of basic peculiarities of PPP as a type of public management in Ukraine. The necessity of the Code in PPP legal relations adoption is substantiated. The system of public management in PPP is analyzed. The wide and narrow approaches to the understanding of the “public management” definition are learned. The international experience of public management of PPP legal relations is analyzed (in particular, in such countries as the USA, Saudi Arabia, and others). It is proved that Ukraine needs to improve economic ways of financing public-private partnership projects by means of attracting sponsors, international banks and other institutions in order to achieve the best “value for money” effect.

Keywords: public-private partnership; public management; investment policy; aim; international experience; financial institutions; development.

Introduction

Public-private partnership (PPP) relationships are a necessity for the life of a modern society, in which the market principles of the economy must be combined with its social orientation, and therefore, be distinguished by a balanced combination of public and private interests in the person of their carriers – public and private partners as partners in the implementation socially necessary projects.¹

Currently, the PPP in the areas of infrastructure and networks, the provision of services and the provision of service-infrastructure and other public services is rapidly developing and of increasing interest in the world.²

Main goal of the research

The purpose of this study is to substantiate the thesis on special legal regulation of public-private partnership (PPP) as a kind of public management.

Presentation of the basic research

According to A. Rodin, “in most countries of the world, economic development is

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¹Вінник О.М. Інституційна форма державно-приватного партнерства: проблеми правового регулювання. URL: (02.01.2019).

²Сазонов В.Е. Государственно-частное партнерство: гражданско-правовые, административно-правовые и финансово-правовые аспекты / Кафедра административного и финансового права Российского университета дружбы народов / Предисл. д.ю.н., проф. А.Б. Зеленцова. М., 2012. – 560 с. – С. 28.

characterized by the search for new forms and methods of public administration and regulation. Increasing the value of the private sector in the development of industry complexes reflects a new concept of the role of the state in the economy".³

G. Atamanchuk believes that public administration is a practical, organizing and regulating influence of the state (through the system of its structures) on the social and private life of people in order to organize, preserve or transform it, based on its power.⁴ V. Martynenko determines that public administration is a process of authoritarian governance through the formation and implementation of a system of state executive bodies at all levels of the administrative-territorial division of the country, which uses a set of methods, mechanisms, methods of power influence on society.⁵

Public administration in the broad sense is a collection of all activities of the state, realized in the functioning of the organs of all branches of government and aimed at regulating social relations. Speaking about the broad understanding of public administration, it must be said that it covers activities:

- a) executive bodies – at the expense of implementation of executive and regulatory activity aimed at implementation of the requirements of the norms of laws;
- b) bodies of legislative and judicial power – at the expense of lawmaking activity and administration of justice;
- c) other state bodies which do not belong to certain branches of power – the Public Prosecutor's Office, the Central Election Commission, the National Bank, etc.;
- d) non-state bodies (local self-government bodies, public organizations) in the course of the implementation of their powers delegated by the state.

Public administration in the narrow sense – is the executive and administrative activities of executive bodies and other bodies, in terms of their implementation of executive and administrative functions. It should be noted that along with executive bodies, for which the executive-administrative activity is the main one (that is why the said bodies are the "core" of the state administration in the narrow sense), the state administration in its part also implements other bodies and officials (the President of Ukraine, public prosecutor's office, non-state bodies while exercising delegated authority, etc.).

The peculiarity of this activity of other (non-executive) bodies, which allows a clear distinction between broad and narrow understanding of state law, is as follows. Only part of the entire set of activities of state bodies, which has executive and administrative character, is an integral part of public administration (in its narrow sense). Moreover, such activities are not conducive to these bodies, it is secondary, auxiliary, internally organizational. It should be noted that in administrative law the narrow understanding of public administration is the main one, since such an approach allows qualitative analysis of the executive and regulatory

³Родин А.А. Взаимодействие международного и внутригосударственного права в правовом регулировании государственно-частного партнерства: Автореф. дис. ... канд. юрид. наук: 12.00.10 / РУДН. М., 2010. – 22 с. – С. 3.

⁴Атаманчук Г. В. Теория государственного управления: курс лекций. 4-е изд., доп. М.: Омега-Л, 2006. – 584 с. – С. 33.

⁵Мартиненко В.М. Демократичне врядування: проблеми теорії та практики // Публічне управління: теорія та практика: Зб.наук.праць. Х.: Вид-во "ДокНаукаДержУпр", 2010. № 1. – С. 22.

activity of executive bodies (for which public administration is the main area of activity), as well as internally organizational activities within the framework of the functioning of other state organs.⁶

The special role of the PPP as a form of cooperation between the public carriers (state / Crimea / local government) and private (business representatives) interests also imposes specific requirements for the management of PPP, which has several components: regulatory regulation by the state; contractual and local (in the case of using the corporate / institutional form of PPP – in particular, through a share agreement); PPP management by its partners and external management (in terms of providing appropriate permits, approvals, monitoring compliance with the requirements of PPP / authorized bodies and their officials, imposing sanctions on violators of such requirements).

The purpose of state regulation of PPP is, first of all, the observance of three key principles:

1) ensuring the optimal use of the PPP's positive aspects, which are primarily in the implementation of guarantees for private partners and investors (both domestic and foreign) and adherence to forms of support from public authorities and local authorities.

2) In addition, the key feature of the PPP is the prevention of the occurrence of various negative phenomena in the field of economic competition (in particular, the economic concentration or concerted actions of economic entities in order to monopolize the market), as well as ensuring the effective use of the latter opportunities provided to them in accordance with the principle: "use it or lose it";

3) prevention of corruption offenses, in particular due to the fact that all the costs of the PPP project are transparent and open at the stage of analyzing the effectiveness of the project, as opposed to the traditional public procurement procedures defined by law;

4) Avoiding opportunities for private partners to abandon the opportunities provided by the PPP to implement the PPP project (first of all, the use of PPPs to satisfy, first of all, their own / private interests partner while ignoring public interests) [7, c. 128-129].

Public administration (in the broad sense) by the public-private partnership on the part of the state manifests itself in the four most important components:

a) regulatory legal regulation of relations, which arise when using such a form of cooperation between state authorities / local self-government bodies and private entrepreneurs;

b) planning (identification of socially necessary projects to be implemented in the form of PPP);

c) the current management of the PPP (in the form of granting appropriate permits, approval of PPP projects, their public, environmental expertise, etc.);

d) control over compliance by the PPP participants with the requirements and contractual obligations established by the legislation on the implementation of PPP projects.⁷

⁶ Колесникова К. Співвідношення державного управління та публічного адміністрування у процесі суспільної трансформації // URL: <http://www.kbuapa.kharkov.ua/e-book/putp/2013-3/doc/1/06.pdf> (14.12.2018).

⁷ Вінник О. М. Корпоративні і партнерські відносини: проблеми правового регулювання: монографія. К., 2010. – 166 с. – С. 129.

In the narrow sense, public administration in the field of PPP manifests itself first and foremost in the clear establishment of legislation on the guarantees of the proper implementation of the PPP project and on the clear delimitation of powers between public authorities / local authorities regarding the current management and control of the PPP project. Of particular significance in this case is the creation of a proper system of bodies with appropriate powers in the field of PPPs and the establishment of key provisions on the basic principles of their cooperation with the PPP-authorized body – the Ministry of Economic Development and Trade of Ukraine.⁸

Public administration, namely the state policy in the field of implementation of PPP projects, should primarily aim at the implementation of the PPP goal, in particular:

1) use of different forms, models, directions of PPP depending on the sphere of economic activity in which such partnership is applied (housing and communal services, transport, healthcare, education, sports, tourism, etc.);

2) conditions for the involvement of private investors in PPP projects, ready to invest and spend time on the implementation of PPP projects, while respecting public (state and regional) interests; It is envisaged that combining the efforts of the state and the territorial communities with private partners and their financial capabilities in the conditions of a fair distribution of profits and risks between them will enable to solve the above-mentioned problems.

3) depending on the choice of the industry in which the implementation of the PPP project at the planning stage should take place at the following stages:

– long-term perspective (more than 10 years): formation of conceptual foundations of industry development, predictability, forecasting and the most economic efficiency of tariff policy (where it is needed – housing and communal services, transport, etc.); transparent tender for the selection of a private PPP partner; taking into account the principles and objectives of such a partnership, the protection of property rights and the rights of shareholder partners and investor shareholders (using the corporate form of PPP).

At the same time, it should be noted that the mechanism of tariff formation plays an important role in ensuring the success of PPP projects, since it directly ensures the possibility of returning attracted private investments. In some spheres of the national economy, in fact, there is no market relations, and the tariff does not fulfill the function of the economic regulator. Utility tariffs in most regions of Ukraine do not cover the cost of services, in almost all tariffs there is no investment component that does not stimulate the company to operate efficiently and save energy. The inability of a PPP private partner to influence tariffs significantly complicates the return of invested investment funds. These problems, together with the absence of an effective compensatory mechanism for compensating differences in tariffs, do not allow enterprises to plan and implement measures to upgrade their equipment and networks;

– medium-term perspective (up to 10 years): identification of priority areas for attracting private investments into the relevant branch of the national economy, as well as

⁸Положення про Міністерство економічного розвитку і торгівлі України, затверджене постановою КМУ від 20.08.2014 № 459 // URL: <http://zakon2.rada.gov.ua/laws/show/459-2014-%D0%BF> (30.12.2018).

forms and means of providing budget support; definition of criteria on the basis of which budget support is issued; financial support of scientific activity, development of the regulatory framework and measures aimed at reforming the relevant economic sector; stimulating the attraction of private investments and loans from international financial organizations, implementation of pilot projects and dissemination of experience, creation of joint ventures for the implementation of projects of national importance.

So, the Kansas City community (U.S.) approved a plan for modernizing the Kansas City International Airport with a single terminal. The overwhelming majority of voters (75%) decided to build a new terminal based on the existing airport.

Expected cost of implementation of the mentioned project is about 1 billion USD, while the analysis of project effectiveness and assessment of possible risks was accompanied by environmental scandals and complaints about the ethics of the implementation of such a project.

The Infrastructure and Real Estate Team Edgemoor has been recommended by the KCI Selection Committee as the most cost effective partner for project financing, design and construction of a new universal terminal at Kansas City International Airport.⁹

The public partner also included an additional investor – Meridiam Infrastructure and a design and construction joint venture, consisting of Clark Construction Group, Clarkson Construction contractor located in Kansas City, and The Weitz Company. Skidmore, Owings & Merrill (SOM) will be the main designer, and the financial advisor will perform Project Finance Advisory Limited (PFAL). Edgemoor's choice took place after a multi-stage procurement process, which included individual filing with qualifications and funding, interviews and further questions put forward by the public partner to all applicants.

Interestingly, there is the PPP experience in Saudi Arabia, in particular the construction of the Acwa Power sewer collector. The total cost of a project of \$ 315 million will be financed by commercial bases distributed at a floating interest rate of \$ 167 million and a fixed rate of \$ 100 million. The remaining costs will be financed by the "Joint Stock" loan on the basis of the ratio of debt to equity of 85:15. An additional commercial redundancy fund has also been increased to finance any potential over-spending.¹⁰

The plans for anti-crisis actions and post-crisis recovery of the economy introduced in many countries of the world provide for the expansion of cooperation between the state in the form of public-private partnerships (PPP) and / or public-private partnerships in the form of public-private partnerships (PPP) and / private (PPP) partnership¹, which should become an effective mechanism for infrastructure development and provision of public services. The significant increase in the PPP in the world is due not only to the state's desire to attract private sector financial resources to address societal challenges of socio-economic development, but also the need to use complex organizational, managerial and production technologies.¹¹

⁹Kansas City to get US\$1 billion International Airport P 3 // URL: <http://www.infrappworld.com/news/megaproject-1045-kansas-city-to-get-us-1-billion-international-airport-p3> (15.12.2018).

¹⁰Acwa Power close on big desalination PPP project in Saudi Arabia // URL:<http://www.infrappworld.com/news/megaproject-1044-acwa-power-close-on-big-desalination-ppp-project-in-saudi-arabia> (15.12.2018).

¹¹Концепція розвитку державно-приватного партнерства в Україні 2012-2017 роки // URL: <http://ppp-ukraine.org/wp-content/uploads/2015/03/PPP-Development-Concept-2012-2017.pdf> (17.12.2018).

The importance of PPPs as a mechanism for socio – economic development of the country is evidenced by numerous conceptual, programmatic, normative and methodological documents, both national and international: declarations of the G202 summits aimed at developing anti-crisis measures; special laws and other normative acts on PPP, PPP concepts and programs.

Implementation of state policy in the field of PPP is characterized by inconsistency, lack of systematic steps towards the formation of PPP conditions, unclear definition of the functions of state authorities involved in the development of PPP, ineffective coordination of the activities of the relevant state authorities. In pursuance of the strategic objectives of the Program of Economic Reforms for 2010-2014, state and local documents on the socio-economic development of the country contain references to the importance of the implementation of the PPP, but there is no consistency between the mechanisms and instruments of public administration in this area. The development of individual forms of cooperation is carried out independently by various state and local authorities without sufficient coordination and compliance with the requirements of the Law.

Another problem of the lack of effective interaction between the public and private sectors of the economy is the low level of institutional capacity of public authorities and the private sector to implement public-private partnerships.

The institutional capacity of public authorities and the private sector to implement PPPs in Ukraine is characterized by low level of interpersonal trust, citizens' confidence in state authorities, public and political organizations, inadequate ideology of partnership in society, underestimation by experts of state authorities and local self-government of PPP projects' potential, lack of awareness society in the benefits and risks of applying PPP mechanisms, insufficient staffing of central authorities and that local self-government experts in the field of PPP, insufficient level of financing of the real sector of the economy.

The relationship between the state and business in Ukraine is characterized by numerous problems in such areas of public administration as licensing and obtaining permits, land allocation, protection of investors' property rights, and resolution of commercial disputes. The low level of transparency in budget relations complicates the attraction of domestic and foreign investments in the development of national economy infrastructure and the provision of public services on the basis of PPP.

The contradictory and inconsistent legal and regulatory framework of public-private partnership relations is the subject of a separate thorough scientific research.

Conclusions

Taking into consideration all mentioned above, Ukrainian legislation in the field of PPP should be improved by means of:

1) improvement of the regulatory framework of PPP relations: development of a Code of Relations in the field of public-private partnership, which will include provisions, in particular regarding the forms, models, areas of the PPP, the authorized state bodies (state bodies and local self-government bodies) regarding the implementation of the state PPP policy, provisions for performance analysis and evaluation of PPP projects and public investment projects, etc. We agree with the view that the Government of Ukraine should

consider legislative reform of all legal instruments - general and sectoral – related to the planning, evaluation and approval of public investment projects, whether they are funded by public authorities or local authorities, or on their behalf, private institutions in the form of concessions and public-private partnerships;

2) activation of development institutes in the public-private partnership management system in Ukraine: in order to increase the effectiveness of the PPP system, the state should build relations with international development institutions and more actively formulate national development institutes whose activities should be oriented towards the achievement of the priorities of innovation of the economy with the use of modern approaches to risk management. Implementation of development institutes should be carried out in compliance with the requirements of financial stability, diversification of resources and reduction of investment risks, exclusion of administrative influence and risks of corruption.

The role of financial development institutions (universal and specialized development banks, export-import banks, state venture and leasing companies, innovation funds, funds and regional development agencies, etc.) will be in the financial, consulting and information support of PPP projects. Non-financial development institutions (technology parks, industrial parks, business incubators, techno-implementing industrial production and tourist and recreational special economic zones, research centers, technology transfer centers, subcontracting, design development, energy conservation, etc.) will promote the development of business infrastructure within the framework of PPP, raising the skills of civil servants, introducing PPP issues into academic training programs for public administration and local self-government ernment, organize workshops, seminars, round tables for the PPP;

3) Improving the investment climate and entrepreneurship environment in the context of the development of public-private partnership in Ukraine: further development of PPP in Ukraine will be largely determined by the favorable investment climate and business conditions. Improving entrepreneurship and attracting private investment in PPP projects requires:

- increase transparency of the licensing system and reduce bureaucratic barriers;
- streamlining procedures for inspections and technical regulation (standardization and certification);
- simplification of procedures for registration of property;
- creation of favorable conditions for use of land plots within the framework of PPP projects;
- ensuring transparency in the relations of private and public partners in the preparation and implementation of the PPP project;
- focusing the state on the implementation of PPP projects and the formation of effective feedback in the relations between the state and the private sector;

4) improvement of cooperation between state (local) authorities and civil society institutions in implementing public-private partnership projects in Ukraine: the development of PPP relations will require intensification of community participation in the preparation and implementation of PPP projects at the state and local levels. In this context,

it is necessary to develop mechanisms for interaction of government bodies with civil society institutions in order to engage the community on a permanent basis before discussing, examining and monitoring the implementation of PPP projects;

5) Improvement of financing mechanisms for public-private partnership projects in Ukraine: improvement of financing mechanisms for PPP projects should include increasing the efficiency of using budget funds, increasing the involvement of development institutes in PPP projects, expanding tools for long-term project financing, etc. Budgetary financing of PPP projects and public participation in PPP projects should be based on the principles of medium – and long-term programmatic planning and programmatic and project financing.

Public financial support for PPP should include:

- direct financial support through subsidies; reimbursement of construction costs, participation in a tender, major repairs; investment in authorized capital;
- use of tax levers to stimulate investment, introduction of mechanisms of state credit and insurance of import of investment equipment;
- reimbursement of fees for services provided to consumers through the state budget; provision of loan guarantees, reimbursement of losses due to exchange rate fluctuations, obligations to purchase products;
- use of modern market instruments of financing (securities).

Prospects for further research. Currently, the PPP in the areas of infrastructure networks and the provision of service-infrastructure and other public services is rapidly evolving and of growing interest in the world. However, the lack of a thorough scientific study of the peculiarities of implementing a specific PPP project significantly slows down this development.

Taking into account the above, the scientific study of the issues covered in this article allows us to confirm the urgency and practical necessity of writing scientific papers on PPP topics.

А.В. Сороченко: Украинадағы жария басқару мәнмәтініндегі мемлекеттік-жекешелік әріптестік.

Украинадағы жария басқарудың түрі ретіндегі мемлекеттік-жекешелік әріптестіктің (МЖӘ) негізгі ерекшеліктері зерттеледі. МЖӘ саласындағы құқықтық қатынастардың Украиналық кодексінің заңнамалық бекіту қажеттігі негізделеді. МЖӘ саласындағы құқықтық қатынастарды мемлекеттік басқару жүйесі, «жария басқаруды» түйсінудегі кең және тар ұстанымдар талданады. МЖӘ құқықтық қатынастарын мемлекеттік басқарудың халықаралық тәжірибесі (атап айтқанда, АҚШ, Сауд Аравиясы және т.б. елдердің) қарастырылады. «Баға мен сапа ара қатынасында» ең тиімді нәтижеге қол жеткізу үшін демеушілерді, халықаралық банктерді және өзге де мекемелерді тарту жолымен Украинада мемлекеттік-жекешелік әріптестік жобаларын қаржыландырудың экономикалық тәсілдерін жетілдіру қажеттігі көрсетіледі.

Тірек сөздер: мемлекеттік-жекешелік әріптестік; жария басқару; инвестициялық саясат; мақсат; халықаралық тәжірибе; қаржылық ұйымдар; даму.

А.В. Сороченко: Государственно-частное партнерство в контексте публичного управления в Украине.

Исследуются основные особенности государственно-частного партнерства (ГЧП) как вида публичного управления в Украине. Обоснована необходимость законодательного утверждения Кодекса Украины в сфере правоотношений ГЧП. Анализируется система государственного управления правоотношениями в сфере ГЧП, широкий и узкий подходы к пониманию определения «публичного управления». Анализируется международный опыт государственного управления правоотношениями ГЧП (в частности, в таких странах, как США, Саудовская Аравия и др.). Показано, что Украине необходимо улучшить экономические способы финансирования проектов государственно-частного партнерства путем привлечения спонсоров, международных банков и других учреждений для достижения наилучшего эффекта «соотношение цены и качества».

Ключевые слова: государственно-частное партнерство; публичное управление; инвестиционная политика; цель; международный опыт; финансовые организации; развитие.

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Настоящее издание посвящено содержанию и результатам правового мониторинга законодательства Республики Казахстан о юридических лицах, проблемам его оценки и эффективности. Основным источником проведенного исследования послужили результаты анализа законодательных актов, проведенных сотрудниками Института законодательства Республики Казахстан в рамках правового мониторинга, направленных в соответствующие государственные органы для учета при подготовке проектов нормативных правовых актов. В издании затрагиваются такие актуальные правовые проблемы, как классификация юридических лиц, правовое регулирование организационно-правовых форм юридических лиц, правовое регулирование корпоративных отношений. В работе дается анализ проблем законодательства о юридических лицах и сформулированы предложения, направленные на его совершенствование.

Издание адресовано сотрудникам государственных органов, научным работникам, практикующим юристам, преподавателям, докторантам, магистрантам, студентам юридических вузов и факультетов.