



**COUNCIL OF ENTREPRENEURS
UNDER THE CABINET OF
MINISTERS OF UKRAINE**

**Public-private partnership
opportunities in Ukraine:
Legislative, Regulatory and
Institutional Considerations**

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PPP concept

The public-private partnerships (PPP) concept has been widely adopted around the world in recent years.



In view of the economic upturn in Ukraine the state and municipal property in different sectors requires construction, renovation, higher operation & maintenance standards.



Ukrainian's PPP legal framework

The current Ukrainian's PPP legal framework consists of a number of special laws and regulations governing certain types of PPPs:

- **concessions,**
- **joint activity agreement (JAA),**
- **state property leases,**
- **management.**

Let's review the viability of legal framework schemes to get the idea if projects may be procured.



Concession

The legal status of such concessions in Ukraine is regulated by the Act On Concessions which came into force on 16 July 1999. It provides for an extensive list of the spheres in which objects of state and municipal property may be constructed, renovated and/or operated under a concession. It concerns motorways, ports, airports, communications, gas transportation and distribution, electricity generation and transmission, water supply, wastewater transfer and purification, waste collection and processing, postal services, housing construction and operation. In addition, local councils may, on a case by case basis, decide to expand the above list to cover further municipal utilities.

Concessionaires are selected by way of an open tender. Both national and foreign bidders can participate in the tender on an equal basis. There is the model concession agreement approved by the Cabinet of Ministers of Ukraine. However, sufficient contractual freedom remains with parties. It helps to accommodate provisions of a concession agreement to particular needs and specifics of the project.

A concessionaire is free to choose a form of incorporation. So, traditional project-finance structures are possible, including a special purpose vehicle (SPV), either wholly owned by an investor or partially.



Joint activity agreement (JAA)

Non-corporate joint activity is one of the possible options provided for by Ukrainian civil and tax legislation for conducting business. Joint activity is carried out via a contractual joint venture organised by a combination of funds or assets of participants or without combination of contributions in order to achieve joint business purposes.

The joint activity does not have the status of a legal entity. There is no requirement for a minimum amount of capital to be contributed by the participants. The conditions of carrying out the joint activity are established by a written agreement among its participants. Joint activity is subject to registration with state authorities.

The management of joint activity and conduct of joint business of the parties as a rule is assigned to an investor. Profits are divided between the parties proportionally to contributions. The legislation of Ukraine requires separate bookkeeping and tax reporting under the agreements on joint investment activity. Articles 1130-1143 of the Civil Code of Ukraine (effective as of 1 January 2004) regulate the provisions of such partnership.



Lease

The lease of integral property complex or individual item of movable (immovable) property is another way to PPP in Ukraine.

In contrast to individual movable and immovable property, an integral property complex is an economic object with the accomplished production cycle including the land plot where it is situated, autonomous engineering communications and energy supplying systems.

The lessor is the State Property Fund of Ukraine or local councils. The terms of the lease are similar to concession terms and are defined by the lease agreement.



Management

There are some rather new legal institutions which have good prospects. Management is among them. Under the property management agreement a settler shall transfer to a manager the property into management for a specific period of time and the manager shall be obliged to manage this property for fees on its behalf to the interests of the management settler or a person (beneficiary) determined by him.

Benefits from the property transferred into management shall belong to the management settler. The manager shall have the right for the fees stipulated by the agreement including reimbursement for all necessary expenses in connection with the property management.

The amount of remuneration is not determined by the legislation and may be fixed, for instance, in percentage to the amount of profits.



The major weaknesses

The major weaknesses in Ukraine's enabling environment include, inter alia,

- (1) poor cooperation between central and local authorities;**
- (2) unfinished administrative and territorial reform;**
- (3) the problem of the state vs. municipal ownership on land plots and other objects, and other land-related problems;**
- (4) cumbersome and lengthy procedures for obtaining licenses and permits, including in construction;**
- (5) opaque procurement procedures;**
- (6) choice of law and dispute settlement; and**
- (7) poor law-enforcement.**



Existing PPP examples

Public-private partnership has got some development in Ukraine, namely, in the port development sphere.

For instance, the port of Illichivsk has a long experience with PPP and there are several types of agreements of cooperation with private sector operators.

For the port of Illichivsk (like for other state-owned ports) the lease of land and assets is not a very interesting option since the lease contract is closed with the Municipality as the landowner.

Lease for land is paid for 100% to the Municipality and lease for super structure (buildings and equipment) is paid for 70% to the State Property Fund. The remaining 30% rent is paid to the port and forms part of its revenues. As a result, the net profits from such engagement for the port are small.



Existing PPP examples

Since lease of the waterfront and the berths to private sector parties is excluded by the Ukrainian legislation the Joint Activity Agreement (JAA) gives an opportunity within the framework of Ukrainian legislation to include private parties in the handling of cargo and servicing vessels along the berth and the waterfront.

The JAA with Ukrtranscontainer (a part of NKK group) for container handling is an example of a long term JAA contract with considerable operator's commitments for investments (US\$ 51 million for the first phase) and where the private operator is responsible for joint administration and for quay operations.

The operator has agreed to the transfer of some 450 personnel from the port under negotiated social conditions.



Existing PPP examples

In the port of Odessa there are a number of terminals operated on the basis of a JAA with private operators too.

A special case of PPP in the port of Odessa is the container terminal where the port has established some years ago a cooperation with a German port operator for developing and operating the container terminal covering various contracts:

- **A Service contract for the cargo operations,**
- **Management contracts for the lease of assets:**
 - ♣ **for fixed assets (fixed assets lease)**
 - ♣ **for current assets (current assets lease).**



National Projects

- **LNG-TERMINAL** /Sea terminal for liquefied natural gas & regazification/
- **OPEN WORLD** /National informational and educational 4G Network at the National level/
- **AIRIL EXPRESS** /Railway passenger service from Kyiv to International airport “Boryspil” and landing strip №2 at IA “Boryspil”/
- **AFFORDABLE HOUSING** /System of project on building affordable housing/
- **CLEAN CITY** /System of modern waste recycling complexes/
- **ENERGY OF NAURE** /Construction of Solar, wind and small hydro power stations, production of solid alternative fuel/
- **NEW LIFE** /Protection of maternity and child protection/
- **OLIMPIC HOPE 2022** /Sports and tourism infrastructure/
- **DANUBE CORRIDOR** /Development of transport connection and navigation at the Danube region/



PPP opportunities in Ukraine

On 5 February 2008, Ukraine joined the World Trade Organization (WTO) after 15 years of negotiations.

They say, membership in the WTO will help to raise Ukraine's gross domestic product and bring in additional billions in foreign investment. This can be another sign for PPP development.

Ukraine will also gain as the defined pan-European corridors push eastward and the integration of neighbouring eastern countries into the Trans-European Transport Network (TEN-T) takes place, supported by European financial institutions.



PPP opportunities in Ukraine

When Romania and Bulgaria joined the European Union in 2007, Europe had to arrange functional cooperation between the Black Sea ports.

Ukraine, Belarus, Moldova, Romania and Bulgaria are transit countries, geographically, but lack some of the necessary infrastructure.

But rising economic levels and closer east-west partnership are encouraging greater road usage, requiring heavy investment, particularly in road infrastructure.



PPP opportunities in Ukraine

There are, of course, some differences between two kinds of public-private partnership in Ukraine: cooperation between private persons and governmental or local structures, but these differences are not significant.

The reason is that there is no single approach for PPP development established by the legislation.

So, in Ukraine there are opportunities to support international and local initiatives in the field of PPP development, with the assistance of international finance, of course. Ukraine has been closely working with international financial organisations and investors, for instance, with the World Bank and EBRD.

Basing on the experience acquired assisting in several different projects (for example, in the EBRD loan to the Port of Ilyichivsk for around €26m) we know what is required to provide the enabling framework.



Requirements for successful PPPs

The PPP concept requires risk sharing between public and private sectors. So, one of the basics for the success includes political support and an enabling legislative framework.

Political support is important for the private sector, of course, because unless PPP is seen to offer continuing business opportunities, companies will be reluctant to develop the necessary resource required to bid for contracts.

There is a developed legal framework in Ukraine in this area. Of course, it is far from perfect.

Due to the lack of government support and insufficient protection of investors' rights in the recent past, there has been practically no record of big PPP deals in Ukraine.



Requirements for successful PPPs

Nevertheless, it appears that, if due support of the state is ensured, PPP-based project finance could be successful in Ukraine, even on the basis of current laws and regulations.

It would be advisable for the country to develop clearer and more detailed PPP rules with principles of transparency, non-discrimination, proportionality and efficiency. The existing provisions regulating the project agreement give relatively clear guidance on the main issues to be covered and they remain sufficiently flexible to enable the parties to negotiate freely its terms.

Ukrainian legislation makes a solid legal framework for the development of PPP in infrastructure and utility services.

Amendments to the legislation may be required. But structuring the deal and creating security structures in Ukraine became common long ago. There are a number of security tools, such as enterprise mortgages, pledges of movable and immovable property, stock and asset charges, inventory, equipment and accounts receivable pledges, and assignments of supply, insurance and other contracts.

The main issue is that under project financing, PPP must be considered not as a means of tapping private finance, but as benefits in terms of quality, management and creativity for development.



Requirements for successful PPPs

There is no single approach to PPP at either the national or local level.

And there is no single recipe for Ukraine.

Models used in other countries can be considered as models only.

They must be estimated and working elements should be adapted and used to suit.



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Thank you!

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