

# Launching a Successful PPP Program in Ukraine:

## Legislative, Regulatory and Institutional Considerations



by Svitlana M. KHEDA

**T**he current Ukrainian PPP legal framework consists of a number of special laws and regulations governing certain types of PPPs (e.g. production-sharing agreements, concessions, state property leases, etc.). These pieces of legislation contain many ambiguous, vague and conflicting provisions. Investors face real problems during the implementation stage, which are due to various factors, including frequent changes in legislation, underdeveloped legal and institutional framework, lack of transparency, and corruption. This creates a serious obstacle to attracting foreign direct investment and implementing PPPs in Ukraine.

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.

International development institutions have put huge efforts into assisting Ukraine to develop a workable PPP program aimed at clarifying the legal environment and accelerating infrastructure development through the use of PPPs. The majority of PPP experts agree that a successful PPP pro-



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gram can be built on the following three pillars: (1) enactment of a special PPP law; (2) establishing a specialized PPP unit; and (3) launching several pilot PPP projects.

## PPP Law

After years of major political forces playing the game of “whose



PPP draft act is better”, the efforts of various stakeholders to develop a comprehensive legal framework in Ukraine for launching a successful PPP program resulted in enactment on 25 June 2009 of the *On the General Framework for the Public Private Partnership Act of Ukraine* which, however, was later annulled by the Ukrainian Parliament. Nevertheless, yet another draft of the framework PPP law was recently adopted by the Verkhovna Rada in the first reading. This demonstrates that as of now the Ukrainian government seems to have chosen to pursue the “general framework” approach instead of trying to embrace all aspects related to PPPs and regulating them in a single law.

The global experience suggests that existence of a special PPP law is not a prerequisite for launching a successful PPP program. It is often sufficient to amend existing laws and regulations. The Ukrainian reality, however, evidences in favor of adoption of a general framework law declaring PPP development as a matter of state policy, and providing private investors with state guarantees. The new draft PPP law can serve these purposes even though it does not comply in full with the international practices for PPP legislation and, due to its framework nature, would not change much in the current unsatisfactory state of PPP regulation. However, the PPP law has been viewed by many stakeholders as an important policy document that could trigger pilot PPP projects.

It should be emphasized that the adoption of the PPP law itself will not automatically ensure adequate legal regulation of PPPs. It is crucial to bring all existing laws into compliance with this law. Otherwise, the PPP law can be adopted, but it will not work as intended because other applicable legislation will remain in conflict. In addition, PPP-related legislation shall be improved and amended (land, roads, construc-

tion and real estate, and government procurement legislation, etc.)

Good international practice in enabling legal environment for PPPs includes: (1) clarity and efficiency of PPP legislation; and (2) legal regulation of the mechanism of communication and coordination within the public sector for all PPP-related matters in different sectors and at the various levels of government.

The experience of many countries suggests that there is a common need for legal certainty in PPP regulation. However, PPP legislation should not be excessively rigid, setting, where possible, only general restrictions for both public and private partners to efficiently design and implement PPP projects without affecting the public interest. The main regulatory challenge is setting the transparency standards in the area of PPP without excessive regulation of PPP projects.

The same approach toward the PPP regulation cannot be prescribed to all countries. Factors as varied as the type of legal system, level of experience in the field of PPP, public sentiment towards giving social infrastructure over to a private investor, political concerns, and many other considerations influence the type of PPP program selected by each particular jurisdiction.

Globally, the two main types of PPP program from the perspective of legal regulation include (1) enactment of specific PPP legislation, and (2) regulating PPP projects on a contract-to-contract basis. The legal systems of civil law countries usually provide little room for new contractual arrangements, and so specific PPP laws are enacted in order to provide the flexibility required by PPPs. Experience shows that countries that follow the PPP legislation approach frequently demonstrate strong political commitment to undertake PPP projects.

In some countries there are no specific PPP laws, but there are

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- (1) ENACTMENT OF A SPECIAL PPP LAW;**
- (2) ESTABLISHING A SPECIALIZED PPP UNIT;**
- and**
- (3) LAUNCHING SEVERAL PILOT PPP PROJECTS**

The **NARROW** (parallel) **APPROACH** to PPP development contemplating the **IDEA** of **LAUNCHING** a couple of **PILOT PPP PROJECTS** (preferably locally) with a simultaneous **DEVELOPMENT** of the applicable **LEGISLATION** on the national **LEVEL**, appears to be the **ONLY** workable **SOLUTION**

laws, usually on public procurement or concession agreements, applied to PPPs mutatis mutandis. There are countries that have comprehensive PPP laws. There are also countries that have concession laws that give only general provisions with specific legislative requirements set out only in sector-specific laws. Clearly, the decision on enacting laws governing PPPs will, to a large extent, depend on the interest and strong political will of the government.

Common law countries, on the other hand, favor the contractual approach. The contractual PPP program enables the parties to a PPP arrangement to introduce necessary changes during the life cycle of a PPP project and, therefore, provides greater flexibility. It also helps to spread good practice by developing model contract clauses common for all PPP projects. Usually, for the purposes of PPP projects common law countries are guided by their general public procurement laws, soft legislation (rules, guidelines), and case law. In some countries there have been no specific laws simply because they had no PPP projects for which these laws were needed.

However, due to the continuous process of approximation of civil law and common law legal systems the division between the aforementioned types of the PPP programs becomes less strict, especially in civil law countries that have become more eager to strengthen their detailed legislative regulation of PPPs with contractual flexibility. Practice shows that in the end both options do work and it is just a matter of time, capacity building and effort for the PPP program to start bringing positive results.

### PPP unit

The PPP process is rather complex and so implementation in many countries of a PPP law has been carried out in conjunction with the establishment of

specialized PPP units tasked with evaluating, negotiating, and monitoring contract implementation. While not a mandatory precondition for success, such units have helped facilitate the smooth adoption of PPP processes in countries which have experienced highly successful PPP programs.

It is remarkable that notwithstanding the numerous PPP trainings offered by various international development institution and frequent mention of the PPP by many Ukrainian government officials, there still seems to be no single approach or understanding of the notion of PPP at both national and local levels of government. Furthermore, Ukraine has been facing political instability and regulatory unpredictability affecting many important incentives, including PPP, which is a new concept for Ukraine. It has been difficult so far to identify the major champion of the PPP program within the Ukrainian government.

In Ukraine, the role of the PPP unit may be performed by a specially-created PPP authority which could be tasked with coordinating the PPP process, legislative development, policy setting, improving the institutional capacity of implementing organizations, communication with investors, monitoring of PPP project implementation and compliance with PPP agreements, as well as assisting the public partner in negotiating the PPP contract and other project documentation.

### Pilot projects

In Ukraine, as in many countries with insufficient legal regulation of PPPs, the legislative gaps can be rectified in particular PPP contracts; therefore if a PPP project is important to Ukraine and the public partner is interested in its development, there is a chance of its successful launching and implementation even in the current legal and political environment.

At this stage of Ukraine's development, global reforms do not seem to be successful, but step-by-step improvements can be accomplished. Therefore, the narrow (parallel) approach to PPP development contemplating the idea of launching a couple of pilot PPP projects (preferably locally) with simultaneous development of applicable legislation at national level, appears to be the only workable solution. To achieve success in PPP development in Ukraine it is necessary to work with all stakeholders (e.g. the respective Ministries, Presidential Administration, Cabinet of Ministers, Parliamentary Committees, etc.). Regardless of the approach, it is important to create a clear and stable legal environment and to ensure that equal rules apply for all PPP transactions. Many foreign PPP experts seem to share this opinion, and suggest that Ukraine is a country where a staged approach to reforms seems to work best.

Even though it is difficult to envision any PPP project being accomplished within the timeline of the EURO-2012 football tournament, it is a good time to attract the attention of all stakeholders to the PPP model and the successful launching of the pilot project within the EURO-2012 framework could ensure further development of PPPs in Ukraine.

Taking into account that the idea of PPP is a new notion in Ukraine, a PPP capacity building program and launching of pilot PPP projects should involve substantial advisory services, especially offered by international development institutions. Guidance from the international PPP expert community should also be sought to amend Ukrainian legislation so it makes Ukraine an attractive target for foreign project sponsors (lenders) to invest in developing its infrastructure by using the PPP model.

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