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PUBLIC-PRIVATE PARTNERSHIP: PERSPECTIVES FOR UKRAINE

The legal nature of the category «public-private partnership», its origin and peculiarities are researched in this article. The author analyses the problem of adaptation of models of cooperation of public and private partners to national economical conjuncture. There are also defined basic approaches to improve institutional and normative base of public-private partnership in Ukraine.

Key words: public-private partnership, mutually beneficial cooperation, public agencies, private partner, ownership patterns.

Statement of the problem. Today when so-called «global revolution in the state sector» takes place, when ineffectiveness of traditional governmental authorities and management methods becomes more and more appreciable for the international community, new mechanisms of construction of a dialog between the supreme power and citizens assume ever greater importance. These mechanisms had got their appropriate embodiment within the framework of so called «service state» concept. Having a purpose to substitute bureaucratic command structures for market ones, this concept provide for the necessity to consider administrative functions in the context of rendering of public services to a person, citizen, and population. On the one hand, the person turns from the control object into the client of administration, on the other — the person takes an active part in production and rendering such services [1, p. 153]. This becomes real by providing the private partner with access to state-created monopolies, such as production and social infrastructure.

In the row of such mechanisms the most effective one is the institute of Public-Private Partnership (below — the PPP). The main idea of this institute is joining of state and private sources for satisfaction of social needs.

Today it is widely accepted that PPPs address such problems, as budget pressers and growing demand for services. In the past 20 years more than 130 countries worldwide have adopted PPP options. Delegating the management and financing of selected infrastructure and public services to a private partner, with a clear set of obligations, allows for a better allocation of scarce public resources to meet growing demand.

Lately Ukraine, being involved to processes of world globalization and integration, concentrates its attention on renewal of system of state asset

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management either. And this fact seems to be obvious considering the unfavorable investment climate in the country. By the results of the 15th wave of investment climate in Ukraine tracking research made by European Business Association investment attractiveness index of national economy in the third quarter of 2012 was 2.14 points (from five possible) [2]. Such negative dynamic can be overcome only if state managers would have strong will to eliminate differences between private and public partners' interests; it is important also to implement mechanisms to enhance the investment activity, among which PPP takes a leading stand.

Analysis of the research base. Problems of the formation and development of the PPP institute, the institutional analysis of peculiarities of public and private cooperation were the subject of research of such Ukrainian scholars, as Berdanova O. V., Berezhnaya I. G., Vaculenko V. M., Zapatrina I. V., Lebedinska U. P., Sich N. A., Udovichenko V. P. etc.

Different aspects of partnership are covered by articles of following researchers: Agroskin V. I., Afanasiev M. N., Glaziev S. U., Varnavsky V. G., Vilisov M. V., Grishchenko O. I., Gorlanova G. V., Gerard M, McConnell K., Rebok V., Yakunin V. I. and others.

It should be noted, that research work in the field of PPP implementation in our country has a distinct theoretical vector. Scholars try to analyze the sense of the PPP, its origin, forms of realization, advantages and risks aside from the real economical situation in Ukraine, without consideration of peculiarities of social and economical setup. The same time there are many practical guides, issued by practicing lawyers, providing for concrete strategies of implementation of PPP mechanisms depending on the sphere. Its' common shortcoming is an effort to adopt new mechanisms to old business trends.

In the view of the above the main **purpose** of this article is to reveal all barriers which apply the brake to investment attracting in Ukraine and to offer some approaches to develop the institutional base of PPPs.

Presentation of the material. The idea of joining of state and private business capitals for satisfaction of social needs is not new. In times of ancient Rome municipes (the analog of present municipal governments) it practiced transferring antique infrastructure objects (posts, water lines, markets, bath-houses etc.) under the management of private persons. The concession mechanism was first put into practice in 1552 while building the South Channel in France.

Remarkable is that formation of infrastructure complex in Kiev was also bound with concession agreements. Thus, in 1872 there was built the water line; in 1892 the first in Russia and the fourth in Europe tram appeared in Ukraine.

Institutionalization of PPP in its contemporary interpretation started in the end of the 20th century in Great Britain. At that time traditional cooperation between the state and private business as contractor was replaced by the new model called «private finance initiative» (PFI). This mechanism provided private partners with a right of control over the infrastructure object as well

as the right to collect payment for its exploitation. By the expense of these payments private business compensated for its costs.

Ukrainian legislator, having faced the challenge of choice of more effective alternatives to privatization and state procurement in conditions of lack of budget funds in the end of 90s, determined a priority of improvement of investment climate of national economy aiming the reinforcement of home and outward investment activity. With the view of implementation of declared politics, qualitatively new set of instruments providing access for private sector to the process of state asset management was introduced. Among these instruments should be called, in particular, state and communal property lease and concession. In a sense, it destroyed the presumption of «inviolability» of traditional spheres of state responsibility.

As a result of more than ten-year experience of adopting of different forms of cooperation between public and private sectors there had been passed the Law «On Public-Private Partnership» (1 July 2010), which established the principles of public-private partnership on a contractual basis [3].

In order to understand the significance of indicated Law we should resort to deplorable economic performance. For example, the depreciation of infrastructure in the sphere of housing and public utilities reaches 80 %. In the heat supply sector there is a necessity of at least \$1.5 billion per year for reconstruction of heating systems, boiler houses and coal-fired electricity plants. Investment support of the drainage system area should reach \$7 billion per year [4, p.71] and facilitate reducing of electricity consumption, decreasing technical and commercial expenses, assuring proper quality of water. According to estimates of the State Agency on Highways of Ukraine demand for investments in the sphere of transport infrastructure is \$31.5 billion per year [5].

Thus by that time there accumulated lots of challenges demanding appropriate reaction: high level of wearing-out of infrastructure; operational ineffectiveness and low level of public services; lack of innovations in the sphere of infrastructure building and related services; low qualification of workers of public and communal enterprises etc [6, p.229–230]. The same time a lot of statutory provisions came in for criticism so as it's been causing difficulties for implementation of real PPP projects.

Regardless to country of PPP realization, its core sense stays immutable. Thus, according to the definition given by the World Bank «the PPP is an agreement between public and private parties on production and rendering of infrastructure services aiming attraction of supplementary investments and improvement of budget financing» [7].

Russian economist *V. G. Varnavsky* defines PPP as «the institutional and organizational alliance between the state and business aiming realization of international, national and local, but always significant for the society projects in the wide range of spheres: from development of strategic sectors and scientific research to rendering of public services» [8].

In Ukraine institutional and normative base of PPP was formed relatively not long ago. In 2010 there was adopted the Law «On Public-Private Partner-

ship» which defined the PPP as following: «the State-Private Partnership is a treaty-based cooperation between Ukraine, Autonomous Republic of Crimea, territorial communities as represented by appropriate governmental and local self-government bodies (public partners) and corporate entities, except governmental and communal institutions, or individual entrepreneurs (private partners), which is carried out in accordance with the procedure prescribed by this Law and other legislative acts.

As we can see, specific of the Ukrainian PPP model is incarnated firstly in terminological aspect. The term «*state-private partnership*» is peculiar to countries from the post-Soviet space and reflects features of normative regulation of ownership relations. Thus, the Constitution of Ukraine and related normative legal acts determine following patterns of ownership: public ownership, communal ownership and private ownership. These patterns vary in accordance with a party to an appropriation — the state, the territorial community and persons or corporate bodies. But such significant aspect as *interest* defending while carrying out property rights stays neglected. This is the cornerstone, which produces difficulties while determining correlation between different patterns of ownership.

Analyzing the legal nature of patterns of ownership through the prism of category «*interest*», we should agree with a statement of A. V. Colpacova, who marked out two patterns of ownership — public and private [9, p.132]. The truth of this division proceeds from identity of content of ownership: all three — the state, the territorial community and private persons — have equal rights of possession, use and disposal of property.

The same time, the single content of rights of ownership of all parties became a warrant for confusion of public and private ownership. As a result there took place a lot of tries to withdraw the state property from the civil turnover. Thus some contemporary French scholars distinguish spheres of influence of Civil and Administrative Law and consist on following: «Assets belonging to the state can't take part in the civil turnover» («*Les biens du domaine public sont places hors du commerce*») [10]. In a certain sense it seems justified, because from the beginning the state takes the preferred position by limitation of property private partner can own and some ways of acquisition of the right of ownership (for example, nationalization, confiscation, requisition).

A possible way to overcome such antagonism and to bring private and public ownership into proper correlation can be dividing of objects of the right of ownership into two groups: *exclusive public ownership and relative public ownership* [11, p.136]. The first group includes property which is owned solely by the state and bodies of local self-government; private partner's rights are restricted by the following principle — «everything banned in the law isn't permitted» (Civil Code of Ukraine, p.2 p. 325). The second group consists of the other property, which is equal in its status with private property and involved to the trade turnover.

Unfortunately, indicated problem of ownership produced some other gaps of normative regulation of the PPP. In particular, in spite of detailed range

of parties to a PPP treaty, the private partners' status is still unclear. Thus, according to articles 84 and 85 of Civil Code of Ukraine there are two types of companies — entrepreneurial company and non-entrepreneurial one which don't pursue the goal of profit earning. It is obvious that attracting of profit-oriented companies is more advantageous for the state: except capital investments business entities introduce to the partnership also their experience in the sphere of entrepreneurship, innovations, orientation on a high competitiveness, mobility etc.

But in chase of profits both parties forget about the main destination of the PPP; and the most sensitive spheres which demand immediate solutions stay without any attention. In this context the best indicator of burning problems of the society development is the activity of public organizations which can give a right vector of joint efforts of partners. For example, in foreign practice while implementing PPP projects it is obligatory to held *public hearings* to identify priority directions of cooperation. The alternative way is widely spread «*social order*». This social institute provides for sending an inquiry to appropriate public agencies containing concrete suggestions concerning concrete objects of social or production infrastructure. Such «three-dimensional» approach to challenges of regional development allows finding the most effective and rational solutions.

So, considering polarity of missions of business entities and public organizations, social functions and possibilities as partners, in our view, it is reasonable to delegate authorities to public organizations in the sphere of realization of PPP projects in Ukraine.

The next problem of the normative environment of the PPP in our country is simultaneously excessive and insufficient regulating of the PPP. At first sight a legal base of partnership seems to be very extensive so as it consists of following laws: «On private-public partnership», «On concessions», «On concessions for construction and operation of motorways», «On production sharing agreements», «On peculiarities of transfer into rent and concession of objects of water and heat supply and sanitation that are in communal property» etc. There are also a lot of decrees of the Cabinet of ministers of Ukraine which regulate procedural moments of PPP implementation. And the more legislative acts are adopted the more contradictions between them arises.

At the other hand there still stay a wide range of unresolved issues: risk and responsibility sharing between parties of the partnership; funding of PPP projects; tariffs on services; procedure of PPP implementation on each phase; strict regulation of PPP models; reimbursement of private partner's expenses in case of review of the treaty and tariff changes etc. And consequences of these gaps can be unexpected. In particular, parties to the PPP treaty making use of drawbacks of the legal technique sometimes try to substitute true PPP mechanisms to alternatives using meanwhile all advantages of the partnership. Thus, so-called «*outsourcing*» is being masked as the PPP by delegating by communal agencies some unusual for them functions to other organizations, among which are: maintenance and repair of equipment and transport

of communal agency; rendering of informational and legal services; rendering of accounting service and auditing of the company etc.

Such situation is mainly conditioned on the lack of the *holistic politics* of attraction of private sector to projects of establishment, rehabilitation, operation and maintenance of infrastructure and rendering of related services. Indicated politics should be adopted as a base for feather normative-legal acts in the sphere of the PPP and should direct joint efforts of all parties. As well as the house can't be without fundament and the PPP can't be implemented effectually without a reliable legal background.

The next step should be elaboration of appropriate concepts of segmental orientation. The aim of these concepts is to base orgware of each sector considering its specifics. This will allow to avoid routine elaborating of the contract and eliminate contradictions between partners on all phases of the project.

Indispensable condition of a proper realization of PPP projects is the institutionalization of this sphere, what means establishment of governmental institutes and agencies implementing appropriate state politics. Pursuant to the international experience such agencies by its nature are called to be intermediaries and to promote balancing of partners' interests, increasing private partner's confidence to PPP mechanisms, consulting on the issues of creation, realization and efficiency rating of projects.

Unfortunately, Ukrainian institutional model of regulating of PPP is characterized by absence of pattern and duplication of functions. Thus, on the governmental level within the framework of The Ministry of Economic Development and Trade there is established the *Department of investment-innovative policy and PPP development*, which mission is, in particular, forming and assuring the realization of PPP policy, monitoring of effectiveness of activity of executive agencies and local self-government bodies in the partnership sphere, verification of execution of PPP contracts etc. There was also the *State agency for investment and national projects* set up, which task is, in return, assuring the implementing the state policy in the spheres of investment, PPP and management of investment projects, promotion of attraction of home and foreign investments to Ukrainian economy and so on. So in fact by the conscious legislator's will there is created a dual system of organs responsible for ensuring a favorable environment for PPP embodiment. Besides that, local self-government bodies as they develop some spheres of implementing of partnership elaborate their own normative base, which is not harmonized with the state one.

Recently the trend of establishing of nongovernmental PPP institutes intensified. For example, non-enterprising agency «Ukrainian Public-Private Partnership Development Support Centre» which is been functioning since 2010 accomplishes following tasks: development and implementation of PPP projects, project management, development of methodological and methodical support of activity in this field; providing of services on development and support of investment and innovation projects implemented in form of PPP, protection of interests of the partnership subjects etc [12].

It is obvious, that such multi-branched system of agencies and institutes aiming to create conditions for implementing of PPP mechanisms is ineffective and out of date. In the light of the foregoing, it is reasonable, in our view, to unify all the competence related to PPP within the single governmental agency. The latter should specialize in project drafting, arranging tenders, negotiation and conclusion of treaties.

Conclusion. The study concluded that the private-private partnership is one of the most effective mechanisms in the sphere of state asset management nowadays. The world experience of attraction of private partners to strategic economy sectors shows the release of pressure on budgets of different levels and the same time gaining of appropriate social effect in the sphere of rendering of qualified public services.

In Ukraine which on its way of economic and social growth have chosen the vector of improvement of the investment climate issues of PPP implementation acquires an increasing urgency. And today in this context we can speak about some gains: strategic guidelines and reasonability of PPP development in Ukraine are actualized; normative legal base of implementing of PPP mechanisms is partially based; the methodical regulation of risk assessment and determination of efficiency of PPP projects is elaborated.

However implementation of indicated guidelines faces a range of impediments and risks, which are following: absence in the budget legislation of guarantees of compensation of private partner's losses caused by discrepancy of demand for products and services to planed indicators; absence of customs and tax facilities for realizing of PPP; imperfect system of justice; too complex and non-transparent procedure of getting of permitting documents; imperfect tariff and pricing system etc.

In our view, in order to overcome these impediments and to make use of PPP following actions should be done:

- 1) to elaborate and adopt the integrated PPP development policy;
- 2) to improve existing normative legal acts according to adopted policy;
- 3) to create a single state body on issues of PPP development;
- 4) to set appropriate system of governmental guarantees providing for preferential tax terms, simplified system of getting licenses and permitting documents; flexible tariff system, transparent judicial system, etc.
- 5) to make a revision of the system of ownership.

Offered recommendations will contribute estimation of real potential of public-private partnership and working out of the effective implementation mechanisms.

Further scientific research in this sphere. So as the Private-Public Partnership is a new phenomenon for Ukrainian economy it is advisably to prove theoretically its priority comparing to other mechanisms of state asset management. Scholars should also emphasize on the concrete spheres of PPP implementation such as housing and public utilities, transport infrastructure, telecommunications etc.

References

1. Публичные услуги: правовое регулирование (российский и зарубежный опыт): сборник / под общ. ред. Е. В. Грищенко, Н. А. Шевелевой. — М.: Волтерс Клувер, 2007. — 256 с.
2. Індекс інвестиційної привабливості ЄБА [Електронний ресурс]. — Режим доступу: <http://www.eba.com.ua/ua/about/projects/investment-index>
3. Про державно-приватне партнерство: Закон України від 1 липня 2010 року // Відомості Верховної Ради України. — 2010. — № 40. — Ст. 524.
4. Підготовка та реалізація проектів публічно-приватного партнерства: Практичний посібник для органів місцевої влади та бізнесу / С. Грищенко. — К.: ФОП Москаленко О. М., 2011. — 140 с.
5. Analytical brief on the development of public-private partnerships as a mechanism to stimulate investment in Ukraine [Електронний ресурс]. — Режим доступу: <http://www.niss.gov.ua/>
6. Шилепницький П. І. Державно-приватне партнерство: теорія і практика [Текст] : монографія / П. І. Шилепницький. — Чернівці : Ін-т регіональних досліджень НАНУ, 2011. — 455 с.
7. Delmon J. Private Sector, Investment and Infrastructure: Project Finance, PPP Projects and Risk // The world bond and kluwer law international, 2009. — Р. 7.
8. Варнавский В. Г. Государственно-частное партнерство: теория и практика [Текст] / В. Г. Варнавский, А. В. Клименко, В. А. Королев и др.; Гос. ун-т — Высшая школа экономики. — М.: Изд. дом Гос. ун-та — Высшей школы экономики, 2010. — 287 с.
9. Актуальные проблемы гражданского права / Под ред. С. С. Алексеева; Исслед. центр частного права. Уральский филиал. Рос. школа частного права. Уральское отделение. — М.: Статут, 2000. — 318 с.
10. Review of the European PPP Market. First half of 2012 [Electronic resource]. — Mode of access: http://www.eib.org/epcc/resources/epcc_market_update_h1_2012_en.pdf
11. Курс «Введение во французское гражданское право». Париж: Университетское издание, 1999 (Университет Париж-12). — 214 с.
12. Український центр сприяння розвитку публічно-приватного партнерства [Електронний ресурс]. — Режим доступу: <http://www.ukrppp.com/uk/held-events/26-2010-08-05-07-32-32>

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ПУБЛІЧНО-ПРИВАТНЕ ПАРТНЕРСТВО: ПЕРСПЕКТИВИ ДЛЯ УКРАЇНИ

Резюме

У статті досліджено правову природу категорії «публічно-приватне партнерство», її походження та особливості. Автор аналізує проблему адаптації моделей співпраці публічного і приватного секторів до вітчизняної економічної кон'юнктури. Виокремлюються основні підходи до удосконалення інституційної та нормативної бази публічно-приватного партнерства в Україні.

Ключові слова: публічно-приватне партнерство, взаємовигідне співробітництво, державні установи, приватний партнер, форми власності.

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**ПУБЛИЧНО-ЧАСТНОЕ ПАРТНЕРСТВО:
ПЕРСПЕКТИВЫ ДЛЯ УКРАИНЫ**

Резюме

В статье исследуется правовая природа категории «публично-частное партнерство», её происхождение и особенности. Автор анализирует проблему адаптации моделей сотрудничества публичного и частного секторов к отечественной экономической конъюнктуре. Выделяются основные подходы к усовершенствованию институциональной и нормативной базы публично-частного партнерства в Украине.

Ключевые слова: публично-частное партнерство, взаимовыгодное сотрудничество, государственные учреждения, частный партнер, формы собственности.