

PROSPECTS FOR IMPLEMENTING OF PARTNERSHIP RELATIONS REGULATION IN UKRAINE

PhD Student Lyudmyla SEROKLYN

*Academician Y. Bugay International Scientific and Technical University, 02094, Ukraine
lyudmyla.seroklyn@ukr.net*

Abstract

The article defines the essence of the partnership between private business and the state. The main forms of practical implementation of the partnership are considered. Public-private partnership and concession mechanism are described. Peculiarities of concession application as a form of public-private partnership by public authorities are considered. The directions of risk and responsibility distribution between partners are determined. The practical achievements of the experience of partnership implementation in Ukraine in the main areas of application are presented. Proposals for improving the regulation of partnership for the development of the national economy of Ukraine have been developed.

Key words: *concession; partnership; state regulation; public-private partnership*

JEL Classification: *H54, L32, L51*

I. INTRODUCTION

In the context of the systematic transformation of the economic and social components of the modern structure of Ukrainian society, an important area of positive change is the establishment of partnerships between business and government. A special option for such interaction is the search for a mutually beneficial form of partnership for economic development. This direction of partnership is especially important for the management of state-owned objects for which privatization is impossible or ineffective at the national level. Manifestation of partnership can take place at different levels of interaction: from the traditional lease of state property to the use of various options for public-private partnership.

The basis for regulating partnerships in the national environment are regulations that lay down the basic directions of stimulating the development of cooperation between the public and private sectors in order to increase the competitiveness of the economy and attract investment into the economy of Ukraine. In particular, the Law of Ukraine "On Public-Private Partnership" dated 01.07.2010 № 2404-VI, the Law of Ukraine "On Concession" dated 03.10.2019 № 155-IX.

It is believed that the practical implementation of these documents will help resolve issues related to public-private partnership (PPP), creating conditions for its development, attracting and effective use of investment, forming a positive investment image of Ukraine and accelerating integration into the world economic system.

At the same time, the nature of the partnership determines the emergence of many specific tasks, the emergence of new forms of interaction and new mechanisms of state regulation of partnerships, among which the concession becomes increasingly important.

II. ACTUAL SCIENTIFIC RESEARCHES AND ISSUES ANALYSIS AND THE RESEARCH OBJECTIVE

The question of the essence of the partnership between business and government is an important part of research, most of which is disclosed by public-private partnership, mechanisms for its implementation, forms and types of implementation, including the feasibility of concession relations. These and other issues of partnership between private business and public institutions are revealed in the works of a large number of modern researchers. In particular, the essence and purpose of partnership relations, features of realization of public-private partnership are defined in works of Pavlyuk & Pavlyuk (2010) and Shilepnytskiy (2017). Fundamentals of regulatory and legal support of public-private partnership are covered in the works of Nadolishniy (2003). The main reasons that motivate the authorities to cooperate with business given the limited budget and the need to expand investment activities are emphasized (Vdovenko, 2004; Neykova, 2010; Grishchenko, 2011).

At the same time, the state regulation of partnership relations in Ukraine needs in-depth research in terms of generalizing the experience of practical implementation of public-private partnership between government and the private sector. The study of the formation of organizational and economic conditions for intensification of concession activities in the economy of Ukraine as a socially useful way of mutually beneficial cooperation with the private sector, aimed at meeting the social needs of the population, which gives the authorities the right to

solve important tasks while reducing asset maintenance costs.

III. IMPLEMENTATION OF PARTNERSHIPS BETWEEN THE STATE AND PRIVATE BUSINESS

An objective condition for the spread of the partnership between the state and private business was the results of the World Bank's study (1997) on global development. The focus was on the limited performance of the “welfare state”, which does not provide the full range of necessary public goods and services. The state's monopoly on the supply of public goods has already been exhausted, which largely requires the development of market bases for the interaction of participants in economic relations. This state of affairs requires the formation of effective partnerships that can be implemented by involving private companies in the provision of public services. And it is through partnerships between the private sector and the state, the functions of each participant will be performed in full. In the economic sphere, the development of various forms of partnership, which are usually combined with the concept of public-private partnership (PPP), will play a crucial role.

According to the Law of Ukraine № 2404-VI “On Public-Private Partnership” partnership relations can be realized through: concession agreement; property management agreement; agreement on joint activities, other agreements containing elements of various agreements (mixed agreement), the terms of which are determined in accordance with the civil legislation of Ukraine.

Thus, public-private partnership in economic practice is implemented in various forms: performance of works and provision of services, management, supply of products for state and public needs, technical assistance contracts; concessions, financial leasing, leases, product sharing agreements, political partnerships, etc.

According to the provisions of the law, partnerships are implemented in the EU through the mechanism of Public-Private Partnership (PPP), which provides for two aspects:

- a. delegating to the private sector some of the powers, responsibilities and risks for the implementation of projects that have traditionally been implemented or funded by the public sector,
 - b. system of relations between the public administration body and the representative of the private sector, in which a larger role compared to traditional cooperation in the planning, financing and implementation of a service for the population is assigned to the latter, and less compared to the privatization mechanism.
- The partnership can be implemented (Gryshenko, 2011):

- in order to implement priority infrastructure projects in accordance with the package tender procedure;
- to attract the management expertise of a private partner for the implementation of large and comprehensive programs;
- in order to attract new technologies developed in the private sector;
- attracting a variety of financial resources available to business;
- providing favorable conditions for the development of infrastructure created by a private partner.

The 2004 EU Green Paper provides for two types of PPP partnerships:

- a. contractual type, where an individual is guaranteed remuneration from a public institution and / or direct users for the work performed or services provided, and this is regulated by EU directives on public tenders;
- b. institutional type, under which it is possible to form a new legal entity, co-founded by public and private organizations.

It should be noted that in the implementation of PPP projects, various options are used to regulate the cooperation between government and private business. They are differentiated depending on the scope of property rights granted to a private partner, investment obligations of the parties, the principles of risk sharing between partners, responsibility for various types of work. These features of the partnership provide for different levels of regulation of interaction between participants: organizational, financial and cooperative (see table 1).

Table 1. Levels of regulation of interaction of PPP participants

The level of regulation of interaction	Features of partnership implementation
Organizational	Cooperation between public and private partners is carried out through the involvement of third parties, the assignment of certain functions and contractual obligations, the transfer of facilities to external management. The most common implementation option is concessions
Financial	Cooperation is focused on implementation in such forms as commercial rental, lease, all types of leasing, pre-integrated project financing
Cooperative	Partnerships are realized through a combination of various forms and methods of combining the efforts of a number of partners, which are responsible for the individual stages of the overall process of creating new consumer value as a public good. Such cooperation can be carried out through the creation of holding structures for the construction of facilities and their operation, especially in the field of industrial and social infrastructure

Source: developed by the authors

In most cases, various infrastructure facilities have been set up in European countries through the partnership mechanism. In particular, central highways were built in Finland, airports and regional roads were reconstructed in Portugal, water supply networks were upgraded and expressways were built in France. Within the framework of such partnership, concession agreements were used in practice not only in the construction of highways, parking lots, provision of district heating, but also in the areas of national defense, education, urban public transport, etc. Under the terms of the concession, the private business designs and builds hospitals, schools and other public facilities, which it later manages.

Thus, PPP is a cooperation that focuses on the proper maintenance of facilities, the provision of quality services to the public, the distribution of risks between the parties who are most able to control them. The use of PPPs is not only a form of financing and creation of infrastructure facilities, but also a full-fledged involvement of a private partner in sectors in which services are traditionally provided by the state. Thus, in accordance with the *Law of Ukraine On Public-Private Partnership*, this mechanism extends to such areas as prospecting, exploration of mineral deposits and their extraction; production, transportation and supply of heat and distribution and supply of natural gas; construction and / or operation of motorways, roads, railways, runways at airfields, bridges, overpasses, tunnels and subways, sea and river ports and their infrastructure; engineering; water collection, purification and distribution; health care; tourism, recreation, recreation, culture and sports; ensuring the functioning of irrigation and drainage systems; waste treatment; production, distribution and supply of electricity; real estate management.

Business-government partnership is similar in content to the implementation of traditional projects. However, a significant difference is the peculiarities of risk distribution between public and private partners. The private partner assumes the risks associated with the design, construction, financing, operation and maintenance of the facility, while the public partner assumes the regulatory and policy risks. The scheme of using the partnership between private and public participants should be generalized through the definition of the basic features of PPP as the most typical practical form of such partnership (see Figure 1).

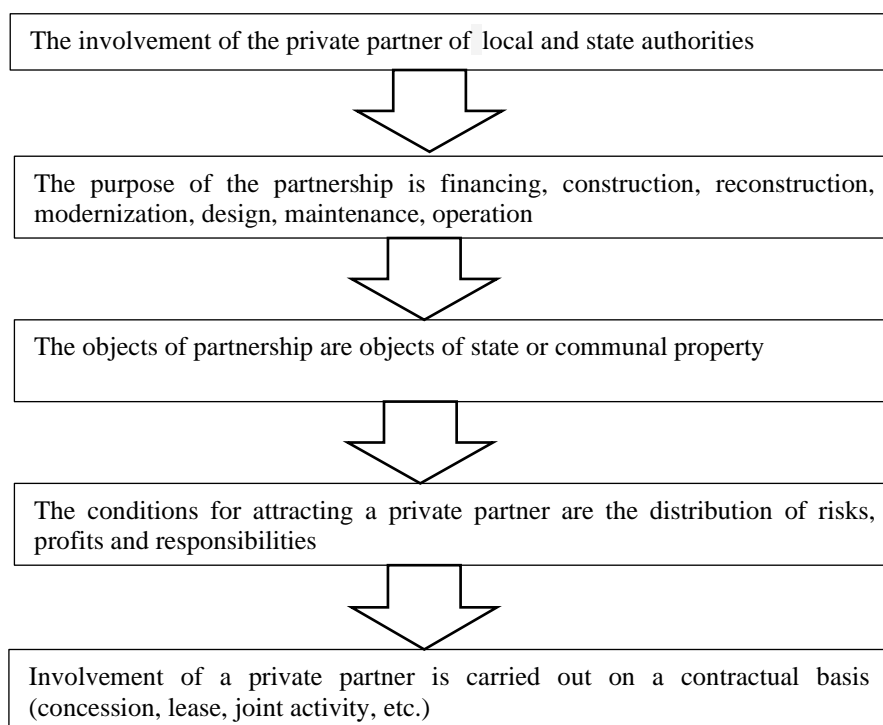


Figure 1 – Visualization of the main features of the practical application of business-government partnership under the legislation of Ukraine

Source: developed by the authors

The generalization of theoretical and practical experience confirms the thesis that the PPP implements a new quality of management functions of the state. There are two important aspects to note.

The first aspect is related to the rethinking of the functions of the state in the conditions of active expansion of market relations in the sphere of public-property relations on the basis of their structuring. This state of affairs is particularly evident in the reform of natural monopolies, which differentiates a wide range of functions that are transferred to private business. This also applies to changes in the production and distribution of public goods. A number of traditional benefits are paid for in full or in part by the population, receiving appropriate paid services

from private participants (education, health care, housing and communal services, culture). Consequently, the direct provision of public goods by the state through its own state institutions is replaced by guaranteeing their sufficiency and quality.

The second aspect reflects the redistribution of public and private shares in the structure of public interests, ie the participation of private business in the creation and distribution of public goods. Today, in developed countries, public property is subject to state property, public services, natural resources and certain monopoly activities of the state. Public property belongs to society as a whole and to no one in particular. The state ensures the preservation of the necessary amount of its control in partnership with private business for each individual cooperation project. At the same time, the state assumes the obligations of the participant of such a project regarding the inviolability of the terms of the contracts and the responsibility for the accepted obligations. For such forms of PPP as concessions and production sharing agreements, state rights that reflect the interests of society as a whole cannot be restricted or transferred to private business.

Foreign experience of public-private sector interaction shows that the most common form of partnership used in large-scale projects are concessions and production sharing agreements. However, the scope and mechanisms of PPP are changing, which requires a change in approaches to their regulation.

IV. APPLICATION EXPERIENCE OF PARTNERSHIPS BETWEEN THE STATE AND PRIVATE BUSINESS IN UKRAINE

In Ukraine, the legal framework for regulating the development of partnerships between business and government began in 1999 on the relationship of concession, joint venture agreement, PPP.

According to the data of Minister for Development of Economy, Trade and Agriculture of Ukraine, be the 01.01.2021 on the terms of PPP concluded 192 agreements, of which 39 agreements are implemented (29 - concession agreements, 6 - agreements on joint activities, 4 - other agreements), 153 agreements are not implemented (118 - not performed, 35 - terminated / expired); by January 1, 2020, 187 agreements have been concluded on the basis of PPP, of which 52 are being implemented (34 concession agreements, 16 - on joint activities, 2 - others); 135 contracts are not implemented (for four expired, 18 terminated, 113 are not fulfilled). More than 40% of PPP projects out of their total number have been implemented in the field of water collection, treatment and distribution (a total of 21 agreements: 10 - Mykolaiv region, 4 - Kyiv region, 3 - Zaporizhia region, 1 each - Poltava region, Lviv region., Luhansk region, Zakarpattia region), more than 15% - in the field of production, transportation and supply of natural gas (total of 8 agreements: 3 - Zakarpattia region, 2 - Donetsk region, 1 each - Chernihiv region, Lviv region ., Zhytomyr region), over 13% - in the field of infrastructure (5 - Odessa region, 1 - Ivano-Frankivsk region, 1 - Kherson region), health care (1 - Lviv region, 1 - Kyiv region) region), electricity generation (1 - Kherson region, Kharkiv region, Mykolaiv region), tourism (2 - Lviv region, 1 - Kropyvnytskyi region,), other areas (total 6 contracts: 2 - Khmelnytsky region) ., 1 - Odesa region, Kyiv region, Donetsk region, Zaporizhia region), search and prospecting of minerals (1 contract in Donetsk region), in the field of waste treatment (1 in Donetsk region).

Currently, promising projects and opportunities to attract investment in them on the terms of PPP. In particular, the Kherson ICC and the Olbia Port Stevedoring Company were recently transferred to concession, and the authorities are also going to offer investors new facilities for public-private partnership: seaports, airports, railway stations.

According to the current regulatory requirements, the use of PPP has certain features:

- the partnership initiative can come from both the state and a potential private partner,
- in case of loss of a private partner in the competition, it is possible to agree to a partnership on the terms of the best offer of another applicant,
- availability of other additional opportunities to protect their investments for a private partner, in particular the right to arbitrate the dispute,
- the creditor's ability to influence the change of the concessionaire, provided that its authorized capital has more than 10% of the property of the enterprise with foreign investment.

The processes of selection of participants and approval of projects under the law on public-private partnership and the law on concession are similar, and have a regulated procedure, which contains several main stages (see Figure 2).

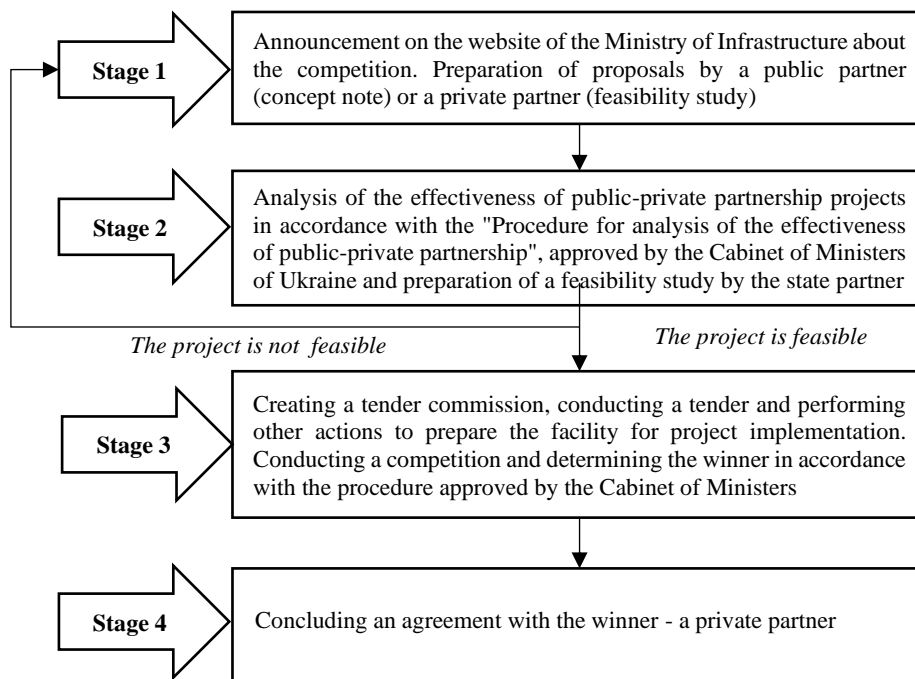


Figure 2 – The main stages of practical application of business-government partnership under the legislation of Ukraine

Source: developed by the authors

The timing of the stages, which are defined in Fig. 2 are legally regulated and last a total of about a year, but in practice they may deviate in both directions.

For example, the duration of the procedures for the concession of the Kherson ICC and the State Enterprise "Stevedoring Company of the Port of Olbia" from the moment of publication of the announcement to the determination of the winner was six months.

It should be noted that the concession is a type of public-private partnership, but it contains a smaller, broader list of state support. In particular, the PPP determines the right to acquire partial ownership of newly created real estate under the contract, which does not provide for a concession. Instead, the concession provides for a more detailed procedure for identifying a private partner and provides more certainty regarding the application of foreign law, unless it is contrary to national law.

Generalization of legislative bases of realization of partnership relations between business and the power at PPP (Pavlyuk & Pavlyuk, 2010), gives the bases to define the basic tasks of the state in this process:

- identification of the need to involve private business structures in specific areas of the economy on a partnership basis;
- development of proposals and recommendations for partnership with business;
- determination of key characteristics of projects taking into account public interests, organization of competitive procedures for selection of private partners;
- preparation of a package of documentation for projects, negotiations and conclusion of agreements with private partners;
- control over the implementation of agreements, monitoring and ensuring the realization of public interests within the partnership;
- assessment of compliance with the terms of the agreement by a private partner;
- formulation of recommendations for continuation or termination of contractual relations with a private partner.

So should agree on common scientific position (Nadolishniy, 2003; Pidhaiets, 2017), the state in partnership with private business regulation provides in the following areas:

- formulates the principles and develops a strategy for business relations with society in general and with public authorities in particular,
- ensures the formation of the institutional environment for the development and implementation of partnerships,
- organizes and manages public-private partnership, develops its forms and methods, as well as specific mechanisms.

It should be noted that an important aspect of PPP success is the legitimate sharing of risks between partners.

Thus, in Ukraine the risks of miscalculations of both public and private partners in PPP projects are high. This is primarily due to the rise in price of projects compared to their original cost due to both miscalculations and rising prices for raw materials and services.

In this sense, it is advisable to emphasize the following common risks in partnership agreements:

- risks borne by the state partner: delay in deliveries or non-compliance with the adopted standards when creating the facility, the risk of changes in demand for the product of the PPP project;
- risks borne by the private partner: non-payment of claims, non-repayment of debts under PPP projects.

World experience shows that attracting private capital to the partnership, creating attractive conditions for it compared to the usual commercial activities, along with clearly defined tasks and responsibilities allow the development of the economy.

V. CONCLUSION

The results of the study show that the practical experience of implementing partnerships between government and private business in Ukraine is quite small. At the same time, it is necessary to determine the prospects for the implementation of public-private partnership in its various forms, including concessions. This is primarily due to the existence of a significant number of assets that the state can transfer to public-private partnerships, including concessions. However, this process is complicated by the need to improve the legal regulation of future agreements, given the benefits for society.

In this sense, it is worth focusing on solving a number of fundamental tasks. First of all, the process of establishing a partnership should be considered more broadly than involving private business in capital-intensive projects that the state cannot implement on its own.

In addition, an important aspect is to create the stability of the "rules of the game" for both partners with a clear division between the partners not only responsibilities and risks, but also responsibility for the use of assets. In this case, the real interests of both partners should be taken into account in view of the national benefits, without prejudice to the interests of each party to the partnership.

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