

**THE PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS: PROBLEMS OF
LEGAL REGULATION**

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The public-private partnership relations (hereinafter - PPP) become important for Ukraine, taking into account all advantages of the PPP and the problems arising from such relations, including agreements coming from PPP.

The special legal regulation of PPP relations establishes the contractual form of such partnership and fixes the open list of agreements [1, articles 5, 6], that could be settled in the PPP field, among them: PPP agreement, a joint activity agreement, the agreement on product distribution, government contracts/agreements on government procurement and others. However, the legislator ignored the fundamental provisions of the requirements concerning with the content and the form of PPP agreements. The legislator established just generalities about the conclusion of such contracts according to the requirements established by the laws of Ukraine (general legislation - on PPP, and special - PPP agreements, government procurement, agreement on product distribution, and other).

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The legislation vacuum containing in the Law on PPp regarding to the PPP agreement in a certain way compensated by-laws that regulate certain types of PPP relations (relative to the competitive principles of determining the private partner, the information about the implementation of PPP agreements). But, the definition of the essential conditions of the PPP agreement on the regulation level contradicts with the Law on PPP, par. 6, p. 1, article 5 of mentioned Law provides that the essential conditions of agreements that implement within the public-private partnership should meet the requirements established by the laws of Ukraine.

The procedure of the competition for determining the private partner for the implementation of a public-private partnership regarding to the state and communal property objects and objects belonging to the Autonomous Republic of Crimea approved by the Cabinet of Ministers of Ukraine dated 11 April, 2011 № 384 [2]. This procedure determines the mechanism of preparation and realization of competition that should happen on the principles of transparency, objectivity and non-discrimination of winner deciding. Also it determines the mechanism of appropriate agreements implementation in the PPP field provided for by p.1 article 5 of the Law on PPP, if the laws that regulate the relations arising in the process of implementation of these agreements doesn't establishe another procedure of the competition (particularly concerning with such PPP models, as a PPP agreements, on public distribution, public procurement, there are special procedures of the definition of the contractor / concessionaire). So, according to p. 7 of abovementioned Procedure the essential conditions of the PPP agreement are: the name of the PPP and the object of the PPP; the obligations of the parties, including the scope and form of financial participation of public and private partners in the PPP implementation; the list, volumes and terms of the adreements implementation; the requirements to quality of goods, works and services that performs under the agreement; the

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distribution of risks identified by the results of the analysis of the implementation effectiveness of the public-private partnership between the partners, and forms of management of such risks; the procedures and conditions of the winner's obtaining of the right to use the land for implementation the public-private partnership (if it necessary); the conditions, size and order of payment, if it provided by the terms of the partnership; the order and conditions of income and/or products allocation between the parties of partnership contract, if such such allocation provided by the terms of the partnership; the requirements regarding to the returning of the public-private partnership objects and the land plots, in the cases of the contract termination; the obligation concerning with the reimburse of the cost related to the conducting of the effectiveness analysis of the implementation of public-private partnerships and/or ecological expertise; the conditions of making amendments in the partnership agreement; the parties' liability for its failure; the procedure of disputes consideration; the term of the partnership agreement, the date and place of its signing and the order of its entering into the force.

Consequently, the essential conditions of the PPP agreement, according to the abovementioned Procedure, are quite numerous comparatively with the general requirements to the minimum amount of such conditions of the economic agreement (subject, price, duration, conditions that are necessary under the law for the given type of contracts, and conditions that are requesting by one party, and should be agreed - p. 2 article 180 of the Economic Code of Ukraine [3]) and the civil contract (conditions of the subject, defined as an essential or necessary, as well as those that should be agreed by the application of at least one party - par. 2, p. 1 article 638 of the Civil code of Ukraine [4]). It means that in this case here is the «authority abuse» by the body that issued the specified Procedure: the requirements for PPP contracts should be establish at the law level (in our case - PPP Law). This is evidenced by

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international experience. Thus, the Law of Slovenia «On public-private partnership» [5] established the requirements to the contract with a private partner/investor (art. 120-127). Concerning with the content: the form/type of the PPP model, its parties and duration of the contract, legislative acts regulating the relevant type of PPP (concession, on public procurement, on public services provision, etc), the size of the private investment and the way of realization of the right to receive the income from their investments; the possibility of terminating the contract and the receiving of the assessed amount of the company statutory capital part (should be paid within three years from the date of the request, in accordance with applicable securities market's procedure). Concerning with corporate/share PPP agreement: its purpose; the amount of the statutory capital, the amount and form of the partners' investment; legal regime of the state invested property/assets and the way of its return; and the schedule of state-owned assets bringing and the control method of it proper use; the terms and methods of implementation of any investment and other obligations; the ownership models created and used in the process of PPP functioning; the payment terms of business subcontractor; changes in capital of the partnership that need the consent of the public partner; penal sanction for failing of improper implementation of contractual obligations; grounds for modification, cancellation and termination of the contract of corporate/shares PPP, rights and obligations of the parties in such cases; the order of participation in corporate/mutual PPP's capital; the procedure of partnership leaving .

The Latvian law regulates the PPP relations [6], establishes more detailed **requirements to the PPP agreement**, particularly concerning with:

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the period - from 5 to 30 years (with the possibility of its renewal, if it is necessary for the purposes of the agreement and achieving certain results that should be backed by financial and economic calculations (article 60);

the contracting parties (article 61): state partner (partners) and provided for by the law - private partner (partners);

the content (articles 62): the subject of the agreement, including the scope, content, quality and method of construction works or services; financial conditions of the agreement; the complex of the rights that transfers from the public partner to the private partner; the public resources of public partners that transfers to the private partner, the order of transfer of such resources; property rights of the parties in respect of the property created during the term of agreement, and intangible assets related licenses, permits, other documents; the duration of the agreement; the conditions of construction works execution or services rendering, and the conditions of theirs revision; the conditions of return (transfer) to the public partner the resources that were given to the private partner for the PPP agreement implementation, as well as the objects created in the PPP process for its further use, in the case of early termination of the PPP agreement; the limitations or conditions concerning with the changes in the share capital of a private partner or commercial companies that decisively influenced by the private partner; the risks of each government transfers to a private partner; the mutual payments of the PPP agreement's parties and the conditions for their revision; the right of a private partner (if it's necessary) for the collection of payments for any services from the users, as well as the amount of such payments that should be received within the period of agreement duration, and the conditions of its review; the obligations of the private partner (if it's necessary) to ensure the continuing access of third parties to the PPP

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object and possibility to receive the services that are provided in the PPP agreement duration; the right of contracting parties to transfer their rights and obligations to third parties under this agreement, and the conditions that restrict this right; the obligations of the private partner regarding to the insurance of certain risks under the PPP agreement with the its list definition; the obligations of the private partner regarding with environmental protection and protection of cultural heritage (if it's necessary); the obligations of the contracting parties concerning with the transferring or purchasing of the real estate, equipment and other property necessary for the agreement implementation, and customs duties payment (if it's appropriate); the procedure of state partner (partners) checking of implementation of the agreement; force majeure circumstances and acts of the parties in the case of its occurrence; the cases and procedure of the agreement early termination, the procedure of determining the amount of compensation in such cases; change order of the PPP agreement conditions; the presence of the previously concluded contracts associated with the PPP agreement; the conditions when the public partner or the lender may assume any obligations of the private partner with the purpose of ensuring the effective and uninterrupted fulfillment of the construction works or services rendering provided for by the PPP agreement; the certificate on the right of the representative of the public partner to receive information from the private partner's lender regarding with its financial position and the compliance with the necessary funding; the procedure of the PPP agreement continuing in the case of termination of legal entity's activity of public partner in the cases provided for by the law; the procedure of the dispute resolution and other provisions deriving from the Law on public procurement or PPP Law, or provisions that are included with the parties agreed and that are not contrary to regulations.

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The experience of legal regulation of PPP's relations in the Russian Federation (mainly regional, because at the Federal level there is only draft law [7]) also testifies about the necessity of including to the key act of PPP legislation the requirements to the PPP agreement.

So, in accordance with the Law of St. Petersburg dated 20 December, 2006, «On participation of St. Petersburg in public-private partnerships» [8]:

the PPP agreement - an agreement between St. Petersburg represented by authorized executive body of city state authorities and russian or foreign legal entity or an individual person, or an association of legal entities. All of them operating on the basis of the contract on joint activity, and in the cases provided for by the law and regulations of the city, the authorized executive body implement the agreement with the legal entity, with Saint-Petersburg's 100 percent of the shares;

the PPP's parties (paragraphs 3 and 4, article 4): 1) the partner - (a) russian or foreign legal entity or individual person, or (b) association of legal entities, acting on the basis of the contract on joint activity, carrying out activities on the basis of the PPP agreement; 2) St. Petersburg represented by the authorized by the executive body of city state authority, a legal entity, with Saint-Petersburg's 100 percent of the shares (in the cases provided by regulations of the city);

the agreement object (par. 5 article 4) - property created (including by means of construction), reconstructed or operated in accordance with the PPP agreement;

conditions of the PPP agreement (article 7): **essential:** 1) the object of the agreement; 2) the agreement duration and/or procedure of its determining it; 3) the procedure for the creation and/or reconstruction and/or operation of the agreement's object; 4) the settlements procedure between the parties; 5) distribution of risks

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between the parties; **other conditions** that could be included in the PPP agreement in the case of no inconsistencies with the law: 1) the partner should ensure the providing of goods (works, services) to consumers according to the PPP agreement; 2) the termination (suspension) of operation of the agreement subject, except the force majeure, and other cases provided by the current legislation of the city and the PPP agreement, unless otherwise provided by federal law, should be coordinate with St. Petersburg; 3) the procedure and terms of the agreement object transfer to St. Petersburg, including the requirements regarding the quality, if the agreement object should be transferred to the ownership of St. Petersburg; 4) the procedure of information, property rights transferring, including intellectual property rights, with the aim of further operation of the agreement object by St. Petersburg, if the agreement object should be transferred to the ownership of St. Petersburg; 5) the procedure of agreement object operation during the period that is necessary for St. Petersburg to move fully to the agreement object operation by the city, if the agreement object should be transferred to the St. Petersburg ownership; 6) the term of works' fulfillment on creation and/or reconstruction of the agreement object, its introduction into the operation, as well as the prolongation procedure; 7) the condition and terms of transferring of the burden of property upkeep, and the risks of accidental loss or damage of such property; 8) the participation, including financing, provision of property, property or non-property rights, of each agreement parties that is necessary for building (reconstruction) and/or operation of the agreement object, or the procedure for its determination; 9) the fees for using the agreement object that is the property of St. Petersburg; 10) technical and economic indicators and features that are needed to get (reach) as a result of creation (reconstruction) and/or operation of the PPP agreement object; 11) the volume of goods production, works fulfillment, services providing for exploitation of the PPP

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agreement object; 12) the procedure of the St. Petersburg control of the implementation of the PPP agreement; 13) methods of ensuring the obligations execution by the parties of the PPP agreement; 14) the possibility to deposit the agreement object on the other contractual rights or selling, as well as the possibility of rights cession, including the financing concerning with cession of monetary claim, particularly, upon the occurrence of certain circumstances without the necessity of concluding the additional agreements; 15) the procedure of granting the partner's consent on the rights and obligations transfer, including the cession of claim assignment form and/or by debt transferring, as well as the deposit of agreement object, for the aim of ensuring the obligation execution by the parties of the agreement; 16) payments under art. 8 of this Law (regarding the financing of the creation and/or reconstruction and/or operation of the object upon the budget of St. Petersburg); 17) compensation and guarantation obligations of a partner and other persons participating in the agreement by the partner's side; 18) insurance regulations; 19) partner's income connected with the activities provided for by the PPP agreement, particularly: (a) receiving the payments from consumers of goods (works, services) produced (fulfilled, provided) with the PPP agreement object; b) St. Petersburg's payment concerning with funding of PPP agreement object (construction, reconstruction, operation) determined by the PPP agreement, depending on such factors: the volumes and terms of obligations performing concerning with the production of goods, fulfillment of works, providing of services; the quality of the agreement object or goods (works, services) produced (fulfilled, provided) with using of such objects; other factors, or theirs complex); c) payments of other persons, as well as payments under the contracts implement in accordance with the agreement; 20) the rights and obligations of other persons participating in the agreement, particularly, regarding with the control over the fulfillment of the

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agreement, granting the consent (approval) on the execution of certain activities, collection and distribution of funds under the agreement, payments in the amount and order defined by the agreement and performing rights and obligations under the agreement; 21) approving with Saint Petersburg the issue about organization, engaged for the operation of the agreement object, and the essential conditions of the contract with such organization, unless otherwise provided for by federal law; 22) approving with St. Petersburg the issue concerning with the person of contractor (general contractor) involved as the partner for the construction (reconstruction) of object, and approval of the essential conditions of the contract with such contractor, except the agreement settled in connection with par. 5 p. 1 art. 5; 23) St. Petersburg right on the elimination of the partner or other persons from the operation and fulfill the operation by St. Petersburg on the conditions determined in the agreement, in the case of substantial breach of the agreement conditions or in case of other circumstances indicated in the agreement, particularly, for reducing or eliminating the risk or consequences of emergency situations, for health, safety and security of property of individuals and legal entities, protection of the environment; 24) the St. Petersburg's right to terminate the agreement in case of refusal of credit organization from further lending of the partner (to credit with the purpose of partner's obligations performing); 25) the possibility to settle the agreement between the credit organization, St. Petersburg and/or partner, defining the content and the procedure of exercising the right mentioned in the previous (24) paragraph; 26) exclusive cases of unilateral change of conditions of the agreement and/or unilateral refusal from its execution; 27) an arbitration clause providing for the possibility of solving disputes under arbitration or the international commercial arbitration; 28) other conditions not contradicting to the current legislation;

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standard agreement and methodical recommendations on their settlement (article 10): developed and approved by the Government of St. Petersburg in respect with certain forms of investment and/or for certain spheres of the agreements implementation; has the advisory nature; their absence is not a basis for the PPP agreements concluding.

According to the draft of The Federal law «On the measures concerning with development of public-private partnership and on the amendments to certain legislative acts of the Russian Federation» [7], PPP carries out on the basis of the PPP agreement, concluded between the bodies of state power of the subjects of the Russian Federation and/or local authorities - on the one hand, and investors (legal entity or two or more such entities, acting on the basis of partnership agreement/agreement on joint activity) - on the other hand. Under such an agreement the investor should at its own expense to create and/or reconstruct the object of the PPP agreement without changing its purpose, and the bodies of state power of the subjects of the Russian Federation or bodies of local self-government are obliged to give the property, including the land that is necessary for the implementation of the agreement and support the investor in the implementation of the agreement under the current legislation (par. 1 p. 2, article 3);

object of the PPP agreement is any property that is necessary for the exercise of powers of the subjects of RF and its municipal entities, except the property that could be in state and municipal ownership, and objects that belong to: 1) object of municipal infrastructure and other objects of the municipal economy; 2) object of energy; 3) object of defense and security; 4) object that couldn't turnover in accordance with Federal laws, or in the case of withdrawn of object from turnover (p. 3 art. 3);

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conclusion of PPP agreements with observance of the following principles (article 4): (1) society's awareness about the PPP projects; (2) competitiveness (the conclusion of the agreement by tender); (3) transparency of tender procedures; (4) integrity execution of the parties' obligations under the agreement; (5) openness and transparency in relations between parties of the agreement;

conclusion and implementation of PPP agreements in the order and on conditions determined by the laws of the Russian Federation, such conditions should include: (1) the procedure of citizens' and PPP investors' informing; (2) the conditions and procedure of interaction with civil society institutions in PPP projects, as well as organization of public control over such projects; (3) the procedure and the form of the tender; (4) **essential conditions of the agreement**; (5) the term of agreement implementation; (6) the parties' obligations under the contract, including the allocation of financial and property obligations of the parties; (7) the requirements concerning with the permitted use of the agreement object and responsibility for violation of such requirements; (8) the procedure of agreement object transferring; (9) the requirements concerning with the definition of activities (works list), performed with the use of the agreement object; (10) the mechanisms providing the guaranteed execution of the parties' obligations under the agreement; (11) the procedure termination of the agreement, including early termination, and also unilaterally, and the consequences of such termination; (12) other conditions related to the preparation, conclusion, execution and termination of the agreement, (parts 2 and 3 article 4).

The multiplicity of conditions of the PPP agreement testify by the advisory regulations established the PPP relations in the market relations countries [9; 10; 11]. This regulations includes the **common conditions of PPP agreement** (definition of

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terms used in it; the purpose and subject of the agreement, the term of the agreement and other relevant/intermediate time periods; the distribution of risks between the parties; financing and refinancing; property rights of the parties and the procedure of their implementation, guarantees and risks insurance; parties' payments; the cases and the procedure of compensation; the right of the public partner to control the implementation of the PPP agreement; the procedure for assessment and compensation of damage and other consequences in case of non-performance/improper performance of contractual obligations; termination of the agreement and the means to prevent such termination; force majeure; the protection of intellectual property rights, trade secrets and confidentiality of personal data; the procedure and conditions of joining of the infrastructure, if the PPP agreement provides the construction; the procedures of resolving the disputes between the parties; other rights and responsibilities of the parties; the role of the authorized body on PPP's issues in PPP relations) and special conditions, that are mandatory for certain types of PPP agreement (concession, public procurement and other). In addition, the PPP agreement may contain other provisions, freely agreed by the parties in accordance with the legislation that regulates the contractual relationship.

So, foreign experience confirms the need to identify the basic principles of establishment the contractual PPPs relations at the level of the special law that should provide the main requirements to the PPP agreement, as a specific agreement, that can have also the characteristics of the other named contracts (a contract of joint activity, concession, etc), and should have the special features that predetermine the special regulation of such relations.

The legislator applied such correlation scheme of the common and specific regulation in related to the contracts on technology transfer. The legislator fixed the provision regarding the contracts concluding during technology transfer concerning

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with disposition of intellectual property rights and taking into account the requirements of a special law on technology transfer contracts [12, article 19-21].

Thus, the domestic Law on the PPP should be supplemented with the general requirements to the contents of the PPP agreement, and special requirements reflecting certain form of different contract and respectively - the PPP model (corporate, concession, product distribution agreements, construction of objects and their complexes etc). It should be taken into account the foreign experience and domestic concerning with sub-regulation [2]. So, the general conditions should include requirements that are necessary for any of the PPP agreement and, accordingly, that are reflect the specificity of PPP relations: the name of the PPP, its type, form and model; parties, purpose and agreement subject; contractual terms (total and intermediate); works requirements (quantitative and qualitative); risks distribution between the parties identified according to the results of the efficiency analysis of PPP implementation; the obligations of the parties under the agreement, including the allocation of financial and property obligations of the parties; the requirements of the permitted use of the agreements object; the procedure of the agreement object transfer; legal mechanisms of the ensuring the proper execution of the parties' obligations under the agreement; responsibility for non-fulfillment/improper fulfillment of the parties' obligations under the agreement; the procedure of termination of the agreement, including early termination (including at the request of one of the parties), the consequences of the agreement termination; force majeure; legal mechanisms of protection of rights on intellectual property objects; the procedure of disputes resolving between the parties; other conditions concerning with the preparation, conclusion, execution and termination of the agreement.

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The special requirements for PPP agreements of certain types, forms and models (concession, corporate, public procurement and other) should be defined at the level of laws that regulate the corresponding type of contractual relationship (concession [13, 14, 15], the public procurement [16], the product distribution [17] and others), or by the Law on PPP (concerning with corporate/institutional partnerships [18, p. 192-197]).

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УГОДИ ДЕРЖАВНО-ПРИВАТНОГО ПАРТНЕРСТВА: ПРОБЛЕМИ ПРАВОВОГО РЕГУЛЮВАННЯ

Вінник О. М.

Стаття присвячена проблемам правового регулювання договірних відносин державно-приватного партнерства. Аналізується вітчизняний і зарубіжний досвід такого регулювання та пропонується встановити ґрунтовні вимоги до угоди ДПП на рівні закону.

Ключові слова: державно-приватне партнерство (ДПП); угода ДПП; істотні умови угоди ДПП.

СОГЛАШЕНИЯ ГОСУДАРСТВЕННО-ЧАСТНОГО ПАРТНЕРСТВА: ОБЩИЕ И СПЕЦИАЛЬНЫЕ ТРЕБОВАНИЯ

Винник О. М.

Статья посвящена проблемам правового регулирования договорных отношений государственно-частного партнерства. Анализируется отечественный и зарубежный опыт становления таких отношений и предлагается установить основные требования к соглашениям ГЧП на уровне закона.

Ключевые слова: государственно-частное партнерство/ГЧП; соглашение ГЧП; существенные условия соглашения ГЧП.

AGREEMENTS OF PUBLIC-PRIVATE PARTNERSHIPS: GENERAL AND SPECIFIC REQUIREMENTS

Vinnyk O. M.

This article is devoted to the problems of legal regulation of contractual relations of public-private partnerships. Analyzed the provisions of the Law "On Public-Private Partnership" and contracts that can be awarded under the PPP, including the concession agreement, joint-cooperation agreement, agreement for product distribution, government contracts, agreements for public procurement, etc. Studied the essences of the PPP-contracts provided for by the Law, the author defined these essences as too broad. Analyzed the domestic and international experience of such regulation, for example special laws on PPPs from Slovenia, Latvia, the Russian Federation, including the example of St. Petersburg, there is provided to set the fundamental requirements for PPP-contracts by law. On the ground of conducted analysis, the author concludes that international

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experience confirms the need to define the basic principles of establishing contractual relations PPPs at the level of a special law. Such special law have to include the basic requirements to the PPP-contracts, because they are should have both: the characteristics of defined contracts (concession agreement, joint-cooperation agreement, etc.) and special characteristics that determine specific regulation of such relationships. Thus, the national Law on PPP must be amended by the general requirements concerning with PPP-contracts and by the special requirements that reflect a certain type of contract that has been made. But we should accommodate both international experience and domestic by-law regulations. The author notes that the special requirements for certain types of PPP-contracts, forms and patterns (concession, corporate, government procurement, etc.) should be defined at the highest law-governing level that regulate contractual relationship or in the Law on PPP, particularly.

Keywords: public-private partnerships (PPP), contract of PPP/PPP contract, essential conditions of the PPP contract.