

VoxUkraine

REPORT

Assessment of the PPP Reforms in Ukraine  
2016-2020

An Evaluation of implementation of  
reforms in the sphere of public private  
partnership

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## Project background

The project was developed in response to the VoxUkraine ranking of reforms, iMoRe Index (Index of Monitoring of Reforms)<sup>1</sup>. Given the public visibility of the Index, and its effect on guiding the expectations from the newly adopted reforms, as well as its weight in the expert community, we wanted to face the core question underlying the Index: *What are the long-term effects of the newly adopted legislation that was highly ranked on iMoRe Index?* Part of the response consists in conducting the regular audit of the Index of Reforms, results of which are freely available to the public. However, we also wanted to provide some deeper dives into those reforms that generated the most optimism within the expert community throughout the years. With this study on the effects of the public private partnerships' (PPPs) regulation in Ukraine we are starting a series of studies dedicated to high-quality qualitative assessments of the highest ranked reforms. Our hope is for this to start discussions on the implementation challenges faced, and future steps needed to keep up the pace of reforms.

iMoRe Index showed positive expectations from the changes in the [Law on Public-Private Partnerships](#) (2016)<sup>2</sup> and [Law on Concessions](#) (2019)<sup>3</sup>. Moreover, the regulations establishing the methodology for calculating concessionary payments adopted in 2016 also received positive acclaim from the experts<sup>4</sup>. There were other regulatory changes, including those pertaining to developing specific methodologies that contribute to PPP value for money (VfM) assessments and project evaluation, as well as those regulating other aspects of PPP bidding procedures. The present research is to evaluate the projected benefits of the regulations on the overarching PPP reform and summarize the results so far.

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<sup>1</sup> Historic releases of iMoRe detailing the main reforms and their expert ranking is available here: <http://imorevox.org/%d1%80%d0%b5%d0%bb%d1%96%d0%b7%d0%b8-pdf/>

<sup>2</sup> Text of the document: <https://zakon.rada.gov.ua/laws/show/817-viii>

<sup>3</sup> Text of the document: <https://zakon.rada.gov.ua/laws/show/155-ix>

<sup>4</sup> Text of the document: <http://zakon4.rada.gov.ua/laws/show/130-2016-%D0%BF/paran2#n2>

## Methodology: Theory of Change, Comparative Method and Process Tracing

**Theoretical framework.** The research uses process-tracing methodology to identify the main strengths and weaknesses of the existing PPP framework in Ukraine. Process-tracing has remained a largely underappreciated method due to its perceived complexity. The research team has reviewed the literature dedicated to this method, and found it appropriate for identifying the hypothesis made in setting the PPP framework and conducting the process-tracing tests, including a hood test, straws-in-the-wind, and smoking guns.

**Theory of Change.** The term “theory of change” originally emerged in the work of the famous education sociologist and program evaluation expert Carol Weiss (1995). She outlined the ToC as a tool that can be used to conceptualize a program and the social change it expects to see. The ToC outlines the expected causal linkages between inputs, outputs, outcomes and impact or long-term goals. ToC has since become a standard tool for program evaluation and is also widely used in the design of international development programs as well as domestic social programs (Clark and Taplin 2012).

A theory of change is more than the traditional “logframe” because it lays out key assumptions, -- a program logic. These assumptions can be viewed as a set of systematic hypotheses, which can then be tested. Links between outcomes are explained in statements about why one outcome is thought to be a prerequisite for another. Used for program design and planning, ToC can also help with adaptive iteration of programs. In evaluation and research work, a ToC can help structure analysis and iterate hypotheses about causal mechanisms as evidence is collected.

However, in a recent synthesis study I completed (Mundy et. al 2019), we found that ToC approaches are not used in a way that helps at guiding analysis. This is partly because most theory-based evaluations don’t unpack causal assumptions with analytical rigor or use data in ways that are transparent and systematic. While theoretically a ToC should strengthen analytical rigor, it sometimes just ends up providing a complicated descriptive map/typology rather than an analytical framework that is systematically used to interrogate data and build strong warrant for arguments about causal mechanisms. To be useful a ToC needs to do more than provide a rough map of components feeding to an outcome. It needs to lay out key assumptions in a structured way.

**Process Tracing:** Another recent trend that has emerged in the qualitative social sciences and which is gaining steam is “process tracing” – an approach that typically builds on the theory of change as a starting point. Process tracing is used to examine specific cases and allows a researcher to assess whether specific interlocking actions or events within a program or mechanism can reasonably be shown to have produced a particular effect (Beach and Pederson 2019; Collier 2011; Wauters and Beach 2018). One aspect of process tracing is the use of Bayesian reasoning (“updating”), based on the work of the philosopher and mathematician. “Updating” is used to assess the confidence we can have of a claim about cause and effect.

Process tracing aims to provide more rigorous initial elaboration and approach for testing assumptions in qualitative case study research. Process tracing has recently moved from academic to the land of development practitioners as evidenced by a wide number of recent publications on how to use process tracing for international development evaluations (see for example Talcott and Scholz 2015).

Process tracing requires that the researcher lays out a theory of change, and then looks across the ToC assumptions in order to do two things before the research starts:

- Consider alternative assumptions/hypotheses, based on a broad reading of the literature and other case-based materials.

- Explain upfront how the data collected will be used to decide which of these competing hypotheses is most likely true – essentially, establish what data will give you a warrant to make a truth claim.

The key to process tracing is that the researcher sets out her priors, alternatives to them, and the evidence that she believes will be sufficient to test them. In this sense process tracing is intended to ward off confirmation bias in qualitative research and brings qualitative research and its truth claims into a more transparent and rigorous process. It is an intuitively attractive approach to exploring competing hypotheses in a structured way so that ultimate truth claims have a traceable and defensible warrant.

There is a rather elaborate procedure for weighing the sufficiency of data collected, using four main “tests” of evidence to judge sufficiency as described in the box below. These tests are used at the outset of research to assess the levels of theoretical certainty and uniqueness of predicted evidence in relation to case results. They can be particularly helpful in establishing whether the evidence available is likely to have confirmatory power for the proposed hypothesis.

|   |  | SUFFICIENT FOR AFFIRMING CAUSAL INFERENCE  |   |
|---|--|--|---|
|   |  | No   | Yes   |
| NECESSARY FOR AFFIRMING CAUSAL INFERENCE  | No   | <b>1. Straw-in-the-Wind</b>  | <b>3. Smoking-Gun</b>   |
|   |  | <b>a. Passing:</b> Affirms relevance of hypothesis, but does not confirm it.   | <b>a. Passing:</b> Confirms hypothesis.   |
|   |  | <b>b. Failing:</b> Hypothesis is not eliminated, but is slightly weakened.   | <b>b. Failing:</b> Hypothesis is not eliminated, but is somewhat weakened.  |
|   |  | <b>c. Implications for rival hypotheses:</b><br><b>Passing</b> <i>slightly</i> weakens them.<br><b>Failing</b> <i>slightly</i> strengthens them. | <b>c. Implications for rival hypotheses:</b><br><b>Passing</b> <i>substantially</i> weakens them.<br><b>Failing</b> <i>somewhat</i> strengthens them. |
|   | Yes  | <b>2. Hoop</b>   | <b>4. Doubly Decisive</b>   |
|   |  | <b>a. Passing:</b> Affirms relevance of hypothesis, but does not confirm it.   | <b>a. Passing:</b> Confirms hypothesis and eliminates others.   |
| <b>b. Failing:</b> Eliminates hypothesis. |  | <b>b. Failing:</b> Eliminates hypothesis.  |   |
|   | <b>c. Implications for rival hypotheses:</b><br><b>Passing</b> <i>somewhat</i> weakens them.<br><b>Failing</b> <i>somewhat</i> strengthens them. | <b>c. Implications for rival hypotheses:</b><br><b>Passing</b> <i>eliminates</i> them.<br><b>Failing</b> <i>substantially</i> strengthens.       |   |

Source: Collier, 2011.

**Data collection.** The research relies on theory-driven process tracing for which we conducted in-depth interviews with policy-makers and business representatives. The interviews build on the conceptual study of the body of academic and policy literature on PPPs’ regulation and implementation. Interviewees were recruited using snowballing sample technique. Ethical forms, including written and/or oral consent for being interviewed with a confidentiality clause were signed by all those interviewed as part of the project.

## The case of the recent PPP reforms in Ukraine

The Government of Ukraine (GoU) has dedicated special attention to developing and managing effective PPPs in the country, both on national and regional levels. In 2018, the Government has reviewed the body of regulations as well as institutional framework governing PPPs, including concessions. The legislation of PPPs and concessions had a long and convoluted history (see Table 1 for a summary of legislation).

*Table 1. Summary of PPP/concession-related regulations in Ukraine*

| <b>N</b> | <b>Regulation with original date</b>  | <b>Main takeaway</b>   |
|----------|---|--|
| 1        | Law of Ukraine "On Concessions" dated 16.07.1999. No. 997-XIV (the "Concession Law")  | Introduces concessions in Ukrainian legislation. The recent version is discussed in this paper.  |
| 2        | Law of Ukraine "On Concession for Construction and Operation of Highways" (the "Concession Highway Law") dated 14.12.1999 No. 1286-XIV  | Regulates specifically for the highway sector.   |
| 3        | Resolution of Cabinet of Ministers of Ukraine "On Approval of Standard Concession Agreement" dated 12.04.2000 No. 643   | Regulates concessionary agreement standards so as to induce effective contract management.   |
| 4        | Law of Ukraine "On Public-Private Partnership" dated 01.07.2010 No. 2404- VI (the "PPP Law")  | Introduces the concept of PPPs in Ukrainian legislation. Follows the European model.   |
| 5        | Resolution of Cabinet of Ministers of Ukraine "Certain Issues of Organization of Implementation of Public-Private Partnership" dated 11.04.2011 No. 384 (the "Resolution 384")  | Regulates some of the key aspects of PPP management including the work and composition of the Selection committee, some of the competition issues, bidding and selection process, and analysis of effectiveness of PPP proposals.  |
| 6        | Resolution of Cabinet of Ministers of Ukraine "On Approval of Procedure for the Private Partner to Provide Information to the Public Partner on Implementation of the Agreement Concluded in the Framework of Public Private Partnership" dated 09.02.2011 No. 81 (the "Resolution 81") | Sets the procedural and substantive requirements for concessionary's quarterly and annual reporting to public bodies. The reporting is then used by the Ministry of Economic Development to conduct monitoring of the PPP and publish its results.   |
| 7        | Resolution of Cabinet of Ministers of Ukraine "Methods for Identifying Risks Associated with PPPs, their Evaluation and Management" dated 16.02.2011 No.232   | Regulates qualitative and quantitative standards of risk assessment, evaluation and management   |
| 8        | Resolution of Cabinet of Ministers of Ukraine "On Approval of Procedure on Provision of State Support for Implementation of Public-Private Partnerships" dated 17.03.2011 No. 279   | Sets the particularities of providing state support for PPPs. The state support should be based on the request from a private partner or a public body and be approved by a resolution of the Cabinet of Ministers.  |
| 9        | Order of Cabinet of Ministers of Ukraine "On Approval of the Conception of Public-Private Partnership in Ukraine for 2013-2018 years" dated 14.08.2013 No. 739-p  | The Conception identified some of the key problems in regulating PPPs, including sectoral differences in rules and regulations for PPPs, low administrative and institutional capacity, and lack of state support for PPPs, absences of consistent and effective prioritization of PPP projects. |
| 10       | Order of Ministry of Infrastructure of Ukraine "On Approval of Regulation of Bidding Commission for Conducting Concession Tender to Build and Operate Highways" dated 28.01.2014 No. 61   | Introduces regulation on the competition in sector of roads and highways (under the State Agency of Automobile Roads)  |

|    |   |   |
|----|---|---|
| 11 | Draft law on long-term obligations in the framework of public-private partnership | Fixes the problem with a limited medium- and long-term budgetary planning due to 3-year planning. |
|----|---|---|

*Source: Compiled by the Author.*

The Report is tasked with assessing the three changes in the body of regulations on PPPs: (1) new methodology for calculating the concessionary payments, (2) changes to the Law on the Stimulation of PPPs, and the most comprehensive one – (3) the changes to the Law on Concession. In line with the process tracing methodology, our first task was to outline the hypothetical causal mechanisms at play in each of the laws.

The new methodology for calculating the concessionary payments. The following components of the reform generated early optimism among the iMoRE experts:

- (a) The calculation is based on the profit margin or market value of assets instead of utilising the principle of capital intensity;
- (b) Simplifying the calculation of the payment whereby the same standards apply for different sectors;
- (c) Introducing transparent formulas for concession payment calculation which takes into account the type of concessionary payment;
- (d) Building a link between the sum of the suggested concessionary payment and the selection process.

In the earlier version of the regulations, the Government used the capital intensity criteria for concessionary payments' calculations. Capital intensity signifies the degree of capital investments needed prior to starting the operation. Capital intensive investments require high up-front costs, which lead to lower liquidity of capital on the part of the investors. At the same time, capital intensive investments typically have long asset life and stable generation of profits. Regardless of the returns, investors often require more incentives to overcome the risks involved in managing capital intensive projects, such as investments in core infrastructure<sup>5</sup>. High risks are associated mainly with the stages of pre-development and construction. The bonus for the investors is the ability of such investment to generate stable cash flows once moved into operation. In case of the PPPs, the cash flow can either be generated with customer payments for services, or with the government availability payments (AP) schemes. In case of the latter, the government is submitting performance-based payments to the concessioner according to the schedule and additional conditions set in the contract.

Despite the importance of taking into account the scale of investments and their rate of returns, calculating concessionary payments based on capital intensity does not incentivise the private sector to increase its returns. The logic is that concessionary payments are abolished and/or reduced for a fixed period to stimulate long-term capital-intensive investments. Adopting a capital intensity-based formula can be seen as an additional stimulus for the investors to bid on a particular object. At the same time, this alone cannot shift investors' preferences and generate considerable interest to a given PPP project among investors. In itself, it also fails to acknowledge the importance of profit-generation in setting

<sup>5</sup> OECD, 2015. Available at:

<http://www.oecd.org/pensions/private-pensions/Infrastructure-Financing-Instruments-and-Incentives.pdf>

the payment schedule. It also prevents from using the payment amount and schedule as one of the criteria when assessing bids. Hence, while the previous system was well-intentioned, we have not found sufficient proof to suggest that the concessionary payment calculation that is based on capital intensity principle is capable of generating an increased appetite for concessionaires. Besides, it does not allow to assess and account for cost-efficiency of the suggested technology, and its ability to generate profits and be sustainable. Instead, the new changes allow for some flexibility around concessionary payment calculation. The overarching logic is that the concessionary payment consists of the standardised rate plus a calculation based on the profits generated should both satisfy the interest of the state in receiving stable budgetary contributions, and only increase the payments in case the PPP venture is capable of generating returns. The projected results of the reform were broadly described as (1) an increasing degree of transparency, (2) the Government receiving higher concessionary payments, and (3) improving the interest of private capital in participating in PPPs in Ukraine.

Another key piece of legislation that received positive acclaim both from domestic and international experts is the updated Law on Concession. Indeed, the law adopted a number of changes that are conducive to setting up PPPs. Among them, the following:

- (a) Introduces a unified procedure for initiating and taking decisions on PPPs;
- (b) Sets out clear and transparent criteria for the pre-selection, bidding and selection of PPP partners, including concessionary competition and dialogue;
- (c) Allows for the introduction of international independent experts to the Selection Committee;
- (d) Sets out the procedural aspects for transforming the lease agreement into concession agreement, based on the request of the leaseholder and upon fulfilling the investment requirements;
- (e) Improves contract management by introducing an option of switching concessionaires in case of their inability to fulfil the conditions of the contract;
- (f) Allows to resolve disputes using international commercial of investment arbitration;
- (g) Regulates PPPs for natural monopolies.

Projected outcomes of the changes to legislation described above included increase in investments, effective management of state and communal property, and quicker modernisation of assets, particularly infrastructure assets.

Finally, 2019 saw a recent edition of the Law on PPPs which concentrated on resolving some of the administrative complications associated with PPPs in Ukraine. Among other things, the changes simplified the procedure of procurement of goods and services from private partner(s) as part of a PPP. It also allowed for new types of PPP contracts while clarifying the distinctions between supplier contracts for development of infrastructure assets sponsored by the state or regional budgets, and PPPs. The main improvements are:

- (a) Elimination of the need for a standard procurement procedure from a private partner supplying goods and/or services as part of a PPP contract;
- (b) Allowing other types of contracts, including those on property management to be covered under a PPP agreement;
- (c) Where a private partner uses land as part of a PPP agreement, it is allowed to be covered by the PPP agreement without the need to sign additional agreements;



- (d) Where a new asset is created as a part of a PPP agreement, allowing for a joint property to be established according to the PPP agreement in line with the agreed upon distribution of rights;
- (e) Regulates contract termination whereby contract termination is possible by either party, under the conditions specified in the contract, and with the consequences specified in the contract.

The projected outcomes included (1) reduced administrative burden, and (2) increased transparency.

## Theory of Change

The assessment showed that the existing government system facilitates a comprehensive approach to managing traditional public capital investments and PPPs. At the same time, according to the experts of the World Bank and in line with the current dialogue with the Government, the public capital investment management system for PPPs still has significant gaps, such as the:

- Lack of a strategic view on public investment priorities, which leads to often inadequate decisions on what project proposals should be considered for public versus private investment and under what implementation method;
- Lack of clear regulations and detailed guidelines for project identification, development, selection, procurement, contract management and implementation, which creates significant risks in the use of PPPs;
- Inadequate processes and limited technical capacity for developing and implementing PPP projects;
- The absence of a centralized register (database) of the existing PPP-type projects, with limited and scattered data preventing the GoU's ability to know the extent of fiscal and other risk exposure in the existing PPP-type projects under implementation.

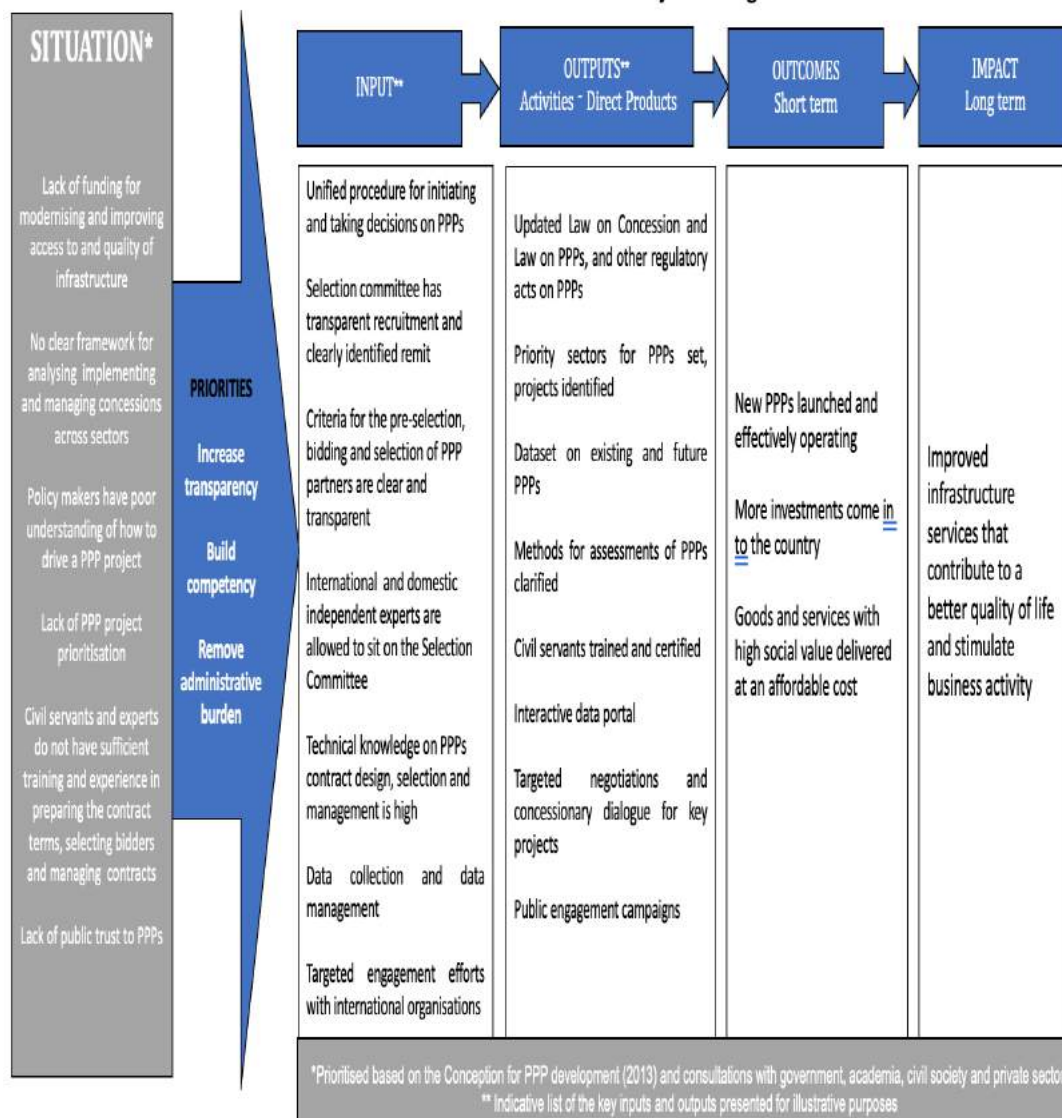
All of the above were identified by international partners, as well as outlined in the Government's Concept for Development of PPPs for 2013-18. Causes of the previously noted problems with PPP projects in Ukraine have been identified as follows:

- The lack of availability and transparency of data on PPP-type projects;
- The weak technical capacity of the Government for developing and implementing PPP projects limits the quality of projects, while increasing their risk exposure;
- Inadequate regulations, processes, and government capacity to develop and implement PPPs can undermine their fiscal sustainability;
- Lack of a robust and comprehensive PPP framework that would be sensitive to political economy considerations, and prevent high risk exposure to corruption, collusion, and bid-rigging.

The discussed changes in the Ukrainian legislation provoked a positive reaction among experts given that from the time the first version of the Law on Concessions till the reform process was streamlined in 2016-18, there were no state-level PPPs in the country. This was seen as one of the failures of the state. Besides, in private conversations experts confirm that the entry costs from private partners were unreasonably high, mainly in terms of administrative burden and time spent on preparing the necessary documentation. At the same time, returns were hard to predict: at the end of the day, the public body had the right to reject an unsolicited proposal which was used as a default option under the conditions of lack of political will to implement the comprehensive reform. Given this, and with the help of international partners, Ukrainian government gradually introduced a number of legislative changes that can be conceptualised as a reform of PPPs (including concessions). The theory of change of the reform is outlined in the Box 1 below.

*Box 1. Ukrainian PPP Reforms: Theory of Change*

## Ukrainian PPP Reforms: Theory of Change



\*Prioritised based on the Conception for PPP development (2013) and consultations with government, academia, civil society and private sector.

\*\* Indicative list of the key inputs and outputs presented for illustrative purposes

*Source: Compiled by the Author*

The logic of the reforms does confirm the overarching theory of change, with most of the adapted regulations fitting into the theory of change presented above. Some aspects, such as systemic work on training of civil servants and experts, regulating and/or providing guidelines on social and environmental protection, reporting requirements and standards, and effective auditing of projects are the reforms still in the making. However, the present changes discussed in the paper present strong steps on the way to implementing a coherent PPP framework.

To conduct a more detailed analysis into the theory of change, we should follow the logic of process tracing, identifying the assumptions made by the experts and policymakers. Below is our attempt at tracing the process of PPP development and management that encompasses the main steps throughout the project life cycle (see Table 2).

*Table 2. Process tracing map for a typical PPP*

| Stage   | Assumptions made   |
|---|--|
| <b>Setting priorities</b>                     | State has a strategy of development which can guide its prioritization of projects. OR Party programme or Government memorandum signals which areas are of high importance to the Government and are seen as priority for PPP development. |
|   | Strategic and high-priority reforms are streamlined by a department, agency or other body within the executive branch.   |
| <b>Initial VfM assessment</b>                 | There is a programme and clear and transparent assessment criteria for PPP project prioritisation.   |
| <b>OPTIONAL</b>                               | There is a designed PPP unit in charge of streamlining PPPs, assisting with PPP-related tasks throughout the project cycle, and collaborating on these issues across ministries.   |
| <b>Structuring and evaluation</b>             | There is expertise and capacity for conducting project-related assessments and a specific department/public body that is in charge of PPP assessments within the Government or individual ministry(-ies).                                  |
|   | The criteria for project assessments are clear both on general and sectoral levels.  |
|   | There is capacity to consult experts when needed.  |
| <b>Design of the ToC and other agreements</b> | The body responsible has the capacity to draft detailed terms and conditions that provide sufficient technical details for private partners to develop their bids, and is realistic.   |
|   | The project is commercially attractive.  |
| <b>Project selection</b>                      | The body responsible has the capacity to choose the most appropriate strategy for conducting the selection.  |
|   | Private partners are interested and are submitting high-quality bids   |
|   | The competition is organized in accordance with the regulations and is competitive, effective and transparent.   |
|   | Contract is signed according to the previously set timeline and includes an agreed upon set of performance-based indicators.   |
| <b>Management</b>                             | The Government has resources and capacity to conduct or delegate management of the PPP.  |
|   | The body responsible for contract management and oversight has competencies in this area and is independent.   |

|  |  |
|--|--|
|  | The private partner(s) will diligently submit high quality, true and correct information.  |
|  | The body responsible will conduct necessary monitoring based on the data received, and public its conclusions in open access.          |
|  | The Government will use its independent Supreme Audit Institutions (SAIs) in order to conduct project audit on an <i>ad hoc</i> basis. |
|  | Performance management mechanisms embedded in the contract work and there is no overuse of state support mechanisms.                   |
|  | Dispute resolution works effectively.  |

In the case of Ukrainian PPP reforms, we observe systemic reforms aimed at ensuring that there are the necessary institutional and functional characteristics for developing and managing PPPs throughout the project cycle. Below is the adaptation of the process-tracing assumptions for the case of PPP reforms in Ukraine as of early 2021. The ranking (1-5) is derived from expert opinions. The grading scheme is as follows:

|   |   |
|---|---|
| 1 | Lack of progress is in terms of legislative norms and regulations and in practice   |
| 2 | Lack of progress is in terms of legislative norms and regulations and in practice but expert discussion ongoing   |
| 3 | Some progress but existence of considerable drawbacks and/or limitations; further reforms required  |
| 4 | Presence of regulations, however some institutional capacity restrictions   |
| 5 | Legislatively established; no restrictions limit the use of the established mechanisms (even if financial burden could potentially affect the incentive to use the specified mechanism) |

*Table 4. Process Tracing Map for the PPP Reforms in Ukraine*

| Assumptions made  | Ukrainian case  | Ranking 1-5 |
|---|---|-------------|
| <b>Setting priorities</b>   |   |             |
| State has a strategy of development which can guide its prioritization of projects.<br>OR Party programme or Government memorandum signals which areas are of high importance to the Government and are seen as priority for PPP development. | Ukrainian Government regularly produces multiple strategies of development, including at the level of CMU and individual Ministries. There is a lack of coordination on the strategic level. Party programmes & memorandums are not representative of the sectoral priorities for PPPs. | 1           |
| Strategic and high-priority reforms are streamlined by a department, agency or other body within the executive branch.  | There is some understanding that PPPs are streamlined by the Ministry of Infrastructure and the PPP unit. At the same time, there is a dedicated agency dealing with PPPs at the Ministry of Economic Development and Trade that started its work in 2019.                              | 1           |

| <b>Initial VfM assessment</b>   |   |   |
|---|---|---|
| There is a programme and clear and transparent assessment criteria for PPP project prioritisation.  | No  | 1 |
| There is a designed PPP unit in charge of streamlining PPPs, assisting with PPP-related tasks throughout the project cycle, and collaborating on these issues across ministries.                          | PPPs are streamlined by the Ministry of Infrastructure's PPP Management Office and the PPP Agency at the Ministry of Economic Development and Trade. Potential coordination problems can occur given that the Ministry of Infrastructure is more advanced in terms of developing PPPs and has a pipeline of projects.   | 2 |
| <b>Structuring and evaluation</b>   |   |   |
| There is expertise and capacity for conducting project-related assessments and a specific department/public body that is in charge of PPP assessments within the Government or individual ministry(-ies). | The expertise is being developed with the help of international partners. The legislation allows for using international consultants to assist the Government in case of need.  | 3 |
| The criteria for project assessments are clear both on general and sectoral levels.   | Yes, however potential issues with the methodology of VfM and risk assessments are not unique to the case of Ukraine and some learning by doing is to be expected. This is related to inability to fully model the situation given the length of contracts, as well as the nature of risks. Often, <i>post factum</i> this can imply that PPPs were not necessarily the best value for money even though it might seem so at the time of taking the decisions. Environmental and social assessments require more details. The standards of assessment and of the monitoring that follows are to be set. | 3 |
| There is capacity to consult experts when needed.   | Yes.  | 5 |
| <b>Design of the ToC and other agreements</b>   |   |   |
| The body responsible has the capacity to draft detailed terms and conditions that provide sufficient technical details for private partners to develop their bids, and is realistic.                      | Yes, and the capacity of a PPP unit is being developed with the assistance of the World Bank and the International Finance Corporation.   | 4 |
| The project is commercially attractive.   | The pipeline of projects rolled out by the Ministry of Infrastructure is commercially sensible. Commercially unattractive projects are unlikely to receive investors' interest during the early dialogue with the Government. This can result with the waste of administrative resources for their initial development and rolling out and should be avoided.   | 4 |
| <b>Project selection</b>  |   |   |
| The body responsible has the capacity to choose the most appropriate strategy for conducting the selection.   | Yes, and the capacity is being developed and scaled up.   | 3 |
| Private partners are interested and are submitting high-quality bids  | Yes (lack of information to disprove)   | 3 |
| The competition is organized in accordance with the regulations and is competitive, effective and transparent.  | Yes. The possibility of the competing interest trying to overrule the decisions in Ukrainian courts and block the PPP contract are minimised due to the set timelines and high political salience of the  | 3 |



|  |  |   |
|--|--|---|
|  | nation-level PPPs. Issues can emerge on a local/regional level and should be closely monitored.  |   |
| Contract is signed according to the previously set timeline and includes an agreed upon set of performance-based indicators.           | N/A  | 3 |
| <b>Management</b>  |  |   |
| The Government has resources and capacity to conduct or delegate management of the PPP.  | As of now, given the early stages of PPP implementation, there is a lack of information to disprove. In principle, yes but practice will show how effective the management of PPPs is.   | 3 |
| The body responsible for contract management and oversight has competencies in this area and is independent.                           | As of now, given the early stages of PPP implementation, there is a lack of information to disprove. In principle, there are prerequisites that suggest that the Government is working on developing such capacities.  | 3 |
| The private partner(s) will diligently submit high quality, true and correct information.  | As of now, given the early stages of PPP implementation, there is a lack of information to disprove. This remains to be seen and should be closely monitored by the Government and experts.  | 3 |
| The body responsible will conduct necessary monitoring based on the data received  | Yes, but the reporting requirements are not standardised. It is important that the initial monitoring reports set a high-quality standard. On top of that, it is important that the civil servants and political elites do not have political bias and overcome (dis)incentives to publish negative reports.   | 3 |
| The monitoring report and its conclusions are published online   | So far, monitoring of implementation of the major public investment project was carried out in according to the established procedures; however, the results were not published. It is important that PPP monitoring reports are published regularly, as is now required by law. It is important to ensure a balance between how informative or even critical the monitoring reports are, and the need for them to be transparent. | 3 |
| The Government will use its independent Supreme Audit Institutions (SAIs) in order to conduct project audit on an <i>ad hoc</i> basis. | No   | 1 |
| Performance management mechanisms embedded in the contract work and there is no overuse of state support mechanisms.                   | Yes, but the practical application of performance management and quality of reporting of private partners remains to be seen as more PPPs are implemented. The main danger is for the state to become a captive, i.e. forced to use state support in order to ensure that PPP projects deliver. This danger is not unique to Ukraine and was noted in the National Audit Office's VfM assessments of PPPs and PFIs in the UK.      | 3 |
| Dispute resolution works effectively.  | Legislation allows for using international commercial arbitrage for settling disputes. The potential downside is the restrictive cost that incentivises the Government to invest more rather than start a dispute. On the plus side, this ensures  | 5 |

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|  | that investors are protected despite the drawbacks of the court system. |  |
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Note: Colour coding as follows: green – significant degree of certainty; yellow – partially present; red – requires additional reform efforts and/or practice development

## Recommendations

As of now, the Government maintained its focus on developing and implementing a comprehensive PPP framework. It is particularly admirable that this was the case despite the changes in power. This suggests that PPPs are indeed seen as something crucial for developing and modernizing infrastructure and inviting more private investments into the country.

Some of the areas of PPP reforms have seen particular success. Few things have to be mentioned here. First of all, most assessments conducted prior to PPP competition and as part of the bid submission are well-defined in legislation, clear, and transparent. The authorities have a very limited opportunity to interfere and the procedure largely corresponds to the best international practice. Moreover, the transparency requirements are met, and all the necessary non-commercially sensitive information is supposed to be shared publicly with free access online. Finally, international law can be chosen, and disputes can be resolved using domestic courts, international commercial arbitration, or dispute resolution mechanisms envisaged by international investment agreements. It is also important to note that the arbitration decisions are enforceable in Ukraine according to the Law on International Commercial Arbitration. Without doubt, these three crucial components of the PPP reforms signify the movement in the right direction.

Other areas require some additional attention. Given the process-tracing analysis above, the researchers arrived at the following recommendations:

1. **There is further work to be done so as to ensure a balance between centralisation of power and expertise in the PPP agency and sectoral work on PPPs within Ministries.** There is some potential for dispersion of power. Initially, in 2017 the PPP unit was founded under the Department of Attracting Investments of the Ministry of Economic Development and Trade. Its main tasks are working on reviewing the old and introducing the new legislation on PPPs. Not all of the legislative acts drafted by the Department come into the Parliament through the Ministerial legislative initiative as often the legislative acts are taken on and initiated by the MPs. From 2019, the Agency on Matters of Support of the Public Private Partnership under the Ministry of Economic Development and Trade (“PPP Agency”) was introduced to take on consultative functions. The Agency is supposed to complement the work on PPP regulation, providing policy guidance and promoting PPP projects on a national and regional levels. At the same time, there is considerable expertise and leadership potential on PPP reforms within the Ministry of Infrastructure where there is a PPP Management Office SPILNO. The Office is tasked with (1) developing legislation on PPPs, and (2) preparation and realization of the three first pilot projects – ports “Olvia”, “Chornomorsk”, and “Kherson”. It is important that the PPP Agency under

the Ministry of Economic Development and Trade and the PPP Management Office under the Ministry of Infrastructure collaborate with each other and develop joint expertise in preparing and managing PPP projects. In principle, the PPP Agency and the PPP Management Office are both tasked with assisting with legal reforms on PPPs. The Management Office, however, has a broader remit in terms of providing technical input. From our conversation with the PPP Agency, they seem to also be fairly involved (and/or ready to be involved) in technical PPP assessments, risk assessments, and social and environmental assessments. There is a grey area in terms of delineating the spheres of interest and specialization of each of these bodies. This is of particular importance and has to be clarified at the early stages of the PPP Agency's existence. At the end of the day, the PPP Management Office is a donor-funded entity under the ministry and its capacity to retain staff in a longer-term perspective can be questionable. In particular, one could hope that the PPP Management Office will be incorporated into the Ministry structure and financed by the Government. For now, it is important to ensure that there is sufficient collaboration and knowledge exchange between the PPP driving forces within the Ministry of Economic Development and Trade and other line ministries coordinating PPP projects.

2. **Project prioritization remains one of the key constraints.** Government should send clear signals to investors and outline its long-term priorities in the PPP area. Recently, the Government has approved a [list](#) of priority projects which is a step forward. At the same time, this does not explain how projects are prioritised and which criteria are taken into account when prioritizing one project over the other. The Government should also develop more precise prioritisation criteria for PPPs. Especially in case of unsolicited proposals prioritization can be less straightforward. Among other things, that can also be particularly useful for regional-level PPPs. Prioritization is important because setting up a PPP project does involve risks that the state takes upon itself. Given that state guarantees are an option, it is in the state's interest to balance its risks and first only get into projects that are of high priorities and where risks are relatively low/manageable. In principle, it is advisable that the PPP framework prescribes the need for consistency between PPP projects and investment priorities of the Government. At present, the procuring authority does not evaluate PPP projects in accordance to their correspondence to Government priorities.
3. **Procurement strategy has to be further elaborated on in the legislation.** It is considered to be a good practice to have an assessment to plan and better prepare the tendering process in advance. This can help save time at the later stages, as well as ensure that the feasibility study and market assessments are more accurate.
4. **The work on certification of experts should continue and be reasonably scaled up.** The current approach of using internationally recognised certification is proving itself effective. At the same time, due to high volatility of staff retaining talent remains a challenge within the Ministries. The issue of training and retaining highly skilled and

trained staff is likely to emerge within the profile ministries, as well as within the procurement authority. For instance, the bid evaluation committee members do not currently face a qualification requirement. However, it is important that the bid evaluation committee members have sufficient capacity to evaluate bids, and introducing qualification requirements can be a sensible step in this direction.

5. **Value for money assessment which takes into account alternative solutions should be further explained within the expert field.** It is important that it is taken critically and there are expert discussions that allow for some learning by doing and ensure improved quality of the VfM assessments. Given the complexity of the assessment, as well as its long-term implications which make it hard to predict price fluctuations and realistically assess project risks, civil servants and experts should be alert to the VfM limitations and maintain their independence of judgement.
6. **Green policies have to be strengthened and regulations on environmental assessments made clear and transparent.** Together with the initial assessments, there should be criteria set for on-going monitoring of PPP projects. As part of the PPP project performance analysis, a detailed study of environmental impacts of the PPP implementation is submitted for as part of the project proposal from a private partner or according to the initiative of the authorizing body. For the environmental assessments, there is a generic methodology adopted. Such assessments have to outline the information on the socio-economic implementation of public-private partnership with performance, the beneficiaries of the project, and the social and economic benefits and consequences of project implementation. However, more details are required specifically for environmental assessments. The environmental assessments have to be aligned with the Government's environmental and climate change requirements and have climate-sensitive infrastructure analysis embedded within them. Where possible, the assets should be developed and built taking into account the need for climate-resilient infrastructure. Now environmental and climate change risks are not specified as the type of risks evaluated or as a part of the risk assessment.
7. **Social assessment should be further developed,** by including procedures of transparent and effective consultation with affected communities, dispute resolution, gender-sensitive impact analysis, and social indicators monitoring. Social assessments are submitted as part of the PPP project performance analysis, in the same way as the environmental assessments. Social risks are also outlined in the risk assessment. At the same time, no methodology of such assessments is specified which means that the quality of such assessments is likely to be low. Unlike for the environmental assessments, there is no consultative process with affected communities as part of such assessments.
8. **More focus should be put on contract management.** There is a running assumption that private agents are rule following and honest. At the same time, the Government

should be prepared to use its informal power, as well as sticks and carrots to ensure projects are well-managed. There should be clear rules in terms of private partners' responsibility for violating the contract. This is of utmost importance given that PPPs can create conducive conditions for holding the Government captive: if PPP projects fail, the Government is typically urged to step in with state support packages, given the social and/or environmental implications of PPP projects. It is important that any emerging risks and/or problems with the PPP project are reported on early and thus can be managed more effectively. Measures should be taken and practices developed to ensure that the government is not a captive that has to sponsor failing PPP projects due to the risks of pulling out.

9. **It is important to introduce transparent auditing of projects and programs designed using PPP contracts.** Given that at present the Supreme Audit Authority in Ukraine does not conduct *a posteriori* Value for Money Audit, this area requires additional attention. There are possibilities for international collaboration to learn from best practices within the EU, in the UK and from other countries.
10. **It is advisable not to pursue too many projects at once so that there is a possibility to learn from mistakes.** Some learning by doing is natural, particularly in terms of ongoing negotiations and contract management of projects. Especially on a regional and local level projects should not be rushed so that there is a better understanding of how to effectively develop and manage a PPP project throughout the project cycle.