



Research article

UDC 34:004:347.4:004.4

EDN: <https://elibrary.ru/lvpigr>

DOI: <https://doi.org/10.21202/jdtl.2024.22>

Public-Private Partnership Agreement in the Context of the Matrix for Assessing their Legal Parameters and Digitalization

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Keywords

agreement,
conflict of interest,
contract,
digital technologies,
digitalization,
law,
legal assessment,
public-private partnership,
restraint of competition,
risk management

Abstract

Objective: by reviewing the legal aspects of public-private partnership agreements, to synthesize their main provisions into a common matrix, which, when digitized, can be used to standardize and simplify the formulation of agreement parameters.

Methods: the author relied on comparative-legal analysis of scientific literature, legislation and Internet sources on public-private partnership, supplemented by a review of public-private partnership agreements in various socio-political spheres, which made it possible to create a science-based and practice-oriented matrix that can serve as a tool for drafting public-private partnership agreements.

Results: national aspects in the legal regulation of the said relations in different countries were highlighted; a number of peculiarities encountered in public-private partnership agreements were described.

Scientific novelty: taking into account the most important legal peculiarities characteristic of different countries, a matrix for drafting public-private partnership agreements is presented, including eight main parameters: 1 – value received, scope, benefits and risks, 2 – route to market, 3 – restraint of competition, 4 – conflict of interest and procurement issues, 5 – powers, approvals, legal assessment, 6 – liabilities, dispute resolution, 7 – ownership structure, governance and level of autonomy, 8 – exit strategies. Depending on the priorities identified, the matrix can be modified, taking into account that priorities define and shape the specific parameters of each individual partnership.

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Practical significance: the matrix obtained can become a planning tool used to analyze and understand the relationships between the eight legal parameters necessary for the formation of relations in the sphere of public-private partnership. It may serve as a legal reference point for the formulation of public-private partnership agreements around the world, and will contribute not only to the revitalization of public-private partnerships, but also to a proper understanding of obligations, responsibilities and limitations. The recommendations provided in the study show direction for the evaluation of public-private partnerships, allowing clear conclusions to be drawn about the partnership. Digital accessibility provided, the proposed matrix will be of interest to many organizations that use public-private partnerships in their professional activities.

For citation

Molintas, D. T. (2024). Public-Private Partnership Agreement in the Context of the Matrix for Assessing their Legal Parameters and Digitalization. *Journal of Digital Technologies and Law*, 2(2), 430–449. <https://doi.org/10.21202/jdtl.2024.22>

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Introduction

Investing in built environment brings forth significant economic progress and social development. Built environment stimulates trade that results in output growth, increased microeconomic efficiency and reduced transaction costs (Jayachandran, 2021). In poor nations where one finds Government budgets already fully allocated, Public Private Partnerships PPP dominate the procurement platform for built environment (Moffatt & Kohler, 2008). Numerous PPP Contracts had been forged as a mechanism to raise risk tolerance and prolong project life¹.

A compilation of critical legal points across regions, are put together in this study to form a matrix to digitalize of the legal features of PPP. A PPP requires a definitive instrument that outlines the understanding between the parties to the intended venture (Leigland, 2018). The contract ought to outline the contributions, expectations, obligations, rights, and duties and responsibilities of the parties. A contract sorts out the key elements such as the mechanism on how profits and liabilities are to be assigned, specifically to avoid disputes (González-Ruiz et al., 2018).

To determine a best fit PPP contract, an appraisal tool is developed using a 4×4 matrix. The argument of function on the vertical axis and horizontal axes are defined below. Noteworthy legal points of different nations are highlighted in this study. These are particularly interesting stipulations that standout among the several Government contracts.

1. Value captured, scope, benefits and risks

1.1. Powers, approvals and due diligence

Chinese Law allows for the flexibility in the determination of both, the composition of board of directors alongside delimit of authority over the operations. Indonesian Law permits Government to enter into PPP Contract with private entities for infrastructure projects². The process for entering into such contracts is governed by PPP laws and regulations, as well as Presidential Regulation No. 38 of 2015 for the co-operation between Government and the business entity for infrastructure development (Rybníček et al., 2020; Buso et al., 2021).

PPP Contracts in the State of Queensland do not stipulate guarantees of the State over the obligations and performance over the partnership. In the United Kingdom, centralization and formality is a foremost concern over the creation of special purpose vehicles to ensure

¹ The World Bank. (2017, April 27). PPP Reference Guide 3.0 (Full version). <https://clck.ru/3AgJNx>

² Eddymurthy, I., & Mooduto, N. (2017). Joint ventures in Indonesia: overview. Jakarta: SSEK Indonesian Legal Consultants. <https://clck.ru/3AgJS8>

its function. Under Australian Law, the PPP is established when significant synergy is demonstrated. Such can be substantiated in increased export earnings or cheaper goods (Jokar et al., 2021). A PPP must substantiate efficiency or reduction in costs by reason of the activity that a project or program is being conducted by the group as a whole rather than by individual members of the group³.

1.2. Ownership structure, governance and level of autonomy

PPP is not expressly regulated under Japanese law and partnership contracts are regulated under the Civil Code Act No. 89 of 1896 and the Companies Act No. 86 of 2005⁴. A PPP partner under Belgian legislation is expected to contribute 25 percent of the registered capital. The minimum capital share to establish PPP with a public company is €61,500. Indonesian Law⁵ stipulates PPPs in a legal entity that has limited liability status, under Company Law (Chen & Hubbard, 2012).

PPP Governance structures with high to activity in policy functions include: The Mission d'appui à la réalisation des partenariats public-privé /MAPPP⁶ as the governance institution in France; the Special Secretariat for PPPs Dissemination as the governance institution in Greece; the Unita Tecnica Finanza di Progetto /UTFP, the technical unit for project financing in Italy⁷; in Portugal by the Commission for PPPs; and The United Kingdom for Infrastructure Local Partnerships (Demirag et al., 2011; Rybnicek et al., 2020; Ito, 2020).

1.3. Liabilities, dispute resolution

Indonesian Law stipulates the aggregate issued and paid-up share capital must be no less than 25 percent of the PPP authorized share capital. An exception for micro, small and medium enterprises, for authorized share capital below IDR50 million, stipulated in Government Regulation No. 29 of 2016, with flexible payment for shares can be made in cash or in kind. Legislation in Brazil⁸ stipulates a corporation and sociedades limitadas

³ Government of Australia. (2016). National Guidelines for Infrastructure Project Delivery. Canberra: The Department of Infrastructure, Transport, Regional Development, Communications and the Arts. <https://goo.su/9k38IH>

⁴ Association of Southeast Asian Nations. (1980). Supplementary Agreement to the Basic Agreement on Asean urea project. Indonesia. Jakarta. <https://clck.ru/3AgJbY>

⁵ Government of the Republic of Indonesia. (1979). Agreement between the Government of the Republic of Indonesia and the United Nations High Commissioner for Refugees regarding the Establishment of the Office of the UNHCR representative for Indonesia. Jakarta: Government of the Republic of Indonesia. <https://goo.su/kUKOk>

⁶ MAPPP – Mission to support the implementation of public-private partnership contracts. (In French). <https://clck.ru/3AgJhn>

⁷ Presidenza del Consiglio dei Ministri. (2010). Unita Tecnica Finanza di Progetto (UTPF). (In Italian). <https://clck.ru/3AgJim>

⁸ National Congress. (2004). Brazil's Public-Private Partnership Law. Brasilia: Lei de Licitações e Contratos Administrativos. (In Portuguese). <https://goo.su/yOEZc5>

is to afford the limited liability protection to shareholders; except for environmental and anti-trust laws, anti-bribery, labour case laws and consumer laws—where a shareholder can become personally liable (Kurniawan et al., 2015; Wang, 2003).

Queensland Courts capacitate the PPP to apply for statutory order for a trust, sale or partition to resolve dispute resolution. At the same time, the parent company Board of Directors is accountable to ensure the guidelines are followed. Specifically for Public Private Partnerships in China, foreign participant is required to pledge no intention to intrude upon China's sovereignty or to exploit its resources (Salem, 1981); Legislation for PPP dispute⁹ resolution ought to avoid lengthy lead times before proceedings commence; and better not seek to oust the jurisdiction of the courts to give urgent interlocutory or final relief.

1.4. Exit strategies

A noticeable omission in Thai laws on early termination in the PISU Act, although it is featured in the EEC framework and the New PPP Act. In the event that early termination is not the fault of the private entity, Government is to appropriately compensate what is fair using proper calculation mechanism. This reflects the partnership concept and ensures private participation is carefully qualified. For cases where the early termination is because of acts or deeds by the private entity; the state is entitled to recover its loss arising out of such breach (Garg & Garg, 2016, Wegrich et al., 2017; Hart, 2003).

British Law permits the termination of PPP operations by mutual consent of the parties; otherwise a breach by one of the parties or by force majeure. In Korea, foreign-invested enterprises and assets invested by foreign investors are not subject to nationalization or seizure by the State. A foreign investor is permitted to reinvest a portion of profits, or the all of it within the territory of the DPRK (Lee, 2003).

Chinese Taxation Law encourages the deposit of funds in the Bank of China by permitting a tax refund on the reinvested amount. By so, the whole or part of the income tax already paid on the reinvested portion may be recovered. In the event that the nationalization or seizure by the State of enterprises and assets, fair compensation is to be paid (Jin & Huang, 2021).

⁹ US Security Exchange and Commission. (2008). Sino-Foreign Joint Venture Contract by and between Sun Far East Limited and Zibo Bao Kai Trading Company, LTD. for establishing Taixing Zhongneng Far East Silicon Co., Ltd. USA: SEC. <https://clck.ru/3AgJsr>

2. Route to market

2.1. Powers, approvals and due diligence

In Spain, the Unión Temporal de Empresas \UTE, is the temporary consortium in effect for PPP. In the USA, the Special Purpose Vehicle dictates the areas of liability and allocation of exposure such as defense hold harmless provision and indemnification (DoD NASA, 2020; Noring, 2019). In Queensland Territory, when the disposal of a PPP Interest is decided in whole or in part; a Deed of Covenant is executed between existing parties and an incoming participant. AusTrade PPP Grant is a special Public Private Partnership where the Australian Government issues a Grant to SMEs to co-operate to pursue specific export activities. Approval enables the group to be eligible, to access the grant scheme of AU\$ 150,000 annually¹⁰ at maximum.

2.2. Ownership structure, governance and level of autonomy

Public Private Partnership units structured under Ministries or institutions, having policy functions that churned out very low to medium activity, or closed down: Austria PPP Kompetenzzentrum; Czech Republic PPP Centrum; Denmark by the PPP knowledge unit; Netherlands by the PPS support; Serbia by the Odbor partnerských projektov; Slovak Republic Sektor za upravljanje javnega premoženja or Division for public property management. Thai law stipulates the Cabinet as final approving authority to the private entity selection and the draft PPP contract during the procurement stage (Hennessey, 2021).

The role of the Cabinet during the procurement stage may be reduced in the upcoming New PPP Act to increase efficiency and flexibility in the PPP process (Mirzaee & Sardroud, 2022). National infrastructure procured through PPP includes the U-Tapao International Airport, High-speed railway connection to three major airports, Map Ta Phut Industrial Port Phase III, Laem Chabang Port Phase III and Digital Park Thailand¹¹. Indian Law¹² stipulates that the Government entity intending to enter PPP with the private sector must first explore the possibility of meeting objectives through alternate means, other than PPP (Selim & ElGohary, 2020). In Europe, the structure of the PPP must primarily be compatible with the internal market to promote economic development; particularly in regions where the standard of living is abnormally low or there is underemployment (Yurdakul et al., 2022). The EU regions referred to in Article 349¹³, in view of structural, economic and social situation.

¹⁰ Austrade Export Market Development Grants Canberra. (2020). <https://goo.su/rnYK>

¹¹ Ponte, J. de. (2021). Delivering Thailand's Infrastructure Pipeline – The PPP push. Melbourne: DLA Piper Global Services LLP. <https://clck.ru/3AgK8V>

¹² Ministry of Finance. (2009). Joint Ventures: a guidance note for public sector bodies forming joint ventures with the private sector. New Delhi: Government of India. <https://clck.ru/3AgK9j>

¹³ Hatton, C., Cardwell, D., & Botts, B. (2020, July 8). European Union: Joint Ventures. Global Competition Review. <https://clck.ru/3AgKCF>

2.3. Liabilities, dispute resolution

Arbitration is not practiced under Cyprus legislation determined the District Courts as the competent authority to act on dispute resolution¹⁴. Indians Law determines the Government Directors on the Board of PPP accountable and liable for certain actions and decisions of the PPP; for any lapses or failures (Liu et al., 2016a; Ma et al., 2023; Liu et al., 2016b; Rufín & Rivera-Santos, 2012).

While in Europe, the European Economic Interest Group /EEIG are the established Council. The structure is defined through a contract made between the participants, who have joint liability for the debts and liabilities of the EEIG. Unless defined otherwise, the EEIG appoints the managers of the PPP (Whiteside, 2020).

Specific to Queensland Territory, the PPP contract include the right of access books and accounts of the GOC PPP by the GOC and its auditors. While under Chinese Law, PPP provides significantly greater degree of flexibility in determining the composition of the controlling organ of the joint venture than do a number of other socialist countries (Wang et al., 2019).

2.4. Exit strategies

British Law stipulates the termination of the PPP may be done by mutual agreement of the parties; otherwise by a breach by either one of the parties; or by force majeure.

PPP law in UK permits shareholder exit options through call options over a shareholder share or offering and pre-emptive right. European antitrust or competition laws underscore structure and purpose of the venture. The PPP must consider the market in which it competes, and any restrictions that it imposes on the parties that can generate efficiencies; otherwise encourage anti-competitive restriction, such as price-fixing or market sharing (Owen Liu, Xiong & Zhu, 2007).

PPP prescriptions observed under Emirati Law¹⁵ are presumed restrictive. These dictate confidentiality and non-solicitation clauses, prohibiting shareholders from soliciting for own purpose. The disposition and acquisition of shares that might contain 'piggy-back', 'tag-along' or 'drag-along' rights in the event of a third- party share sale, such as pharmaceuticals industry or the petrochemicals industry among others (Sharma, 2022).

¹⁴ The Private Sector Participation Governing Rules. <https://clck.ru/3AgKRH>

¹⁵ Mohammed bin Rashid Al Maktoum, Ruler of Dubai (2017). Law No. (22) of 2015 Regulating Partnership between the Public Sector and the Private Sector in the Emirate of Dubai. Dubai: The Supreme Legislation Committee in the Emirate of Dubai. <https://clck.ru/3AgKKF>

3. Restraint of competition

3.1. Powers, approvals and due diligence

PPP in Europe¹⁶ stipulates incompatibility of aid grants or resources which distort or threaten competition by favoring certain undertakings or the production with the internal market of Europe (Rossi & Civitillo, 2014). The Government of Queensland¹⁷ requires that a PPP must present strategic advantages, particularly for highly regulated sectors. As an example, the PPP with Singapore firms explicitly state for arbitration in Singapore. Under Korean Law¹⁸, specific sectors are identified for PPP, to include industry, agriculture, construction, transport, telecoms, science and technology, tourism and financial services. Investment that encumber the development of the national economy and threaten national security, or technically obsolete and harmful to the environment, shall be prohibited or restricted (Hurk et al., 2016; Soomro & Yuhui, 2023; Liu et al., 2014).

3.2. Ownership structure, governance and level of autonomy

The African Law on PPP prohibits agreement or practice between competitors that results in direct price fixing and allocation of markets; collusive tendering and setting of minimum and resale prices. Under Malaysia law, the landscape of involvement in PPP varies from concessionaire, privatization to partnerships (Biyygautane et al., 2020). The collaboration of local practitioners, mostly among Asian nations concerns typical infrastructure developments. Under Australian Law the Competition and Consumer Act 2010 prohibits and criminalizes the cartel conduct in PPP. Under German Law, infringement of the cartel prohibition is criminalized (Outhuijse, 2020).

A PPP that comprises ownership concentration of the independent market players might risk infringement of the cartel prohibition. Otherwise, when both parent companies stay active in the given market, there is a risk that the PPP will be considered to be of a co-operative nature; and the players at risk of infringement of the cartel prohibition. Under German law, PPP can be organized depending on the depth of co-operation the partners elect companies other than partnerships such as the PPP corporation OR Aktiengesellschaft; or the limited liability company, Gesellschaft mit beschränkter Haftung; Silent partnerships or stille Gesellschaft and sub-participations or Unterbeteiligung are also used in German law to organize PPP (Darko et al., 2023).

¹⁶ Hatton, C., Cardwell, D., & Botts, B. (2020, July 8). European Union: Joint Ventures. Global Competition Review. <https://clck.ru/3AgKYR>

¹⁷ Queensland Treasury and Trade. (2013). Government Owned Corporations Guidelines for Joint Venture Agreements. Queensland Treasury. <https://goo.su/v45h3t>

¹⁸ Standing Committee of the Supreme People's Assembly. (1992). The law of the Democratic People's Republic of Korea on foreign investment. Seoul: Fourth Session of the Ninth Supreme People's.

3.3. Liabilities, dispute resolution

Under Australian Law, one should not avoid the lengthy proceedings of dispute resolution or seek to oust the jurisdiction of the Courts to give urgent interlocutory or final relief¹⁹. British Venture Law provides for consultation, conciliation, arbitration, and judicial procedure – in that order of preference, for the resolution of disputes arising during the life of the venture (Khallaf et al., 2021). Indonesian law prohibits practices that aim to unfairly restrict competition under the “Prohibition of monopolistic practices and unfair business competition or anti-monopoly law.” As an example, a market dominant entity from abusing its position by unfairly restricts its competitors’ activities. A non-competition clause may not hold up before the Indonesian Competition Supervisory Body entered into by an industry-dominant business player.

Under Japanese Law²⁰, restricted industries are industries considered to be affected with great public interest, such as water works, railroads, banking, and maritime transportation (Bradshaw, 1963).

3.4. Exit strategies

Under UAE Law, arbitration is conducted by the Dubai International Arbitration Centre or DIAC or in the DIFC-LCIA or the London Court of International Arbitration and under the DIFC-LCIA rules recommended for adoption that specific place for arbitration is decided at the outset²¹. Under Korean Law, the PPP is subjected to basic governing antitrust and fair competition issues in Korea stipulated in the Monopoly Regulation and Fair-Trade Act²². Alternately, PPP via merger and acquisition is caught through the Korean Merger Control Legislation, if a business combination total worldwide assets or turnover is equal or greater KRW300b or US 257.1 million. Under Australian Laws, the disposal and assignment of PPP interest by a PPP within Government: A Disposal or Assignment should not require the consent of the PPP. Under Indian Law the executing Government entity would have to assess possible recourse to recover investment in case the PPP is unsuccessful.

¹⁹ Seungwoo Son. (2012). Legal analysis on Public-Private Partnerships regarding Model PPP Rules. <https://clck.ru/3AgKta>

²⁰ Matsuura, M., Niunoya, M., & Hamasu, Sh. (2023). A structured guide to public private partnerships in Japan. Atsumi & Saka. <https://clck.ru/3AgKue>

²¹ HM Treasury. (2010, March). Joint Ventures: a guidance note for public sector bodies forming joint ventures with the private sector. London: Government of UK. <https://clck.ru/3AgKva>

²² Tae Hee Lee. (2020). International Joint Ventures in Korea. Seoul: Lee & Ko. <https://clck.ru/3AgKwa>

4. Conflict of interest / procurement issues

4.1. Powers, approvals and due diligence

Under Australian Law, PPP permits unqualified right to disclose confidential information and reversely the right to disclose qualified information. In Cyprus arbitration is not practiced, and the District Courts of Cyprus are the competent authority to act (Caperchione et al., 2017). Under Korean Law, impairments to fair competition include discrimination and abuse of superior bargaining position; false, deceptive, or misleading advertising. Under the Law of Malaysia, measures have been implemented to expedite an overall project approval process for PPP, whereby the approval timeline has been reduced to 8–10 months. These regulations are applicable to investment projects deemed highly important as determined by the EEC Policy Committee, which require submission for consideration prior to approval. Under Chinese law, the four main steps to establish PPP are: Obtaining the assistance of the China International Trust and Investment Corporation; negotiating the legal framework of the joint venture; obtaining the authorization of the Foreign Investment Commission of PROC; and registering with the General Administration for Industry and Commerce (Liyanapathirana et al., 2023).

4.2. Ownership structure, governance and level of autonomy

Public Private Partnership of Democratic People's Republic of Korea permits equity and contractual joint ventures to set up and operate wholly foreign-owned enterprises in the Free Economic and Trade Zone. Under Australian Laws²³ the PPP must permit the unqualified right to disclose confidential information by the Government Owned Corporation PPP; and reversely disclose qualified information (Azarian et al., 2023). In Slovakia²⁴, Liability is regulated by the commercial code, but among the partners there is a lot of contractual freedom since there is no explicit law on PPP. Under Indian Law²⁵ a PPP is set up as an autonomous statutory organization and similar guidelines for the organized Group. European Legislation the covenants not to compete are determined upon formation of the joint venture the parties agree not to compete outside of the joint venture²⁶.

4.3. Liabilities, dispute resolution

In Queensland territory a parent PPP should not provide guarantees or assume any liabilities of the PPP unless specifically approved by shareholding Ministers and consistent Investment

²³ Griffiths, A., & Carney, N. (2023). An introduction to public-private partnerships in Australia. Lexology. <https://clck.ru/3AgLab>

²⁴ Ministry of Finance of the Slovak Republic. Public Private Partnership (PPP). <https://clck.ru/3AgLbZ>

²⁵ Government of India. Public Private Partnership In India. <https://goo.su/qlmvkUI>

²⁶ Giguère, S. (2001). Local governance and partnerships. A summary of the findings of the OECD study on local partnerships. Paris: Organisation for Economic Co-operation and Development. <https://goo.su/G5ctv>

Guidelines (Ojelabi & Noone, 2020). Under Korean Law any disagreement concerning foreign investment shall be settled through consultation. Disputes shall be examined and settled by a court of law or arbitration body otherwise disagreement may be taken to an arbitration agency in the third countries for settlement²⁷. Under New Zealand law, for all kinds of PPP structure; actions subjected laws where a dispute arises and free to agree different dispute resolution place or process; when there is failure of competition when there is only a single interested party remaining (Chou & Lin, 2012).

Under German Law, the material merger control provisions: If the PPP partners can prove that despite the creation or strengthening of a market dominating provisions, the PPP improves the competitive conditions in the same or another market that outweighs the negative impact of market dominance, the FCO may still grant merger clearance a substantive test market dominance is performed and the PPP must be prohibited if it creates a market dominating position. In American law, the PPP dictates liability, the structure of exposure is determined to include defense, indemnification and hold harmless clause.

4.4. Exit strategies

Under British Law, PPP operations may be terminated by mutual agreement of the venture parties, by a breach by one of the parties or by force majeure (Marques, 2021). Under Korean Law²⁸, the parties are free to resort to any court of competent jurisdiction within or outside Korea to settle the disputes arising under PPP possible legal remedies include monetary compensation for harm or loss, related provisional attachments, and equitable remedies of specific performance, and temporary and permanent injunction (Lemley & McCreary, 2020).

Under New Zealand laws, shareholders in the PPP do not owe fiduciary obligations to one another. Under Indian Law, the typical exit strategies for international projects: sale, trade, and merger, aggregate or liquidate; claim against insurance or guarantee; haul away or walk away; litigate or arbitrate.

Conclusions

Each legal feature of the partnership contract is weighed across four different legal arguments, signifying a well-crafted agreement. The guidelines below provide direction and clarity, and enables crucial thinking. Therefore, it is sufficient to state that the work is excellent.

²⁷ Mirza & Associates. (2023, May 23). The pros and cons of arbitration vs. litigation: What's the best option for your Business? Mondaq. <https://clck.ru/3AgLhv>

²⁸ Standing Committee of the Supreme People's Assembly. (1992). The law of the Democratic People's Republic of Korea on foreign investment. Seoul: Fourth Session of the Ninth Supreme People's. <https://clck.ru/3AgLjY>

PPP Guidelines

Matrix Of Mechanisms		Powers, Approvals & Due Diligence	Ownership Structure (Governance & Level of Autonomy)	Liabilities, Dispute Resolution	Exit Strategies
	Value Captured (Scope, benefits & risks)	A joint venture is established when significant synergy is forecast to substantiate increase in export earnings, or cheaper consumer services and goods	PPP is compatible with the local market to promote economic development, especially where the standard of living is abnormally low or underemployment	The PPP in the form of a Special Purpose Vehicle can afford the limited liability protection to shareholders; except for environmental and anti-trust laws	Any Agency or GOC should not provide guarantees or assume any liabilities of the PPP unless specifically approved by the Secretary, and consistent with the Investment Guidelines
	Route to Market	The PPP provides for a Deed of Covenant to be executed between existing participants, with reasonable and defined timeframes	PPP Guidelines should restrict industries affected with great public interest: Transport, energy or education. The role of Government is to protect National Infrastructure Assets	Government Secretaries, Directors on the Board of the PPP would be liable and accountable for certain actions and decisions of the PPP for any lapses or failures	Arbitration ought to be put down at the outset such as the London Court of International Arbitration and under whose rules
	Restraints of Competition	The PPP should explicitly prohibit and criminalize the cartel conduct. The role of government is to protect the impact on the economy and NOT the PPP profitability	Government can enter into PPP agreements with private entities for infrastructure projects, provided a step in or takeover can be performed by the sovereignty—no other	A PPP is subjected to basic governing antitrust and fair competition issues: Monopoly and Fair Trade	PPP Agreements must not allow the private sector to take over the undertaking of the projects in its entirety after project completion
	Conflict of Interest (Procurement Issues)	A PPP is not supposed to cause impairments to fair competition: Discrimination, abuse of superior bargaining position; including false, deceptive, or misleading advertising	The Covenants Not to Compete are determined upon formation of the PPP where the parties agree not to compete outside of the joint venture	PPP s or Aid Grants granted or funding resources which distorts or threatens competition by favoring certain undertakings shall be deemed incompatible	

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Conflict of interest

The author declares no conflict of interest.

Financial disclosure

The research had no sponsorship.

Thematic rubrics

OECD: 5.05 / Law

PASJC: 3308 / Law

WoS: OM / Law

Article history

Date of receipt – January 16, 2024

Date of approval – February 12, 2024

Date of acceptance – June 25, 2024

Date of online placement – June 30, 2024



Научная статья

УДК 34:004:347.4:004.4

EDN: <https://elibrary.ru/lvpigr>

DOI: <https://doi.org/10.21202/jdtl.2024.22>

Соглашение о государственно-частном партнерстве в контексте матрицы оценки их юридических параметров и цифровизации

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Ключевые слова

государственно-частное партнерство,
контракт,
конфликт интересов,
ограничение конкуренции,
право,
соглашение,
управление рисками,
цифровые технологии,
цифровизация,
юридическая оценка

Аннотация

Цель: путем рассмотрения юридических аспектов соглашений о государственно-частном партнерстве синтезировать их основные положения в общую матрицу, которую при переводе в цифровой формат можно использовать в интересах стандартизации и упрощения формулирования параметров соглашения.

Методы: автор опирался на сравнительно-правовой анализ научной литературы, законодательства и интернет-источников по государственно-частному партнерству, дополненный рассмотрением соглашений о государственно-частном партнерстве различной социально-политической направленности, что позволило создать научно-обоснованную и практико-ориентированную матрицу, которая может послужить инструментом при составлении соглашений о государственно-частном партнерстве.

Результаты: выделены национальные аспекты в правовом регулировании обозначенных отношений в различных странах и описан ряд особенностей, встречающихся в соглашениях о государственно-частном партнерстве.

Научная новизна: с учетом важнейших правовых особенностей, характерных для разных стран, представлена матрица для составления соглашений о государственно-частном партнерстве, включающая восемь основных параметров: 1 – полученную стоимость, масштаб, выгоды и риски, 2 – выход на рынок, 3 – ограничение конкуренции, 4 – конфликт интересов/закупки, 5 – полномочия, одобрение, юридическая оценка, 6 – обязательства, разрешение споров, 7 – структуру собственности, управление и уровень автономии, 8 – стратегии выхода. В зависимости от обозначенных приоритетов ее можно модифицировать, учитывая, что приоритеты определяют и формируют конкретные параметры каждого отдельного партнерства.

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Статья находится в открытом доступе и распространяется в соответствии с лицензией Creative Commons «Attribution» («Атрибуция») 4.0 Всемирная (CC BY 4.0) (<https://creativecommons.org/licenses/by/4.0/deed.ru>), позволяющей неограниченно использовать, распространять и воспроизводить материал при условии, что оригинальная работа упомянута с соблюдением правил цитирования.

Практическая значимость: полученная в результате исследования матричная схема может стать инструментом планирования, используемым для анализа и понимания взаимосвязей между восемью юридическими параметрами, необходимыми для формирования отношений в сфере государственно-частного партнерства. Она послужит юридическим ориентиром для формулирования соглашений о государственно-частном партнерстве, используемых во всем мире, и будет способствовать не только активизации государственно-частного партнерства, но и правильному пониманию обязательств, объемов ответственности и ограничений. Приведенные в исследовании рекомендации задают направление для оценки государственно-частного партнерства, позволяя сделать четкие выводы о партнерстве. При условии цифровой доступности предложенная матрица будет представлять определенный интерес для многих организаций, использующих государственно-частное партнерство в своей профессиональной деятельности.

Для цитирования

Молинтас, Д. Т. (2024). Соглашение о государственно-частном партнерстве в контексте матрицы оценки их юридических параметров и цифровизации. *Journal of Digital Technologies and Law*, 2(2), 430–449. <https://doi.org/10.21202/jdtl.2024.22>

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Конфликт интересов

Автор сообщает об отсутствии конфликта интересов.

Финансирование

Исследование не имело спонсорской поддержки.

Тематические рубрики

Рубрика OECD: 5.05 / Law

Рубрика ASJC: 3308 / Law

Рубрика WoS: OM / Law

Рубрика ГРНТИ: 10.27.41 / Сделки

Специальность ВАК: 5.1.3 / Частно-правовые (цивилистические) науки

История статьи

Дата поступления – 16 января 2024 г.

Дата одобрения после рецензирования – 12 февраля 2024 г.

Дата принятия к опубликованию – 25 июня 2024 г.

Дата онлайн-размещения – 30 июня 2024 г.