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THE MOST CRITICAL LEGISLATIVE ISSUES RELEVANT TO PUBLIC-PRIVATE PARTNERSHIP PROJECT STARTUPS IN UKRAINE

Based on the Diagnostic Review of Legal and Regulatory Framework for PPPs in Ukraine, 20 October 2011

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THE MOST CRITICAL LEGISLATIVE ISSUES RELEVANT TO PUBLIC-PRIVATE PARTNERSHIP (PPP) PROJECT STARTUPS IN UKRAINE (I.E. POSSIBLE DEAL BREAKERS)

There is considerable discussion at present in Ukraine about needed legislative reform in the area of Public-Private Partnerships (PPPs). Many recommendations will be made by a number of concerned parties over the coming months. Some of the proposed changes will be absolutely critical (deal breakers) and others will be important but not essential in the short term – e.g. in some cases, ways can be found to work around the problem by inserting appropriate text into the PPP agreement itself.

It is important for potential PPP stakeholders to have a sense of which issues are the most critical in order to make sure that at least the bare minimum of changes is made to legislation to facilitate the start-up of PPP project activity for the benefit of Ukraine, especially for those PPP projects in which international contractors, operators, or financiers are expected or desired to be involved.

Except where noted, all the points below were included in the "First Priority" category in the recent legal diagnostic report prepared by Gide Loyrette Nouel.[1] The points are not necessarily listed in order of priority.

At the end of this document, a summary is provided of the USAID-funded Public Private Partnership Development Program (P3DP) is supporting the Government's efforts to enact appropriate reforms in legislation to facilitate bankable and sound PPPs.

The Critical Issues

1. Clarify that all types of PPP project are subject to the PPP Law.

(This is not explicitly listed in Gide's "First Priority" Category, but it is implicit in their report, taken as a whole.)

Issue. The PPP Law has been interpreted in different ways. Under one interpretation, a type of arrangement with private-sector participation that is directly governed by other legislation (e.g. concession or lease) would not be governed by the PPP Law.[2]

Discussion. This interpretation would allow a municipality to conclude a concession or lease agreement without needing to pay any attention to the PPP Law, thus escaping from the additional controls required by the PPP Law. It is not clear what the legislators intended, but if this interpretation were correct, it would permit a kind of "law shopping" in which the public entity could choose whether or not to go under the provisions of the PPP Law.

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[1] Gide Loyrette Nouel, *Diagnostic Review of Legal and Regulatory Framework for PPPs* (Final Report, 20 October 2011). The report was prepared for the USAID-funded Public Private Partnership Development Program (P3DP) using legal experts from Gide's international and Kyiv offices.

[2] Those in favor of this interpretation point to paragraph 3 of Article 5 of the PPP Law, which states (unofficial translation): "Agreements concluded in compliance with paragraph one of this Article shall be regulated by legislation regarding the specifics stipulated by this Law in relation to the agreements for which it is decided to implement the public-private partnership."

Solution. A simple clarification needs to be added to the PPP Law to avoid any doubt that all types of PPP contract are subject to the PPP Law.

2. Enable parties to agree in the PPP agreement on payments to be made upon the early termination of the agreement that are fair, that avoid the unjust enrichment of both party, and that create appropriate incentives.

Issue. The concession law and the Law On Peculiarities of Leasing Out or Giving in Concession of Communal Facilities of District Water and Heat Supply and Sanitation ("communal leasing and concession law" for short) prescribe the compensation that is permitted to be paid to the private partner in the event of PPP contract termination.[3] It should be noted that a project that would naturally fall under either of these specific laws must still comply with the specific law even if it also falls under the more general PPP Law.

The communal leasing and concession law is the most restrictive of the PPP-type laws in Ukraine in this regard: it states that no compensation will be paid to the private partner relating to the value of the assets that the private partner has implemented.

The general concession law is less restrictive: loosely translated, it states that the portion of the asset value for which the concessionaire did not receive compensation during the term of the concession must be paid upon termination. To try to make this conform to a commercially plausible (if not ideal) rule, one *might* interpret this to mean that it is required to make a payment of the *depreciated value* of the assets that were financed by the concessionaire (i.e. the full purchase value of the asset less depreciation up to the date of termination). But there is no consensus that this is how the law is to be interpreted.

Discussion. In general, more flexibility is needed for crafting sound provisions in the PPP agreement for termination payments that are fair and that give correct incentives to both parties. The critical issue is that senior lenders will want to see their loans repaid (or a very high proportion of the outstanding debt repaid) even when it is the private partner that defaults on the PPP agreement. Moreover, it is not fair for the public authority to receive free-of-charge the public infrastructure that the private partner has contributed, even if the private partner is at fault; this would be unjust enrichment.

There are different formulations that would satisfy international lenders. The best one, from the lenders' point of view, would be to pay at least the entire amount of outstanding senior debt regardless of the type of termination. However, policy objections can be raised against such an extreme position; after all, shouldn't the senior lenders be exposed to more project risk than that? So, various qualifications can be introduced. But ideally the appropriate place to put these qualifications is in the PPP contract, not in the law.

Lenders will simply not accept the provision required at present by the communal leasing and concession law (namely, *no compensation* is permitted relating to asset value). The provisions in the general concession law – *if* they were interpreted to require payment of the depreciated value of assets – might be acceptable, depending on the calculated values (e.g. they would

[3] Unless otherwise indicated, "PPP" in this note is used in a broad sense to cover concessions, lease arrangements, and other types of PPP.

probably be acceptable if the depreciation period were greater than the maturity of the loan),[4] but they are not ideal, and they do not necessarily provide the right incentives to the parties. (E.g. the private partner might try to provoke a termination if the value it would receive in that case were much greater than the expected net gain (in present value terms) if the PPP were to continue to its normal expiration date.) Moreover, there is no assurance that this is how the law would be interpreted.

In many countries, the parties are given ample latitude to design PPP contract provisions suitable for this purpose. In some countries, PPP units (or their equivalent) have set out recommended or mandatory contract provisions. In any event, the PPP unit (where one exists) would scrutinize the termination-payment provisions in every proposed contract to make sure they are sound.

In most countries, the relevant provisions contained in primary legislation are very general. For example, UNCITRAL has recommended a simple clause that has been used almost verbatim in a number of actual PPP laws:

> The concession contract shall stipulate how compensation due to either party is calculated in the event of termination of the concession contract, providing, where appropriate, for compensation for the fair value of works performed under the concession contract, costs incurred or losses sustained by either party, including, as appropriate, lost profits.

This is generally considered to be an appropriate level of generality/detail for a PPP law.

It may be possible to implement certain pilot projects in some sectors (e.g. if the project falls under the general concession law only) without any legislative changes, depending on the details. But a change will surely be needed for any PPP that falls under the municipal leasing and concession law. This would be an absolute obstacle if the law is not changed.

Suggested solution. A simple change should be made in the appropriate law, perhaps along the lines of the UNCITRAL clause above.

It may be felt more desirable to make the provisions more prescriptive – for example by adding that the termination payment must be fair and equitable to both parties. This is not advisable. If the purpose is to *educate* public authorities so that they will have a better idea of what to include in the termination payment, the appropriate solution is to develop guidance material for public authorities about how to write PPP contracts, conduct workshops, etc. If the purpose instead is to *regulate* through legislation the contents of the termination-payment clause in this manner, the danger is that the particular clause agreed by the parties in the PPP agreement could be challenged later by a party on the grounds that the specific terms are not "fair and equitable". The private partner will want certainty that the contract clause agreed between the parties will be controlling. Also, the detailed terms of such a termination-payment clause will depend to some extent on the type and circumstances of the particular PPP project, and it would be equally inadvisable for primary legislation to try to regulate this by using highly detailed language.[5]

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[4] If the depreciation period is greater than the loan maturity, at any given time the depreciated value of the assets financed by the loan will usually be greater than outstanding debt, since depreciation is taking place more slowly (i.e. over a longer period) than is debt repayment.

[5] An alternative manner of dealing with this kind of issue, in general, is that (i) an approving authority is directed in the law to approve the contract only if it complies with certain specified principles, and (ii) the law specifies a certain period of time following the decision of the approving authority for appeals to be made, after which the

3. Amend the Budget Code to clarify that budget organizations (including municipalities) can commit themselves (e.g. in a PPP agreement) to make expenditures beyond the current budget year.

Issue. At present, according to a literal reading of the Budget Code, a municipality in Ukraine is not permitted to commit itself to make payments, other than debt service or debt guarantees, unless the expenditures are included in the current annual budget. (Debt and debt guarantees cannot exceed certain quantitative limits, verified by the Ministry of Finance, but in principle such multi-year commitments are valid.)

The relevant part of the Budget Code (in Article 48) reads as follows (unofficial translation):

> 3. Orders, entering of contracts, purchases of goods, services, or other similar transactions during the budget period, for which the possessor of the budget is to be bound without a corresponding budgetary appropriation or in excess of the authority established by this Code and the Law on the State Budget of Ukraine (the decision on approval of the local budget) are invalid. Such transactions do not create budgetary commitments and budget arrears.

This provision could limit PPP projects in Ukraine – including P3DP pilot projects – to those arrangements relying solely on user charges for the remuneration of the PPP company.

Discussion. Some good-practice PPP contracts include a commitment by the municipality to make payments in the future. This could be an *absolute obligation* (e.g. where a municipality agrees to pay a fixed payment every month from its budget to supplement user charges for parking, if a subsidy is needed for the PPP to be viable)[6] or it could be a *contingent obligation* (e.g. the municipality will make payments to ensure that the PPP company receives a specified minimum revenue, taking into account user-charge revenue received).[7] Under present Ukrainian law, there may be a question as to whether PPP agreements containing such provisions – of either type – are valid.

In actual practice, commitments that run beyond the current budget year are commonly entered into by municipalities in Ukraine (e.g. multi-year construction contracts), and no one contests their validity. Moreover, courts (not just in Ukraine) do not always interpret legislation according to the "plain meaning" rule. So the present provisions of the Budget Code may not be a barrier to multi-year payment commitments in a municipal PPP agreement for a private partner that is ready to put its trust in customary practice. But this will not be sufficient for most foreign companies and their lawyers. It would therefore be prudent to avoid any possibility that such a PPP agreement (or payment provisions in the agreement) might be declared invalid for this reason.

It is not difficult to fix this problem in the law. The argument could be made, however, that this not a sufficient solution. Direct and contingent liabilities of the state and of local governments in PPP arrangements have turned out to be a serious problem in some countries: they can impose a huge fiscal burden that becomes apparent only later – when it is too late to

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contract is deemed to be validly approved and can no longer be challenged for non-compliance with the directives that were given to the approving authority in the law.

[6] Strictly speaking, one could consider this also to be a *contingent* obligation: it is conditional on services being provided ("availability") and being provided adequately. But "contingent liability" commonly implies the notion that the payment will have to be made only if an *unlikely* future event occurs.

[7] These two kinds of PPP payment obligations are often referred to, somewhat misleadingly, as "direct liabilities" and "contingent liabilities", respectively.

avoid them. These payments are similar in many ways to debt service payments, even if they are not considered as such by accounting conventions.

There are controls in existing law in Ukraine concerning municipal debt and debt guarantees. One could make the argument that the state should have the same kinds of control over municipal payment commitments in PPP contracts. It would be an easy change to state in the relevant legislation that the financial obligations of budget organizations arising from PPP agreements are to be considered as if they were debt obligations or debt guarantees, as appropriate.

The problem is that it is not easy to determine what the "debt equivalent" to a PPP payment obligation should be in all cases – mainly for the following reasons:

- PPP obligations involve a stream of payments into the future; there is no stated equivalent of the initial outstanding "debt" value. The financially correct solution is to capitalize these future payments using an appropriate discount rate to arrive at a "present value", which would be a measure of the outstanding liability at the present time. But this adds complications, which would require more detailed rules. Moreover, there is no consensus internationally that capitalizing future payments in a PPP contract to arrive at a single figure for the present value of PPP liabilities is the best way to deal with this issue.[8]

- Furthermore, there is a refinement that would need to be made to the method of capitalization noted above. Only that part of the future payments that reflects capital investments (including related financing) should be considered – i.e. the part of future payments under a PPP agreement that reflects recurrent operating expenditures should not be included. The reason is to *treat like with like*. Debt is (or should be) used for capital expenditures. But the service fee in a PPP includes both a capital charge and a payment reflecting the PPP company's expenditures for operating and maintaining the infrastructure to provide the public service. Therefore the only part of the capitalized future PPP payments that should be included as equivalent to debt is the part that corresponds to capital costs. It may not be readily apparent how to extract from the PPP payment obligation that part which is a capital charge. (This can easily be done if a proper financial model is used for the PPP Feasibility Report, but, again, this adds complications that should be dealt with in the medium term, not right now.)

- Finally, the most difficult problem of all is how to value *contingent* payment obligations – those that would take place only under certain conditions (e.g. when the revenue generated by user charges falls below a specified value). There is a good deal of discussion internationally about this – both in the context of debt and more recently in the context of PPPs. It would seem to be too conservative to value all of these contingent liabilities at their *maximum* exposure value (i.e. the very worst case that could occur). But there is no consensus about the right approach; and in any case most approaches involve carefully formulated decision rules and a relatively sophisticated capability for quantitative analysis.

[8] E.g. an IMF publication in 2006 refers to the disadvantage of "treating the present value of future service payments by the government under PPP contracts as a liability" because this has "little immediate prospect of being accepted by accountants or statisticians" (IMF, *Public-Private Partnerships, Government Guarantees, and Fiscal Risk*).

More thought needs to be given to these issues – and perhaps others – in the months and years ahead. Right now, however, what is needed is a *simple solution* that can remove any obstacle to municipal pilot PPP projects and provide minimally sufficient safeguards.

Suggested solution. *First,* it should be made clear in the appropriate legislation that budget organizations are permitted to enter into PPP agreements (and possibly a broader category of agreements) under which they make payment commitments, direct or contingent, that extend beyond the current budget.

Second, the regulation soon to be issued by MoEDT concerning the methodology for appraising a PPP project based on the PPP Feasibility Report should specify that public contracting authorities must determine and disclose payment obligations (including contingent obligations) arising from the PPP – and that the impact of the PPP in relation to the municipalities' budgetary needs and resources in future years should be assessed. (P3DP is assisting MoEDT in the preparation of this regulation.) There is an international consensus that – at least as a first step – the most important way to address the question of these direct and contingent liabilities arising from PPPs is to bring them out into the light so that their future fiscal impact can be well understood and taken into account in planning and implementing PPPs.

4. Amend the PPP Law in order to regulate step-in in the event of a defaulting private partner and without requiring a new tender.

Issue. At present, there is no *explicit* provision in Ukrainian law that permits a lender to "step in" to a PPP contract if the PPP company is on the verge of default and substitute a new company in place of the original one. The main uncertainty might be that a third party might dispute such a replacement on the grounds that it was not carried out by competitive procurement.

Discussion. "Step in" rights are absolutely essential in PPPs financed by "project finance": international lenders insist on this. Borrowers and public authorities may think this is overreaching by the lenders, and they often feel annoyed. Nevertheless, it is simply not a point for negotiation. (Borrowers and public authorities end up swallowing their annoyance.)

It is important to understand why step in is so critical for lenders. In most PPPs, the lender cannot simply take ownership of company assets and sell them if the borrower defaults. For example, what good would it be to dig up water pipes and sell them? The break-up value of the enterprise would far less than the value as a going concern. Ordinary collateral is therefore of little use. In *project finance*, it is the *cash flow* that is generated by the PPP that pays the lender back: so the only way that the lender can have the security it needs is to ensure that it can keep the company performing well – and keep it bringing in sufficient revenue. That is the reason for the unusual security arrangement of step-in rights. These rights are exercised very rarely, but lenders (and their lawyers – especially their lawyers) will insist that they be part of the financing package.

The lender must be able to act quickly to find another company to run the business, and so competitive tendering is not appropriate. It is also not necessary. One major reason for competitive procurement, in general, is to permit a public authority to get the best price. In the case of step-in rights, the substitute company takes over the *existing PPP contract*, including the existing performance requirements and the existing prices. This eliminates one major policy reason for competitive procurement.

Moreover, public authorities should ensure that the step-in agreement associated with a PPP contract requires their giving their consent to the entity selected by the lenders as the substitute PPP company. Lenders will generally accept a restriction such as this so long as clear and objective criteria are set out to determine the eligibility of the substitute entity.

Suggested solution. All that is needed is to insert in the appropriate legislation a provision along the following lines:

> The parties may include in a PPP agreement provisions that permit lenders, in the event of a serious breach by the private partner or other circumstances that could justify the termination of the PPP agreement, to substitute in place of the private partner a qualified new entity that would perform under the existing PPP agreement.

Normally, the question of what rights the public authority should have to consent to the substitute entity would be left to the details of the PPP agreement. These details will depend to some extent on the bargaining positions of the parties.

However, if it is desired to be more prescriptive in the legislation, language similar to the following, to be added to the text above, would probably be acceptable to lenders, since it is consistent with what is included in good-practice step-in agreements:

> Any such substitution shall be subject to the consent of the public partner based on the qualifications of the proposed substitute entity and using criteria and procedures agreed between the parties.

5. Provide in the PPP Law and related laws that all disputes arising from any type of PPP arrangement concluded with a non-resident of Ukraine or an enterprise with foreign investment may be settled by international arbitration with the seat outside of Ukraine or in Ukraine (depending on the agreement of the parties), notwithstanding limitations provided by other legislation (except "exclusive" competence of Ukrainian courts).

Issue. There are two main issues. First, even though in general in Ukraine, international arbitration can be used if at least one of the parties to the dispute is a foreign legal entity or if it is an entity with foreign investment (defined as having at least 10% foreign ownership), this last phrase does not apply to concessions: e.g. a dispute arising from a *concession* agreement between a municipality and a Ukrainian PPP company majority owned by foreign shareholders cannot be resolved by international arbitration.

Second, there may be issues of concern in the domestic arbitration law – which would need to be used if the PPP company did not have any foreign shareholders.

Discussion. Unbiased and competent (and enforceable) dispute resolution is of key importance in a PPP. The contract provisions do not mean much if they cannot be correctly adjudicated and enforced.

International companies and lenders will insist on "international arbitration" as the ultimate dispute resolution mechanism in the PPP contract. This does not necessarily mean that the arbitration has to take place outside of Ukraine (although international companies and lenders may initially push for this).[9] It would be a deal breaker – and it would be unfair – to expect

[9] The law applicable to the arbitral proceedings themselves (the *lex abitri*) is determined by the "seat" of the arbitration. Designating a location in Ukraine as the seat might involve certain risks (notably the possibility of

most municipalities in Ukraine (except perhaps the largest ones) to agree to go to, e.g., Stockholm or Vienna to resolve disputes with the PPP company. What international companies and lenders will want to see most of all is *party autonomy*: that the arbitration will be conducted under internationally recognized arbitration rules (e.g. UNCITRAL rules), including the parties' ability to *freely* select the arbitrators and an "appointing authority" (the entity that can help select arbitrators in the event that there is a stalemate in the normal selection process) – and perhaps an arbitral institution to perform administrative tasks.

Some of the pilot PPPs might involve purely local PPP companies – i.e. with no significant foreign shareholding. The international arbitration law would not be able to be used in these cases. But the ordinary (i.e. domestic) arbitration law in Ukraine permits considerable flexibility and freedom. For example, even though the arbitrators used must be on the list of approved arbitrators of a Ukrainian "permanent arbitration court," it is a simple matter for a Ukrainian business association or NGO to set up such a court and select arbitrators to be on their list. Under the law, such an arbitral tribunal's decision is not subject to challenge on the merits of the case, and the decision will be enforced by Ukrainian courts.

In fact, it is this very simplicity that has given domestic arbitration a bad reputation in Ukraine. In some cases, consumers and other unsophisticated parties have been led to sign contracts that include arbitration under the auspices of specified arbitration courts whose arbitrators are not independent and unbiased. In the past, there were also abuses in which arbitration was used to determine legal entitlements with a view to making illegitimate transfers of real property.

However, if an appropriate arbitration court is specified in the PPP agreement – one created specially by an appropriate organization for the purpose of resolving PPP disputes – this dispute resolution procedure would appear to be well suited for PPPs that do not have significant foreign involvement.

Suggested solution. It should be stated in legislation that the law on international commercial arbitration applies to disputes arising from PPP agreements, provided that the requirements of that law are met. (The law itself does not say that concessions are excluded.)

6. Clarify that disputes relating to real property that fall within the exclusive competence of Ukrainians court are limited to disputes directly concerning property rights over real property (i.e. title rights), and that Ukrainian courts do not have exclusive jurisdiction over disputes concerning contractual rights relating to real property.

Issue. Ukrainian law states that disputes related to real property in Ukraine must be decided by Ukrainian courts (i.e. not arbitration). There is a danger that a court could interpret any dispute related to a PPP agreement as being "related to" real property if the PPP involves the use of real property of some kind (as it almost certainly will).

Discussion. Such an interpretation by a court would defeat the purpose of the arbitration clause of the PPP agreement. Even if a higher commercial court finally concluded against the lower court's interpretation, the proceedings would add complications and delays that are best to be avoided.

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local court intervention in the proceedings), and so the first preference of international parties would be to have the seat in a neutral country where the legal environment regarding arbitration is well understood and known to be non-interventionist.

Suggested solution. A suitable clarification needs to be added to legislation, capturing the sense of the headline above.

7. Provide accelerated procedures for the formalization of the title of use (right of use) over land plots transferred to the private partner in a PPP.

Issue. In a PPP in Ukraine, the land used by the PPP company remains in the ownership of the state or municipality but the PPP company is given a right to use the land for purposes of the PPP. The laws regulating land use, however, do not take into consideration this particular PPP right of use and would require the PPP company to follow the usual lengthy procedure of title registration to formalize the right.

Discussion. These requirements could cause substantial delays. For example, the PPP company is not able to begin construction until the registration procedures are completed.

Suggested solution. The preferred solution is to give the PPP company the right of use concerning land based solely on (i) the underlying property rights of the public authority and (ii) the PPP contract by which the public authority allows the PPP company to use the land. The PPP company would not have to go through title formalization procedures.

8. Clarify or amend the licensing conditions that restrict the private partner's right to receive licenses only on the basis of documents confirming title of use or title of ownership over respective networks; allow the granting of such licenses on the basis of any type of PPP agreement that provides for the right to operate the infrastructure.

(This is in Gide's "Second Priority" category; nevertheless the issue may arise in a pilot PPP, and the solution is simple.)

Issue. Under present Ukrainian law (more precisely, secondary legislation), a concessionaire can receive a permit or license to operate infrastructure, but if the concessionaire subcontracts the operating responsibilities to another company, that company will not be entitled to receive an operating license.

Discussion. This would not pose a problem for many of the types of pilot projects that are being considered. Generally the PPP company will operate the infrastructure itself and so no other company will need to have a license. But in certain types of PPP that involve "project finance," it is typical for the PPP company to be essentially a financing vehicle: the PPP company will sub-contract responsibilities for construction to another company and responsibilities for operation to yet another company (which is likely to be an affiliate of the PPP company). This is a typical structure for a BOT – e.g. a potable water treatment or wastewater treatment PPP.

Since it may be that one of the pilot projects will be of this type (even though not at the top of the P3DP list), it is important to change this aspect of the law.

Suggested solution. All that is needed are small changes in wording to various pieces of secondary legislation. There would appear to be no significant public policy argument against doing this. (Note that the PPP contract would contain the needed restrictions concerning any sub-contracting or assignment of responsibilities by the PPP company.)

9. All tariff-related issues

Issue. The core problem is that tariffs for municipal utility services (water, wastewater, and district heating) are set either by the municipality itself (for small cities and towns) or by the National Commission for the Regulation of the Utility Services Market of Ukraine ("Regulatory Commission"). There is a specified methodology but: (i) the methodology has certain deficiencies; (ii) the tariff-setting body (whichever it is) may make unsound discretionary assumptions in applying the methodology; and (iii) the tariff-setting body might simply deviate from the required methodology – e.g. to keep tariffs low to respond to political pressure. Furthermore, the Regulatory Commission is new and does not have a track record that can give comfort to private-sector investors.

In some countries, it is possible for the PPP contract itself to specify the tariffs to be charged and to provide precise formulas that govern how tariffs will be adjusted over time and in response to various changes in circumstances. This is not permitted in Ukraine for tariffs in the specified sectors.

Discussion. The way that tariffs in the specified sectors must be set in Ukraine creates substantial regulatory risk for investors in PPPs in these sectors – or at least creates a *perception* by potential investors of such risk.

Suggested solution. *An analysis will be made and possible solutions will be assessed in depth in the context of a tariff regulation study, funded by USAID through its Public Private Partnership Development Program (P3DP).*

Summary of Related P3DP Activities

P3DP is cooperating with several agencies of the Government of Ukraine and with the Verkhovna Rada (VR) in areas related to legal reform affecting PPPs (*P3DP Objective 1*) and has two active representatives in a VR Parliamentary Committee Working Group ("Working Group") dealing with assessing and drafting proposed amendments to PPP-related legislation.

P3DP plays an active role in the drafting activities for needed primary and secondary legislation. Each of the critical issues mentioned in this note are either reflected in on-going P3DP activities or will be included in such activities in the future, as summarized below. (The reader should refer to the first section of this note for the full title of each issue.)

1. Applicability of the PPP Law

A majority of the members of the Working Group agree that the PPP Law should apply to all types of PPP, and an appropriate clarification will be made in the law. P3DP is participating in and monitoring the drafting process.

2. Termination payments

This item (albeit in slightly different wording) is already at the focus of the Working Group and has been dealt with in a draft law prepared by the Ministry of Regional Development. This draft law has been submitted to the Cabinet of Ministers. P3DP participated in the drafting and is monitoring the legislative process.

3. Multi-year payment commitments

Ultimately, this issue should be resolved by drafting appropriate amendments dealing directly with the budget issue. P3DP will work on this issue in cooperation with one of its Implementing Partners, the Institute for Budgetary and Socio-Economic Research (IBSER). As a stop-gap solution, the Working Group, with P3DP's participation, is discussing the introduction into legislation of provisions that would allow the private partner to decrease its investment obligations or use other contractual measures to protect its interests if the public partner does not respect its payment commitments.

4. Lenders' step-in rights

This item (albeit using different wording) is under consideration by the Working Group. P3DP is participating in and monitoring the drafting process.

5. Arbitration

This item is under consideration by the Working Group. P3DP is participating in and monitoring the drafting process.

6. Clarifying exclusive competence of Ukraininan courts over real property disputes

P3DP intends to present this item to the Working Group in the near future.

7. Right of use over land plots

This item is under consideration by the Working Group. P3DP is participating in and monitoring the drafting process.

8. Licencing conditions

P3DP is in the process of identifying all of the relevant Government agencies, and it will propose to support them in drafting appropriate changes to the regulations concerning this issue.

9. Tariff issues

The exact role of P3DP will depend in part on the results of the on-going P3DP study on tariff regulation and its potential impacts on PPPs.