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Public-Private Partnership in the Security Sector: Updating in the Conditions of Counteracting the COVID-19 and Armed Aggression in Eastern Ukraine

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ABSTRACT

The subject under consideration is relevant since there are no definitions or selected forms of intersection between the public-private sector in the sense of safety and security. It acquires special significance given unforeseen situations such as Covid-19 in synthesis with hostilities. The purpose of the study is to identify possible ways to implement the idea of public-private partnership in the security sector by solving such research problems as highlighting the forms of public-private partnership in the security sector and characteristics of their application; identification of objects of a public-private partnership with the security sector; outlining the directions for resolving disputes arising from public-private partnerships in the security sector. In the implementation of this study, general and specialized methods of scientific cognition were applied: the system analysis method, the dialectical method, the formal-logical method, and the structural-functional method, as well as a number of empirical methods. The results of the research are interesting and useful for Ukrainian legislators and subjects of public administration.

KEYWORDS: agreement, armed conflicts, pandemic, public administration, public-private partnership, security measures.

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Asociación público-privada en el sector de la seguridad: actualización en las condiciones de contrarrestar la COVID-19 y la agresión armada en el Este de Ucrania

RESUMEN

El tema en consideración es relevante ya que no existen definiciones ni formas seleccionadas de intersección entre el sector público-privado en el sentido de la seguridad. Adquiere especial trascendencia ante situaciones imprevistas como la COVID-19 en síntesis con las hostilidades. El propósito del estudio es identificar posibles formas de implementar la idea de asociación público-privada en el sector de la seguridad resolviendo problemas de investigación tales como destacar las formas de asociación público-privada en el sector de la seguridad y las características de su aplicación; identificación de objetos de una asociación público-privada con el sector de la seguridad; esbozar las direcciones para resolver disputas que surjan de asociaciones público-privadas en el sector de la seguridad. En la implementación de este estudio, se aplicaron métodos generales y especializados de cognición científica: el método de análisis de sistemas, el método dialéctico, el método lógico-formal y el método estructural-funcional, así como una serie de métodos empíricos. Los resultados de la investigación son interesantes y útiles para los legisladores ucranianos y los sujetos de la administración pública.

PALABRAS CLAVE: acuerdo, conflictos armados, pandemia, administración pública, asociación público-privada, medidas de seguridad.

Introduction

The urgent need to introduce public-private partnership in the security sector in Ukraine is stipulated by two determining factors: 1) hostilities in Eastern Ukraine as a result of the armed aggression of the Russian Federation; 2) the application of restrictive measures to counter the spread of the Covid-19 pandemic. At the same time, a unified normative legal act regulating the conditions of public-private partnership in the security sector has not been adopted.

Accordingly, with the beginning of the hostilities in Eastern Ukraine as a result of the armed aggression of the Russian Federation, almost for the first time since Ukraine's independence, the need for effective state security has become acute, requiring proper equipment of the Armed Forces of Ukraine and other military formations. Achieving this goal

requires the transformation of the national economy, the concentration of available resources, and the efforts of each (Bilous-Osin et al., 2020; Slinko & Uvarova, 2019; Boiko et al., 2020). Involving private entities in resolving these issues through public-private partnerships is a necessary step that can qualitatively increase the readiness of national military formations to carry out their tasks, to ensure the rebuff and deterrence of armed aggression.

The need for public-private partnership in the field of state security in the face of armed aggression is also justified on the one hand by the need to diversify weapons, military and special equipment, military machinery and devices, etc., which requires appropriate investment (scientific, research and financial, etc.), and on the other refusal to import military equipment, components, resources and technologies from the Russian Federation. In such conditions, the scope of volunteer activity is expanded, in particular, one of the areas is to provide assistance to citizens affected by the armed aggression of the Russian Federation in Donetsk and Luhansk regions (Verkhovna Rada of Ukraine, 2011).

At the same time, the Covid-19 pandemic proved to be a threat to national security, the effective overcoming of which is currently a priority for the state and society (Kivalov, 2020; Luchenko & Georgiievskyi, 2021; Zyma et al., 2021). In the conditions of the next wave of Covid-19, the need to concentrate efforts on all resources, both public and private, is obvious (United Nations General Assembly, 2020). It should be noted that at the beginning of the Covid-19 pandemic, the interaction between public institutions and private entities was spontaneous, without proper regulation and legalization, in particular through charitable assistance in providing humanitarian and volunteer assistance. Such interaction can be effective and predictable through a public-private partnership, which allows determining on a contractual basis the priority areas, the implementation of which will take place in a timely manner (Novikovas et al., 2017). The advantage of public-private partnership is also the preservation of organizational control by the state and the improvement of relevant activities. Within the framework of public-private partnership, activities for the production of necessary goods, medical equipment, production of medical oxygen, etc. can be carried out.

There is a need to identify possible ways to implement the idea of public-private partnerships in the security sector. Thus, the study aims to solve the following research

problems: highlight the forms of public-private partnership in the security sector and characteristics of their application; identify objects of a public-private partnership with the security sector; outline the directions for resolving disputes arising from public-private partnerships in the security sector while fighting against Covid-19 in the areas under hostility.

1. Scientific approach to the issue of public-private partnership

The sphere of state security is determined by its special significance for the state and society. The tasks and goals achieved in this area determine the composition and number of actors involved in their implementation, require the use of all available tools, recognized world practices. One of these, until recently little-developed areas in Ukraine remained public-private partnerships, especially in the field of state security. The issue of public-private partnership in the security sector is relevant, but currently, there is no comprehensive study of the implementation of this idea. In order to ensure high-quality and dynamic development of the state, to achieve the strategic goals of state power, to solve urgent problems, public-private partnership is increasingly used as a form of cooperation between the state and the private partner (Kozlovskiy et al., 2019). This form of interaction is an effective way to increase the efficiency of state property. Studying the issue of public-private partnership, there is a need for a clear interpretation of this model of interaction between public authorities and the private sector.

Scientific approaches to the understanding of public-private partnership can be grouped depending on the chosen main feature that characterizes this concept: as a form of interaction, which is aimed at solving socially significant problems on mutually beneficial terms (Ivanishkina, 2010; Neykova, 2010); as cooperation of the state and business entities for the implementation of socially significant projects (Pavlyuk, 2010; Yakunin, 2007), as formal and informal rules, which to meet the needs of society (Polyakova, 2009). Thus, it is possible to distinguish the general features of public-private partnership:

- 1) the participants are public and private entities;
- 2) the relationship between the parties in the partnership is determined by official documents (agreements);
- 3) the relationship has a partnership (equal) nature;
- 4) partners have common goals in a specific state interest;

5) to achieve the goals, all types of assets (contributions and resources) of partners are combined;

6) costs and risks are shared between the partners involved in the use of the results obtained, under mutual agreements.

Of considerable interest are the conclusions on public-private partnership in certain areas of public relations (Paoletto, 2000; Lenk, 2011; Savas, 2000; Torres & Pina, 2001) and in some regions of Ukraine. The latter concerns, for example, G.O. Komarnitska and I.M. Komarnytskyy (2018), who described the possibility of realizing the innovative potential of the development of the mountainous areas of Lviv region using the tools of public-private partnership.

This article examines for the first time aspects of the introduction of public-private partnership in the security sector as a systemic tool for democratization processes in Ukraine. To consistently cover the problem, meaningful blocks are identified that characterize a homogeneous group of public relations, relating to the definition of the separation of forms of public-private partnership in the security sector and the characteristics of their application; identification of objects of a public-private partnership with the security sector; outlining areas for resolving disputes arising from public-private partnerships in the security sector. Despite the obvious relevance of practical rather than formal involvement of private entities in public administration in the security sector, it is insufficient to study the deep foundations of effective participation of the private sector in the improvement of the organization of security issues in public administration.

The spread of COVID-19 has become another challenge for regions that are already suffering from ongoing conflicts. However, local authorities are trying to take measures to contain the disease even under such conditions. The introduction of public-private cooperation in the direction of security and the fight against coronavirus infection, subject to military aggression, have already implied certain difficulties but elicited discussion and innovations. Since there are neither particular examples nor experiences of such cooperation in the world, Ukraine is the first to provide a theoretical and practical basis for developing legal cooperation between the state and the private sector. Quarantine restrictions during the pandemic have a specific nature, and the authors assume that various kinds of delays are possible for the partnership, which suspends the process.

2. Legal determination and forms of public-private partnership

The need to introduce public-private partnerships in the security sector has been repeatedly demonstrated at the highest state level. For example, the National Security Strategy of Ukraine “Human Security – Country Security” identifies the main priorities for the development of public-private partnership (paragraph 6), the creation of an effective system of security, and resistance of critical infrastructure based on a clear division of responsibilities between public and private partnership (The President of Ukraine, 2020).

The strategy of development of the defense-industrial complex of Ukraine is one of the directions of realization of the state military-industrial policy proclaimed to provide access of economic entities of all forms of ownership to participation in projects on creation and production of defense products, introduction and realization of public-private partnership, promoting investments in domestic and foreign markets (The President of Ukraine, 2021). Practical implementation of this area is possible only through a public-private partnership. This in turn requires a significant review of the role of public-private partnerships in the field of security, the development of relevant legislation, and active law enforcement. A significant step in this direction is the reform of enterprises of the defense-industrial complex of state ownership, especially the State Concern “Ukroboronprom” by transforming them into companies, management, and disposal of their property, and aimed at ensuring defense, economic security, and protection of state interests (Kopytin, 2020).

A similar meaning for the normative determination of public-private partnership in the security sector have national regulations governing public-private partnership in Ukraine as a whole, namely: organizational and legal framework for interaction of public partners with private partners (Verkhovna Rada of Ukraine, 2010; Verkhovna Rada of Ukraine, 2003a); principles of relations arising in the process of organization and implementation of economic activity between business entities, as well as between these entities and other participants in relations in the field of business (Verkhovna Rada of Ukraine, 2003b); the procedure for consideration of cases arising from the conclusion, amendment, termination and execution of agreements concluded in the framework of public-private partnership, including concession agreements, except for disputes which are considered in other proceedings (Verkhovna Rada of Ukraine, 1991); the mechanism of preparation and carrying out with application of principles of openness, equality, objectivity,

and non-discrimination of competition on choosing of the private partner for the realization of public-private partnership concerning objects of the state, municipal property, and objects belonging to the Autonomous Republic of Crimea, determination of the winner of the competition and concluding relevant agreements within the framework of public-private partnership, except for the concession agreement (Cabinet of Ministers of Ukraine, 2011); a set of legal, financial and organizational principles for the implementation of projects carried out on the terms of the concession (Verkhovna Rada of Ukraine, 2019) and so on.

The form of public-private partnership is an external demonstration of cooperation between the state and the private sector. In the legislation, the public-private partnership form is defined depending on the contract made for its implementation. So, the following can be concluded: concession agreement; property management agreement; agreement on joint activities; other agreements (Verkhovna Rada of Ukraine, 2010). It is also assumed that an agreement concluded within the framework of a public-private partnership may contain elements of various agreements (mixed agreement), the terms of which are determined under the civil legislation of Ukraine. Consequently, in general, it is allowed to combine at the same time several types of these agreements to implement a public-private partnership, but this should be provided by current legislation.

The current legislation of Ukraine defines an administrative agreement in paragraph 16 of Part 1 of Article 1 of Code of Administrative Proceedings of Ukraine (Verkhovna Rada of Ukraine, 2005). The distinguishing features are not exhaustive and do not give a concept of all its aspects (Tymchyshyn, 2018). When differentiating between an administrative agreement and agreements concluded within a public-private partnership, the key characteristic is the subject of the agreement: for administrative agreement – the definition of rights and obligations in the public sphere to implement public administration functions, and for agreements which are concluded for the purpose of public-private partnership – this is not typical (Levchenko et al., 2021). During the implementation of public-private partnership, the authorized subjects of public administration act as holders of public-administrative management functions until the determination of the private partner, and when concluding the relevant agreement and determining its provisions, the parties are already guided by the provision of private law (civil, economic), which determines the

equality of the parties a public-private partnership, mutual responsibility and fair and mutual distribution of risks.

Considering that the most common form of public-private partnership is a concession, we will consider the features of its application in the field of state security. Concession (from the Latin concession – permission, assignment) in the theory of law is defined as the transfer to the management of a particular property for a specified period.

3. Concession in the field of state security: analysis of the Ukrainian legislation

In the current legislation, the concession is defined as a form of public-private partnership, which provides for the grantor of the concessionaire to the concessionaire the right to create and /or build (new construction, reconstruction, restoration, overhaul, and technical re-equipment), and/or management (use, operation, technical maintenance) of the concession object, and/or provision of socially significant services in the manner and under the conditions specified in the concession agreement, and also provides for the transfer to the concessionaire of most of the operational risk, including demand risk and/or supply risk (Verkhovna Rada of Ukraine, 2019). Thus, a concession is a transfer to a private entity (concessionaire) of the right to create and/or build, and/or manage the relevant facilities, which continue to remain in state ownership or ownership of the territorial community. The characteristics of a concession determine the broad possibilities of its use in various spheres of the economy and concerning any objects (Britchenko & Saienko, 2017).

An analysis of the international experience of public-private partnership in countries with different levels of socio-economic development, implemented through the concession form of public-private partnership, shows that such partnerships are successfully used in transport (roads, railways, airports, ports, pipeline transport) and social infrastructure (health, education, entertainment, tourism), housing and communal services (water supply, electricity, water treatment, gas supply, etc.), in other areas (prisons, defense, military facilities) (Cherchata, 2020).

In Ukraine, the concession is used mainly in the field of infrastructure. Over the last few years, seaports (for example, Kherson Sea Commercial Port) have been transferred to concession, and the work on the preparation of concession projects for other seaports of Ukraine has been intensified, which corresponds to Ukraine's National Transport Strategy until 2030 (Cabinet of Ministers of Ukraine, 2018) and Ukraine's Seaports Development

Strategy until 2038 (Cabinet of Ministers of Ukraine, 2013). The Ministry of Infrastructure (2015) established the Project Office for the Development of Public-Private Partnership to ensure the rapid and effective development of the public-private partnership mechanism. The Project Office is responsible for preparing the relevant concession facilities.

In the field of state security, the concession is not used, which is a consequence of both the generally low level of development of public-private partnership in this area and the disorganization of the authorized state bodies' activities for the preparation of concession projects. In addition, it should be noted that the law prohibits the implementation of public-private partnership in the field of state security. For example, it is established that the object of concession may not be state property used in the manufacture and repair of all types of weapons in service with the Armed Forces of Ukraine, other military formations formed under the law, the Security Service of Ukraine (Verkhovna Rada of Ukraine, 2019).

Thus, the concession as a form of public-private partnership allows attracting investment, thereby improving the quality and competitiveness of the relevant products in the short term and significantly improving the effectiveness of public security in the long term. As for the objects of public-private partnership, this is what the public-private partnership is aimed at or in relation to. In this case, the object of public-private partnership must be owned by the state or local community. Objects of public-private partnership are: existing, in particular reproducible (through reconstruction, restoration, overhaul, and technical re-equipment) objects that are in state or communal ownership or belong to the Autonomous Republic of Crimea, or property of companies, 100 percent of actions (shares) which belongs to the state, territorial community or the Autonomous Republic of Crimea; created or newly built objects under the agreement concluded within the framework of public-private partnership (Verkhovna Rada of Ukraine, 2010). This list of objects is typical and not especially focused on the sphere of state security since specifics of this sphere require the inclusion of military weapons, equipment, and other objects intended for ensuring state security.

In turn, in one of the drafts it was proposed to determine under the objects of public-private partnership in the field of national security and defense of Ukraine:

1) created (acquired) or existing (restoration) objects, including houses, structures (integral property complexes), social infrastructure, non-residential premises, construction

in progress, mothballed objects and other real estates), and land plots on which the objects are located;

2) weapons, military, and special equipment; systems of military machinery, equipment, and devices, automated systems, dual-use products, and technologies;

3) facilities for production, deployment, modernization, repair, operation or disposal of weapons, military and special equipment, as well as ensuring the functioning of such facilities;

4) property rights belonging to the state;

5) objects of intellectual property rights;

6) special software (Markevych, 2015).

At the same time, it is clear that the implementation of public-private partnership in the field of national security and defense of Ukraine takes into account the peculiarities of the legal regime of particular objects established by the laws of Ukraine. It should also be noted that the public-private partnership for some of these facilities will be carried out in certain forms of public-private partnership.

Regarding the secrecy of public-private partnership in the security sector, the specifics of public security and the composition of public-private partnership in this area also determines the extension of the secrecy regime in connection with their classification as a state secret, which is defined as a type of secret information covering data (for example, in the field of defense, economics, science and technology, foreign relations, state security, and law enforcement), the disclosure of which may harm the national security of Ukraine and which recognized as a state secret and subject to state protection (On State Secret, 1994). This applies to all stages of a public-private partnership, from the list of facilities being prepared for a public-private partnership, proposals for a public-private partnership, the identification of a private partner, and the making of a contract. The secrecy regime inherent in public-private partnerships in the field of public security also affects the requirements for private entities involved in public-private partnerships (Yaroshenko et al., 2018).

In addition to the general requirements for private partners, there are also requirements for ensuring and maintaining the regime of secrecy (state secret). Also, a private partner in the implementation of public-private partnership in the field of security can be only legal entities formed under the laws of Ukraine or even founded by citizens of Ukraine.

For the implementation of public-private partnership in the sphere of state security, joint ventures, institutions, organizations can also be formed, in the authorized capital of which property, property rights, and other assets are transferred, which are state property and are the object of public-private partnership (Markevych, 2015).

The issue of resolving disputes during the implementation of public-private partnership, including in the field of state security is also unresolved. These are: 1) disputes over the choice of private partner for the implementation of public-private partnership; 2) the fulfilment of obligations stipulated by the agreement concluded within the framework of public-private partnership. Disputes arising from public-private partnership relations in court are carried out taking into account the provisions of agreements concluded within the framework of public-private partnership. Thus, the parties to a public-private partnership agreement are free to choose the dispute settlement mechanism, including mediation, non-binding expert assessment, national or international commercial or investment arbitration, including arbitration located abroad (if the founder of a private partner is an enterprise with foreign financing (Verkhovna Rada of Ukraine, 1996), as well as procedural rules for resolving disputes (Verkhovna Rada of Ukraine, 2010). In court, disputes arising from the conclusion, amendment, termination and execution of agreements concluded in the framework of public-private partnership, including concession agreements are resolved in commercial proceedings (Verkhovna Rada of Ukraine, 1991).

In the current situation, it is difficult to say how the pandemic has affected international security in general, especially in Ukraine. Since the coronavirus infection has not yet ceased to rage, and the hostilities have been going on for several years and increasing in strength, it is difficult but possible to draw a defined conclusion.

Conclusions

As a result of the study, the authors concluded that there is no normatively determined procedure for cooperation between public and private entities in the security sector. Public-private partnership in the field of security is carried out by concluding the same types of agreements, with the possibility of combining them, at the same time, the specificity inherent in this area reveals in the specific conditions of each of these types of agreements.

In order to increase the positive effect of the introduction of new forms of involvement of private entities in the administration of the security sector, it is necessary to: separate the administrative agreement as a form of interaction from the agreements that are forms of public-private partnership (substantiated by the peculiarities of the conclusion and legal action inherent in administrative agreements, as well as their appeal in court); introduction of a regime of secrecy regarding public-private partnership in the security sector (substantiated by the specifics of the security sector as a sphere of public relations, which should initially be streamlined in order to protect the national security of Ukraine); comparing the positive effect of the possibility of involving foreign partners in public-private partnerships in the security sector and preserving the national interests of Ukraine (substantiated by the increased risk of possible abuse by private entities that are not residents of Ukraine).

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