

Addis Ababa University
College of Law and Governance Studies
School of Law

**Using Public Private Partnership as Market Regulatory
Mechanism in Ethiopia**

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Declaration

I, the undersigned, declare that this thesis is my original work and has not been presented for a degree in any university and that all sources of materials used therein have been duly acknowledged.

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Introduction

Public infrastructure is believed to be an enabler in economic development and enhancement of human life. The responsibilities to develop infrastructure and provide public services ultimately fall on governments. Nevertheless, governments – developed and developing – often encounter challenges to satisfy the ever-growing demand for infrastructure through public finance only, as the development of public services consumes a large sum of money. Therefore, governments held that partnering the private sector in this regard provides a viable opportunity to overcome the challenge and develop new and better infrastructural services.

The partnership between governments and the private sector for development of public infrastructure is typically designated as Public Private Partnership. Globally, Public Private Partnerships are understood and used in the form of long-term contractual arrangements between a public authority and a private entity for the development of infrastructure and delivery of public services.

On the other hand, the development and provision of public services need to be subjected to government regulation, obviously for two reasons. The first is that public services are designed and implemented primarily to serve public interest. The second is that public services usually create either monopolistic or oligopolistic market situations, known to be among the causes for market failure, in favour of the private sector service providers.

The facts that Public Private Partnerships are mainly used to develop and deliver public services, and that public services need to be regulated enable us to pose a question as to how governments can use Public Private Partnerships to regulate the private sector. Accordingly, the thesis tries to analyze how Public Private Partnerships may be used as an instrument of regulation.

The government of the Federal Democratic Republic of Ethiopia had shown its intention to utilize Public Private Partnerships long before it established the country's policy framework. The government had already introduced Public Private Partnerships through the enactment of the Ethiopian Federal Government Procurement and Property Administration Proclamation No. 649/2009. However, this legislation did not provide for the legal framework for the

implementation of Public Private Partnerships, except that it defined the meaning of such a partnership.

Almost a decade later, the Ethiopian government formulated its policy toward Public Private Partnerships in August 2017 and further enacted its Public Private Partnership Proclamation No. 1076/2018. Since then, Ethiopia is trying to develop Public Private Partnership projects and cope with the growing demand for public infrastructure in the country.

Though it can be too early to evaluate the Ethiopian Public Private Partnership framework from empirical point of view, it is still possible and worthy to look into the framework theoretically.

As already indicated above, the thesis tries to analyze Public Private Partnerships from the perspective of regulation. Hence, the thesis bases itself on a central research question 'Is Ethiopia Using Public Private Partnership as an Instrument of Regulation?'

Since the thesis is doctrinal one employing qualitative research methods, it makes use of methods such as review and analysis of subject matter literature, and examination of pertinent legal instruments and other authoritative documents. This reveals that legal instruments and other authoritative documents serve as primary source and subject matter literature as secondary source of data in the thesis.

To this end, the thesis is structured to have three chapters and a conclusion at last. The first chapter deals with Public Private Partnerships and related issues. The second chapter deals with market regulation and related issues, and particularly tries to investigate into the interface between Public Private Partnerships and market regulation. The third chapter discusses issues relating to the use of Public Private Partnerships as an instrument of regulation in Ethiopia. Finally, the thesis provides conclusion to summarize discussions and state possible answers with recommendations.

Chapter One

(1) Public Private Partnership

(1.1) Essence of Public Private Partnership

Public Private Partnership, hereinafter also referred to as PPP, is fundamentally about using the skills and finance of the private sector in the production and provision of public services.¹ To put it in other words, it is an innovative procurement approach where the public and private actors agree and cooperate to develop infrastructure and deliver public services, but sharing the risks, costs and benefits.²

This reveals that PPP is a sort of collaboration between public and private sectors for the sake of meeting clearly identified public needs via the appropriate allocation of resources, risks, responsibilities and benefits.³ However, it is important to note that PPP is not a solution option to a certain infrastructure related problem, but it is a viable project execution alternative for the preferred solution option.⁴

(1.2) Defining Public Private Partnership

It is knotty to come up with a generally accepted definition of PPP⁵ so that there is no single and internationally recognized definition. However, PPP can be described as "a long-term contract between a private party and a government entity, for providing a public asset or service, in which

¹ Olufermi Soyaju, 'Legal Framework for Public Private Partnership in Nigeria' (2013) 46 De Jure 813, 816

² Koppenjan, J.F.M. (2005). The Formation of Public-Private Partnerships: Lessons from Nine Transport Infrastructure Projects in the Netherlands. *Public Administration*, 83(1), 135-157, as cited in Wei Xiong, Bin Chen and Huaming Wang, 'Governing Public-Private Partnerships: A Systematic Review of Case Study Literature' [2018] Wiley Research and Evaluation 95

³ Canadian Council for Public Private Partnerships, as cited in United Nations, Economic and Social Commission for Asia and the Pacific (ESCAP), *A Guidebook on Public-Private Partnership in Infrastructure* (2011) 1

⁴ ESCAP (n 3) 1

⁵ Donahue, J. D., & Zackhauser, R. J. (2011). Collaborative Governance: Private Roles for Public Goals in Turbulent Times. Princeton, NJ: Princeton University Press, as cited in Martijn van den Hurk, 'Public-Private Partnerships: Where Do We Go from Here? A Belgian Perspective' (2018) 23 *Public Works Management and Policy* 274, 275

the private party bears significant risk and management responsibility and remuneration is linked to performance.⁶

Another similar definition describes PPP in terms of a long-term, usually 25-30 years, contractual arrangement between a private entity and a governmental agency for the provision of a public asset or service through private sub-contracting and risk sharing while the control of projects is still in the hands of the public.⁷

At this juncture, it appears possible to identify some common PPP features indicated in the definitions and under the discussion on essence of PPP. Accordingly, the following points may be contemplated:

- PPP is essentially a partnership that emanates from a contract between public and private sectors;
- The objective of PPP is development and provision of public services for a long period of time; and
- Under a PPP arrangement, the private party assumes significant financial risks and at the same time expects benefits.

⁶ International Bank for Reconstruction and Development (The World Bank), *Public-Private Partnerships Reference Guide* (version 3, 2017) 5

⁷ Akinloye A, Matthias B and Mohan K (eds) (2016) *Public Private Partnerships: A Global Review*. Abingdon, UK: Routledge; Bovaired T (2004) *Public-Private Partnerships: From Contested Concepts to Prevalent Practice*. *International Review of Administrative Sciences* 70(2): 199-215; and Zaato JJ and Hudon PA (2015) *Governance Lessons from Public Private Partnerships: Examining Two Cases in the Greater Ottawa Region*. *Commonwealth Journal of Local Government* 16(17): 12-30, as cited in Joshua Jebuntie Zaato and Frank Louis Kwaku Ohemeng, 'Breaking the Path in National Development? The Politics of Public-Private Partnerships in Ghana' (2016) 2 *Journal of Strategic Contracting and Negotiation* 326

(1.3) Why Public Private Partnerships Are Preferred?

It is an established fact that public infrastructure⁸ is an enabler, serving as catalyst to human and economic development.⁹ Infrastructure is critical to attract foreign direct investment and expansion of international trade which are so essential to a country's economic development and growth.¹⁰

The development of public infrastructure and provision of public services are ultimately the responsibilities of governments.¹¹ However, governments, particularly in developing countries, face the challenge to cope with the growing demand for infrastructure. As a result, governments started to view working in partnership with the private sector as an attractive mechanism to develop new and better infrastructure services, thereby contributing to economic development and enhancement of citizens' life.¹²

In other words, PPPs are preferred as a solution to address infrastructural gaps resulting from the limited capacity of governments.¹³ They are believed to be important for generating investments from the private sector in the development of infrastructure projects.¹⁴

⁸ United Nations Commission on International Trade Law (UNCITRAL), *Legislative Guide on Privately Financed Infrastructure Projects* (2001) 3-4;

This legislative guide defines public infrastructure as physical facilities that provide important public services and further lists some examples including power generation and distribution facilities in the electricity sector; telephone communications and data transmission facilities in the telecommunication sector; desalination and waste water treatment plants, and water distribution facilities in the water sector; waste collection and disposal facilities in the sanitation sector; and public transportation facilities such as railways, under-ground trains, bus lines, roads, bridges, tunnels, ports, airlines and airports in the transportation sector. The terminologies such as public services, public goods and infrastructure also have the same definition in the thesis.

⁹ Soyeju (n 1) 814

¹⁰ Soyeju (n 1) 815

¹¹ The World Bank (n 6) 15

¹² ESCAP (n 3) 1

¹³ Woetzel, Jonathan, Nicklas Guremo, Jan Mischke, Martin Hjerpe, and Robert Palter (2016). *Bridging Global Infrastructure Gaps*, Shanghai: McKinley Global Institute (June) as cited in Albalade D, Bel G and Geddes R, "Do

PPPs have also been preferred for the development of infrastructure projects around the world due to their effectiveness in delivering good value for money.¹⁵ Value for money can be achieved through the use of public resources in a way that creates and maximizes public value.¹⁶ Under a PPP scheme, both public and private resources including finance, skill and expertise are used together with a view to develop and provide public services. PPP opens the opportunity to build big now and pay the bill in the future.¹⁷

The fact that the private sector is assumed to act more efficiently than a public sector is also among the main reasons supporting the use of PPP. With their own money at risk, private parties are believed to have a strong incentive to manage infrastructure projects properly.¹⁸

(1.4) The Role of Private Sector in Public Private Partnerships

In the preceding discussions, it has been made clear that PPP requires, like a marriage, public and private sectors to cooperate toward common goals and compromise with each other to maximize the total surplus, i.e., the development and provision of public services.¹⁹ The question as to 'what does the private sector actually denote?' has not been addressed yet, however.

Public-Private Enabling Laws Increase Private Investment in Infrastructure?" (Working Paper 2018/15) | Research Institute of Applied Economics 29, 1

¹⁵ Bruno Werneck and Mário Saadi, *The Public-Private Partnership Law Review* (5th edn, 2019) ix

¹⁶ Chan, A. P. C., P. T. I. Lam, D. W. M. Chan, E. Cheung, and Y. Ke. 2010a. "Critical Success Factors for PPPs in Infrastructure Developments: Chinese Perspective." *J. Constr. Eng. Manage.* 136 (5):484-494, as cited in Fengyu Hao and others, "Review of Public-Private Partnership Literature from a Project Lifecycle Perspective" [2018] *Journal of Infrastructure Systems*, 1

¹⁷ Department for Transport, *Value for Money Framework: Moving Britain Ahead* (2017) 8

¹⁸ Huk (n 5) 277

¹⁹ Huk (n 5) 276

²⁰ Forrer, J. Kee, J. E., Newcomer, K. E., & Boyer E. (2010). Public-Private Partnerships and the Public Accountability Question. *Public Administration Review*, 70(3), 475-484, as cited in Xiong, Chen and Wang (n 2) 104

Under PPP, the private sector covers a wide range of institutions that operate with profit motive. Hence, non-state actors such as voluntary organizations, non-governmental organizations and other civic and professional societies are out of the ambit of this research.²⁰

Even though the private sector embraces parties that operate with similar profit motive, the roles transferred under PPP contracts to the private parties vary from contract to contract.²¹

In general terms, private parties under PPP contracts have such roles that relate to designing, financing, building, operating, maintaining and providing infrastructure projects.²² Moreover, private parties are, in all cases, accountable for project performance and bear significant risk and management responsibilities.²³

As it will be discussed in the next chapter, the government or public sector under a PPP contract also remains responsible for, among others, making sure the public service is delivered as per the quality and quantity defined in the contract, in such a way that brings good value for money.²⁴

(1.5) Other Forms of Private Sector Participation

"At one extreme there are fully public sector enterprises, and at the other fully private firms." In between these two extremes exist many different arrangements that combine public and private roles.²⁵ In other words, there are different arrangements that allow private sector participation.

The participation of private entities in infrastructure projects can be designed in a number of different forms.²⁶ PPP is one of such forms and there are usually other five broad categories of

²⁰ Bikila Huriisa Wolde, 'Public Private Partnership (PPP) in the Ethiopian Health Sector: The Case of Addis Ababa City' (DPhil thesis, Addis Ababa University 2016) 35

²¹ The World Bank (n 6) 1

²² PPP Knowledge Lab, available at

<https://pppknowledgelab.org/guide/sections/28-ppp-processes-and-institutional-responsibilities>

Accessed 9 February 2020

²³ The World Bank (n 6) 1

²⁴ PPP Knowledge Lab (n 22)

²⁵ Philip Kelly, 'Preparing a Public-Private Partnership Law: Observations from the International Experience' (2016) 4 EARD Working Paper Series, 6

²⁶ UNCITRAL (n 8) 13

private sector participation. These are: supply and management contracts; turnkey or procurement contracts; private finance initiative; concessions; and franchise.²⁷

(1.5.1) Management Contracts

They are contracts for the management of a public enterprise or service by the private sector. The private sector is assigned with some management responsibilities about public service delivery and is generally not supposed to assume commercial risks.²⁸

(1.5.2) Turnkey or Procurement Contracts

It is a traditional or conventional public procurement approach for infrastructure facilities. Here a private party, selected through a bidding procedure, implements the infrastructure project and its scale of investment is generally for a short period of time.²⁹

It seems that conventional procurement projects and PPP projects are almost similar. However, there are significant differences between them. The main ones include:

- PPP projects are different from [conventional procurement] projects in terms of project development, implementation, and management. The administrative and approval processes in the case of PPP projects are also different.
- A PPP project is viable essentially when a robust business model can be developed.
- The focus of a PPP project should not be on delivering a particular class/type of assets but on delivering specified services at defined quality and levels.
- The risk allocation between the partners is at the heart of any PPP contract design and is more complex than that of a conventional [procurement] project. Both partners should clearly understand the various risks involved and agree to an allocation of risks between them.

²⁷ ESCAP (n 3) 4

²⁸ ESCAP (n 3) 6

²⁹ ESCAP (n 3) 6-7

— A PPP contract generally has a much longer tenure than a [conventional procurement] contract. ...³⁰

(1.5.3) Concessions/ Licensing

In concessions, although there is no single internationally accepted definition for the term,³¹ the public sector defines and grants specified rights to the private entity in order to develop and operate a facility for a certain time. When it comes to payments, they can take place both ways: i.e., concessionaire pays to the government for the reserved concession rights and government may also pay to the concessionaire to meet certain specified conditions.³²

While the processes involved in concessions can resemble PPPs, the contractual structures of the latter are distinct.³³

(1.5.4) Private Finance Initiative

In this model, the private party is responsible for the development and operation of a public service. Sometimes, the public sector may even relinquish its ownership right and purchases the infrastructure services from the private sector. Therefore, such kind of initiatives bear direct financial obligations on the public sector.³⁴

(1.5.5) Franchise

As far as infrastructure and public services are concerned, there is no universally applied definition of the term franchise. But it is used as entailing the allocation of tentative monopoly privileges to undertake an activity, mainly by using auction to control market entry.³⁵

³⁰ ESCAP (n 3) 3

³¹ Kelly (n 25) 8

³² ESCAP (n 3) 8

³³ PPP Knowledge Lab, available at

<https://pppknowlab.org/guide/sections/43-role-of-independent-regulators/#passage-145>

Accessed 9 February 2020

³⁴ ESCAP (n 3) 9

³⁵ Kelly (n 25) 9

Without prejudice to the foregoing discussion on different forms of private sector partnership, activities that fall under the form of PPP may sometimes be characterized as procurement or concession or franchise deals or private finance initiative.³⁶ The substance of rights and obligations on one hand, and risk allocation and sharing structures on the other are more important to label as PPP or other form of participation.³⁷

(1.6) Arguments Against Public Private Partnerships

Despite the promise of the social, economic and political benefits of PPPs, there are a number of tales of failed PPP infrastructure projects in both developed and developing countries.³⁸ Opponents of PPPs argue that risks are not often shared and cost overruns occur all the time, among others.³⁹ The terminology PPP has been even described sarcastically as 'problem, problem, problem.'⁴⁰

Having in mind the complexity of the debate on the merits and demerits,⁴¹ PPPs have perceived limitations and the major ones include:

- Not all projects are feasible (for various reasons: political, legal, commercial viability, etc.).

³⁶ Kelly (n 25) 6

³⁷ Kelly (n 25) 10

³⁸ Hilton R and Stoney C (2007) *Dreams, Deception and Delusion: The Derailing of Ottawa's Light Rail Transit Plans*. *Revue Gouvernance* 4(1): 1-26; Murray S (2006) *Value for Money? Cautionary Lessons About P3 s from British Columbia*. *Canadian Centre for Policy Alternatives*, 1-27; and Vinning AR, Boardman AE and Poschmann F (2005) *Public-Private Partnerships in the US and Canada: There are No Free Lunches*. *Journal of Comparative Policy Analysis* 7(3): 199-220, as cited in Zaato and Obemeng (n 7) 332

³⁹ Hodge G (2004) *The Risky Business of Public-Private Partnerships*. *Australian Journal of Public Administration* 63(4): 37-49; and Vinning AR, Boardman AE and Poschmann F (2005) *Public-Private Partnerships in the US and Canada: There are No Free Lunches*. *Journal of Comparative Policy Analysis* 7(3): 199-220, as cited in *Ibid.*

⁴⁰ Linder SH (1999) *Coming to Terms with the Public-Private Partnership: A Grammar of Multiple Meanings*. *American Behavioral Scientist* 43(1): 35-51, as cited in Zaato and Obemeng (n 7) 331

⁴¹ E. R. Yescombe, *Public-Private Partnerships: Principles of Policy and Finance* (1st edn, 2007) 15

- The private sector may not take interest in a project due to perceived high risks or may lack technical, financial or managerial capacity to implement the project.
- A PPP project may be more costly unless additional costs (due to higher transaction and financing costs) can be off-set through efficiency gains.
- Change in operation and management control of an infrastructure asset through a PPP may not be sufficient to improve its economic performance unless other necessary conditions are met. These conditions may include appropriate sector and market reform and change in operational and management practices of infrastructure operation.
- Often, the success of PPPs depends on regulatory efficiency.⁴²

In spite of all these arguments, however, PPP has become a significant preferred approach for building public infrastructure both in developed and developing countries.⁴³ The global experience also witnesses that PPP is a widely spreading concept well applied and reflected in different economic sectors.⁴⁴

⁴² ESCAP (n 3) 3-4

⁴³ Akinloye A, Matthias B and Mohan K (eds) (2016) *Public Private Partnerships: A Global Review*. Abingdon, UK: Routledge; Vinning AR and Boardman AR (2006) *Public-Private Partnerships in Canada: Theory and Evidence*. UBC P3 Project Working Paper 2006-04. Vancouver, Canada: Infrastructure Canada; and and Zaato JJ and Hudon PA (2015) *Governance Lessons from Public Private Partnerships: Examining Two Cases in the Greater Ottawa Region*. *Commonwealth Journal of Local Government* 16(17): 12-30, as cited in Zaato and Ohemeng (n 7) 327

⁴⁴ Gebree Mieruts and Saary Getachew (Corresponding Author), 'Public-Private Partnership in Ethiopia: The Inclusive Modality in Tourism Investment' (2015) 11 *Journal of Tourism, Hospitality and Sports* 33, 34

Chapter Two

(2) Public Private Participation and Market Regulation

(2.1) Government Intervention into Economy

Government intervention into economy has a long existence.⁴⁵ Public interest and market failure are usually used to justify government intervention.

The history of government intervention under the public interest justification has also a long existence.⁴⁶ As it reflects on one hand the community's interest on wealth distribution and on the other hand the rejection of excessive gains by traders,⁴⁷ public interest requires governments to intervene into the economy in areas of health and safety, environment and other social policy concerns.⁴⁸

Conventionally, governments assume the responsibility to ensure that markets are functioning properly, if not perfectly, through their allocative role to deal with imbalances resulting from market failures.⁴⁹

Market failures enable sellers to deliberately reduce output so as to extract higher prices at the expense of consumers in particular and society in general.⁵⁰ Hence, a monopolistic situation will be created and the monopoly will have a strong market power which allows to behave as a price maker. Such instances of market failure provide the rationale for governments to intervene into

⁴⁵ Michael Hanke-Domas, 'The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?' (2003) 15 *European Journal of Law and Economics* 165, 166

⁴⁶ Glen Hepburn, *Alternatives to Traditional Regulation*, (OECD Report) 9

⁴⁷ Hanke-Domas (n 45) 170

⁴⁸ Hepburn (n 46) 9

⁴⁹ Emerson Abraham Jackson (Corresponding Author) and Mohammed Jabbie (Co-Author), *Understanding Market Failure in the Developing Country Context* (Munich Personal RePEc Archive) (2019) 2

⁵⁰ The International Bank for Reconstruction and Development (The World Bank) and the Organization for Economic Co-operation and Development (OECD), *A Framework for the Design and Implementation of Competition Law and Policy* (1998) 1

the market and correct the perceived failure.⁵¹ Public intervention, thus, appears to be legitimate.⁵²

As far as modes of government intervention are concerned, market regulation and other policy instruments that help to meet societal demands and maintain market frameworks are mentioned among them.⁵³

(2.2) Market Regulation

Regulation is inherent in the very nature of state.⁵⁴ In this regard, regulation can be taken as the power of governmental actors to make and enforce rules; or as an intervention of government into the economy; or as a form of government influence to affect the behavior of market actors.⁵⁵ Typically, regulation embraces the rules of procedure governing the way and manner which institutions are supposed to adhere.⁵⁶ It can also be considered as a type of legal instrument that

⁵¹ Hepburn (n 46) 9

⁵² Stéphane Saussier and Julie de Brux, *The Economics of Public-Private Partnership: Theoretical and Empirical Developments* (2018) 39-40

⁵³ Hepburn (n 46) 9

⁵⁴ Migdal, J.S. (1998), *Strong Societies and Weak States*, Princeton University Press, Princeton, NJ, as cited in John M. Luiz, 'The Politics of State, Society and Economy' (2000) 27 *International Journal of Social Economics* 227, 228;

State may be defined as an organization, composed of numerous agencies led and co-ordinated by the state's executive leadership authority that has the power to make and implement the binding rules for all the people as well as the parameters of rule-making for other social organizations in a given territory, using force if necessary. This definition of state indicates the power to set binding standards of behaviour and enforce the standards, which is otherwise referred to as regulation, is what makes up the state.

⁵⁵ Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a Post-Regulatory World,' in Black J., *Current Legal Problems*, 2001, at pp. 134-135 as cited in Solomon Abay, 'Designing the Regulatory Roles of Government in Business: The Lessons from Theory, International Practice and Ethiopia's Policy Path' (2009) 23 *Journal of Ethiopian Law* 66

Besides, see the discussion at note number 57 hereinbelow

⁵⁶ Soyseja (n 1) 819

deals with an intentional or goal directed process of controlling, governing, directing, enabling, coordinating, influencing or ordering the behavior of market actors.⁵⁷

(2.2.1) Rationale for Regulation

Since regulation is one mode of government intervention, the reasons which justify government intervention can also be used to rationalize regulation.

Government regulation of market is justified by the idea of market failure and the needs for economic co-ordination between macro-economic and social policy consideration.⁵⁸

The need for government regulation of market may further be viewed from the perspective of the private sector's inbuilt profit orientation. The private sector might involve in legally and morally unacceptable practices under the veil of profit maximization.⁵⁹ Misbehaviours of this sector are usually associated with its unregulated profit motive. It is also argued that public interest goals

⁵⁷ Julia Black, as cited in Abay (n 55); and HEKS/EPER, *Market Systems Development: Guideline to Plan and Facilitate Market System Changes* (2015) 10-11.

Within a market system that embraces market actors, relationships, functions and issues, market actors denote several types including:

- Government and its institutions, both at national or local levels, forming essentially the public sector,
- For-profit businesses of any size or ownership form,
- Networks of either formal or informal,
- Membership or representative organizations such as trade unions, employers' associations, chambers of commerce and consumer groups, whose principal role is advocacy,
- Not-for-profit organizations including non-governmental organizations and community groups but also universities and educational institutions having some autonomy from government, and
- Individual or collective producers and consumers without a defined structure.

⁵⁸ Pierce, R.J.J.R. and Gellhorn, E., *Regulated Industries in a Nutshell* (3rd Ed.) West Publishing Company, St. Paul, Minn., USA, 1994), at pp. 43-69; and Ogun, A.I., *Regulation: Legal Form and Economic Theory* (Clarendon Press, Oxford New York, 1996), at pp. 29-54, as cited in Abay (n 55) 102

⁵⁹ Bel, G., Fageda, X., and Warner, M. E. (2010). Is Private Production of Public Services Cheaper Than Public Production? A Meta-Regression Analysis of Solid Waste and Water Services. *Journal of Policy Analysis and Management*, 29(3), 553-577, as cited in Wolde (n 20) 36

such as issues of equity, accessibility, transparency, inclusiveness are less emphasized in the private sector.⁶⁰

(2.2.2) Types of Regulation

Distinction is often made between economic and social regulation⁶¹ on one hand and sectoral and cross-sectoral regulation⁶² on the other.

In general terms, economic regulation refers to the attempt to correct market shortcomings and social regulation to the attempt to realize humanitarian welfare goals.⁶³ In other words, economic regulation may be described as the setting of price levels and structures, registration of businesses, corporate reporting and auditing, monitoring operation costs, specifying entry and exit conditions, and setting standards that ensure fair competition. Social regulation deals with the setting of environmental rules, health and safety standards.⁶⁴

On the other hand, regulatory functions can be categorized on a sectoral or cross-sectoral basis. Countries with a sectoral regulatory category usually place closely linked sectors or segments under same regulatory structure. Other countries following cross-sectoral approach organize one regulatory entity for different infrastructure sectors.⁶⁵

(2.3) Market Regulatory Mechanisms

Simply put, market regulatory mechanisms are tools and techniques used in the administration of regulation.⁶⁶ And if one opts for the wide understanding of regulation as referring to both governmental and non-governmental interventions that aim at ordering the economic affairs of a

⁶⁰ Wolde (n 20) 36

⁶¹ Abay (n 55)

⁶² UNCITRAL (n 8) 31

⁶³ Thimes, B., *Regulation and Regulatory Transformation in European Insurance Markets* (Doctoral Dissertation, Ludwig-Maximilians-Universität München, 1999), at pp. 56, 59-69, as cited in Abay (n 55)

⁶⁴ Kelly (n 25) 39

⁶⁵ UNCITRAL (n 8) 31-32

⁶⁶ Paul Cook, Colin Kirkpatrick, Martin Minogue and David Parker, *Competition, Regulation and Regulatory Governance: An Overview* (2004) 15

society,⁶⁷ regulatory mechanisms could refer to all those instruments employed with a view to order market behaviour.

In many situations, there can be a range of options for regulatory mechanisms. However, it is challenging for governments to ensure that the regulatory instruments they prefer are both effective and efficient.⁶⁸

(2.3.1) Command and Control Regulatory Mechanisms

Being traditional regulatory mechanisms that tell what to do and what not to do,⁶⁹ command and control regulation refers to a system of control based on uniform standards set by government.⁷⁰

Regulation using command and control instruments in most cases is applied by imposing binding standards enforced through legal sanctions such as civil, criminal or administrative measures for noncompliance.⁷¹

Command and control regulation standards can cover rule making and enforcement and licensing arrangements under which market actors must acquire permits to engage in a particular activity. These standards may also extend beyond those rules that are designed to preserve quality or manner of delivery of services to the rules that deal with allocation of resources, prices charged on consumers and margin of profits earned by service providers.⁷²

⁶⁷ Abay (n 55) 70.

To see how non-governmental intervention may form regulation, refer below to the discussion about self-regulation under section 2.3.2.2.

⁶⁸ Hepburn (n 46) 4.

Regulatory instruments are said to be effective in the sense that they overcome the problem they were introduced to deal with; and they are efficient when they can minimize both direct compliance costs borne by those subjected to the regulation, and other, often more indirect, costs which can be imposed.

⁶⁹ Hepburn (n 46) 4, 10

⁷⁰ Thomas W. Merrill, 'Explaining Market Mechanisms' (2000) 2000 University of Illinois Law Review 275

⁷¹ Martín Molinarvo and Sebastián Sáez, *Regulatory Assessment Toolkit: A Practical Methodology for Assessing Regulation on Trade and Investment in Services* (the International Bank for Reconstruction and Development (the World Bank, 2014) 60

⁷² Molinarvo and Sáez (n 71)

With their binding nature, command and control regulatory mechanisms enable to prohibit, with relatively certain and immediate effect, a particular type of undesired conduct.⁷³ On the other hand, there are also a range of options other than these traditional instruments that help achieve public policy objectives.⁷⁴

(2.3.2) Alternative Regulatory Mechanisms

The alternatives to the traditional command and control regulatory instruments may be categorized under three main groups: market-based mechanisms, self-regulation and co-regulation approaches, and information and education schemes.⁷⁵

(2.3.2.1) Market-based Mechanisms

Market-based mechanisms, also often referred to as economic or incentive-based instruments, are used to change or modify market behaviour through the use of economic incentives.⁷⁶ Economic incentives such as taxes and subsidies are used in order to encourage service providers and even consumers to act in accordance with public interest.⁷⁷ These instruments function by providing economic incentives to businesses and citizens so that market actors would behave in such a way that helps achieve public policy objectives.⁷⁸

⁷³ Molimuevo and Sáez (n 71) 61

⁷⁴ Hepburn (n 46) 10

⁷⁵ Hepburn (n 46) 5

⁷⁶ Hepburn (n 46) 22 and Molimuevo and Sáez (n 71) 62;

Here, such kind of mechanisms are categorized as incentive-based ones.

⁷⁷ Molimuevo and Sáez (n 71) 62

⁷⁸ Hepburn (n 46) 22, 23

Fiscal measures and trading schemes are the two common forms of market-based instruments.

Among fiscal measures, taxes and subsidies are usually used. Taxes are usually levied on harmful activities to make them relatively more expensive so that less will be produced and consumed. Alternatively, subsidies are applied to promote production or consumption of activities thought to be advantageous.

Under trading schemes, governments set an allowed level of an activity, for instance, the production of carbon dioxide, and allocating emission permits to firms. Then, the firms will be free to trade these permits amongst themselves. In so doing, governments are able to determine the total level of emissions, without putting limits on individual firms.

Since market-based instruments are the product of government decisions,⁷⁹ governments have a significant role in establishing the regulatory and institutional framework in which the instruments operate.⁸⁰ It is, however, challenging for governments to ensure that the economic incentives introduced through the market-based instruments achieve the desired policy objectives.⁸¹

When it comes to the degree of government involvement into market-based instruments, it varies widely on the basis of the policy objectives to be met through the instruments. In some cases, the introduction of fiscal measures shows a direct government intervention. In trading schemes, on the other hand, the role of government may be limited to help establish the legal and institutional framework required for a market to operate – without getting involved in the day to day operation of the market.⁸²

As compared to the traditional command and control regulation, market-based mechanisms enable to meet public policy objectives at lower cost and with more effectiveness.⁸³ Besides, market-based instruments reflect businesses' and citizens' decisions in response to the economic incentives and these decisions will, in turn, reflect preferences of the businesses and citizens. Therefore, these instruments are able to draw on information which is unlikely to be known for regulators.⁸⁴

The private sector also values the autonomy which market-based instruments give. Such instruments provide the private sector with the freedom to make investment and other choices as

Trading schemes are also used to distribute water between competing uses or to allocate 'slots' for aircrafts to land at crowded airports.

⁷⁹ Alice Kaswan, 'Energy, Governance, and Market Mechanisms' (2018) 72 *University of Miami Law Review* 476, 524

⁸⁰ Hepburn (n 46) 22

⁸¹ Hepburn (n 46) 22

⁸² Hepburn (n 46) 22

⁸³ Hepburn (n 46) 8 and Merrill (n 70) 276

⁸⁴ Hepburn (n 46) 6

long as it pays the required tax or prefers to disregard the subsidy grant.⁸⁵ Hence, it seems to be for all these reasons that developed countries have shifted toward market-based regulation.⁸⁶

(2.3.2.2) Self-regulation and Co-regulation

Self-regulation and co-regulation are regulatory instruments with no or very limited government intervention.⁸⁷

Self-regulation exists when firms in a particular industry or individuals in a given profession voluntarily develop rules of practice or codes of conduct to influence the behaviour or actions within the industry or profession. The group of firms or individual professionals is responsible to develop instruments of self-regulation, monitor compliance and ensure enforcement.⁸⁸

Self-regulation can also be expressed in terms of, at one end, collective arrangements between firms themselves, between firms and other actors (including auditors, technical committees, non-governmental organizations and community groups) and, at the other, private contracts between individuals and firms.⁸⁹

While self-regulation is understood as a system of private ordering,⁹⁰ co-regulation involves explicit government intervention.⁹¹ As this intervention can take different forms, it may not sometimes be easy to make a clear distinction between the two.⁹²

Co-regulation involves government intervention that provides the regulatory arrangements with some form of legislative backing.⁹³ Therefore, co-regulation can be described as self-regulation

⁸⁵ Karwan (n 79) 545

⁸⁶ Molimero and Sáez (n 71) 61

⁸⁷ Hepburn (n 46) 34

⁸⁸ Hepburn (n 46) 34

⁸⁹ Julia Black, "Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a Post-Regulatory World," in Black J., *Current Legal Problems*, 2001, at pp. 121, 113-121, as cited in Abay (n 55) 69

⁹⁰ Cafaggi, F. (ed.), *Reframing Self-Regulation in European Private Law* (Kluwer Law International, the Netherlands, 2006); and Schepel H., *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Hart Publishing, Oxford and Portland, Oregon, USA, 2005), as cited in Abay (n 55) 69

⁹¹ Hepburn (n 46) 35

⁹² Hepburn (n 46) 35

with a legislative backstop.⁹⁴ It is the degree of government intervention and legal backing that establishes the difference between the two.⁹⁵

(2.3.2.3) Information and Education

Smooth flow of information is regarded as one of the prerequisites for a market to work properly.⁹⁶ This reveals governments have to make sure that information flows smoothly in the market. To this end, governments use different regulatory instruments.

Information⁹⁷ related instruments work to change behaviour through ordering or requiring businesses to disclose greater information or to change the distribution of information from where it is available to where it is not. Hence, customers and other businesses will be able to make more informed decisions.⁹⁸

These instruments do not directly impose binding legal norms on the actions of consumers or companies that still make the ultimate decisions on their own. Using these instruments, governments either compel or encourage and persuade businesses to provide greater information

⁹⁴ Hepburn (n 46) 35

⁹⁵ Better Regulation Task Force (BRTF) (2005), *Routes to Better Regulation: A Guide to Alternatives to Classic Regulation*, BRTF, London, December, as cited in Hepburn (n 46) 35

⁹⁶ Hepburn (n 46) 35;

To put it in exemplary way, it is possible to consider a group of firms that introduce codes of conduct to influence the behaviour or actions of its members. So far, the codes of practice remain to be only self-regulatory instrument. But if these codes were supported by law requiring group members to abide by them and imposing penalties when there is non-compliance, it would be a co-regulatory regime.

⁹⁷ McMillan, J. 2002. *Reinventing the Bazaar: A Natural History of Markets*. 1st ed. New York, NY: Norton., as cited in Dr. Shawn Cunningham, *Understanding Market Failures in an Economic Development Context* (Munich Personal RePEc Archive, 1st edn, 2011) 9

⁹⁸ Ronald J. Gilson and Reinier H. Kraakman, 'The Mechanisms of Market Efficiency' (1984) 70 *Virginia Law Review* 549, 561;

Information in a more limited context may be used to refer to one's beliefs about the appropriate price of an asset. And one's beliefs can be determined by both hard information of known facts and soft information of forecasts and estimates.

⁹⁹ Hepburn (n 46) 50

to consumers. Examples include information and education campaigns, labelling requirements, or other requirements to disclose information to the market.⁹⁹

(2.4) Public Private Partnership as Market Regulatory Mechanism¹⁰⁰

On one hand, the whole idea of PPPs has to do with, as has been discussed in the preceding chapter, public services and, on the other, public services require government intervention for their development, organization and delivery, among others.¹⁰¹ This implies governments involve in PPPs in many ways and assume different responsibilities therein.¹⁰²

As governments are ultimately responsible to provide public services, they need to specify the requirements for delivery.¹⁰³ Governments have to choose the right project, choose a competent private partner, and set and enforce the parameters in which that private partner operates. Moreover, governments should also establish processes and institutional responsibilities for PPPs, i.e., the steps to be followed while developing and implementing projects, and the entities responsible for each step.¹⁰⁴

Governments' involvement in PPPs and their relationship with the private sector are defined and bound by contracts. In PPPs, government involvement and its relationships are no more and no

⁹⁹ Hepburn (n 46) 50

¹⁰⁰ Bao and others (n 15) 1.

Review of literature is believed to be an essential and effective means to identify knowledge gap and provide insights for future researches. By the same token, the review of PPP literature reveals that the regulatory role of PPPs is one that has not been studied properly, nor given due attention.

The writer of this thesis has gone through all PPP related literature, referenced in this thesis, and learnt that it is only very few of these literature that attempt, at least incidentally, to look at PPPs from the perspective of their regulatory function.

The 'few' literature are those indicated in the following notes under this particular theme, i.e., PPP as market regulatory mechanism.

¹⁰¹ Christopher Bovis, 'Public-Private Partnerships versus Public Private Partnerships: Conceptual and Regulatory Issues' (2010) 5 *European Public Private Partnership Law Review* 197, 208

¹⁰² ESCAP (n 3) 51

¹⁰³ Jenke Bouma and Ezra Berkhout, *Public-Private Partnerships in Development Cooperation: Potential and Pitfalls for Inclusive Green Growth* (2015) 18

¹⁰⁴ PPP Knowledge Lab (n 22)

less than the contracts negotiated, approved and executed.¹⁰⁵ This reveals that government responsibilities, indicated hereinabove, will be reduced into and form part and parcel of the terms and conditions of PPP contracts.

In other words, PPP contracts themselves determine tariffs or service fees, tariff adjustments and other standards, such as quality, relating to public services and their delivery.¹⁰⁶ In so doing, PPP contracts serve the purpose of alternative regulatory mechanism – regulation by or through PPP contract.¹⁰⁷

¹⁰⁵ Julia Panchal Davis, 'Public-Private Partnerships' (2008) 44 *The Procurement Lawyer* 9

¹⁰⁶ The World Bank (n 6) 181; and PPP Knowledge Lab (n 33)

¹⁰⁷ ESCAP (n 3) 52; The World Bank (n 6) 181; PPP Knowledge Lab (n 33); and Molinuevo and Sáez (n 71) 62

Chapter Three

(3) Using Public Private Partnership as Market Regulatory Mechanism in Ethiopia

(3.1) Overview

The constitution of the Federal Democratic Republic of Ethiopia obliges the government to provide public infrastructure services to and thereby improve economic conditions of all citizens of the country.¹⁰⁸ To this end, the constitution empowers the government to formulate and implement the country's policies, strategies and plans with regard to economic, social and development matters.¹⁰⁹

Acknowledging the well-established link between access to public infrastructure and economic growth and development,¹¹⁰ the Ethiopian government introduced different development programs that stressed the need to enhance the expansion and quality of infrastructure development.¹¹¹

¹⁰⁸ The Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Federal Negarit Gazette, 1st Year No. 1, Addis Ababa, 21st August, 1995, Arts. 41(3)(4), 89(2);

On one hand, the Constitution recognizes, under Art. 41(3), that all Ethiopian nationals have the right to equal access to publicly funded infrastructure services. On the other hand, the provisions, under Arts. 41(7) and 89(2), impose on the government an obligation to allocate ever increasing resources to provide infrastructure services and improve economic conditions of all, respectively.

¹⁰⁹ The Constitution of the Federal Democratic Republic of Ethiopia (n 107) Art. 51(2);

The Constitution specifically empowers, under Art. 77(6), the Council of Ministers to formulate and implement economic, social and development programs. It further states, under Art. 55(10) and (1), that the economic, social and development programs formulated by the Council of Ministers are subject to approval of the House of Peoples' Representatives, which also has the power, by virtue of Sub-Art. 1 of the same Art., to make laws concerning such programs.

¹¹⁰ The Federal Democratic Republic of Ethiopia (FDRE), *Public-Private Partnership Policy* (2017) 4

¹¹¹ The Federal Democratic Republic of Ethiopia (FDRE), *The Second Growth and Transformation Plan (GTP 2) (2015/16–2019/20)* (2015) National Planning Commission (2015) 3, 16, 18; and Ministry of Finance and Economic Development (MoFED), *Ethiopia: Building on Progress: A Plan for Accelerated and Sustained Development to End Poverty (PASSEEP) (2005/06–2009/10)* (2006) Vol. 1, 46, 51

The GTP 1 ran between 2010/11–2014/15 and had about seven strategic pillars. One of the strategic pillars was related with infrastructure development. By the same token, the GTP 2, which runs from 2015/16 to 2019/20, has

In practical terms, Ethiopia has fast population growth and also high demand for public infrastructure.¹¹² However, the gap between actual public service delivery and public service demand is still huge. Previous efforts also remained inadequate in addressing the demand for infrastructure and public services.¹¹³

Although it appreciated the need for infrastructure development in its development plans and worked to realize so, the Ethiopian government could not satisfy the demand for public services yet. One of the main reasons is associated with the fact that infrastructure building activities cannot be successfully implemented by public finance alone. Hence, the government noticed the need for mobilizing resources from different sources in addition to the traditional government financing.¹¹⁴ In this regard, the private sector appears to be indispensable source of finance.

The use of resources from the private sector in the form of partnership with governments, otherwise referred to as PPP, has been practiced in the world to fill the gap in infrastructure financing.¹¹⁵ And this gives credence to the need for developing appropriate framework that deals with the partnerships between public and private sectors.¹¹⁶

Accordingly, the Ethiopian government came up with the country's PPP framework.¹¹⁷

about nine strategic pillars and one of them reiterates the need to bridge infrastructure gaps through special attention during its implementation period.

Furthermore, the Plan for Accelerated and Sustained Development to End Poverty (PASDEP), that ran between 2005/06-2009/10 and served as the basis for formulation of the GTP 1, described public infrastructure as backbone of the country.

¹¹² Dr. Sr. Shahid Sabuh, Dr. Gnanaprakasam Chinnappan and V. Arunkumar, 'Accelerating Development in Ethiopia – The PPP Way: Lessons from India' (2018) 118 *International Journal of Pure and Applied Mathematics* 909, 917

¹¹³ United Nations Development Programme (UNDP), *Prospects of Public-Private Partnership in Ethiopia* (2015) No. 1, 11

¹¹⁴ FDRE (n 110) 1-4

¹¹⁵ FDRE (n 110) 1

¹¹⁶ Kwame A. Aasibomeng, *The Potential for Public Private Partnership (PPP) in Ethiopia* (2011) 12

¹¹⁷ See below the discussion at notes 123 and 124

(3.2) Ethiopian Public Private Partnership Framework

Even if it might be said that PPP projects can be designed and implemented on a one-off basis in the absence of PPP specific framework,¹¹⁸ clear policies and political commitment demonstrated through appropriate legal and regulatory frameworks are important as they provide a stable and reasonable environment for and trust between the public and private sectors.¹¹⁹ As a result, most countries with successful PPP experience established special PPP frameworks.¹²⁰

A PPP framework is a comprehensive approach that contains policy, laws and regulations, and procedures setting what works need to be done by the public and private sectors, and how these works knit together throughout a PPP project life cycle.¹²¹ In other words, a PPP framework consists of policies, laws, rules and procedures, and institutions that together define how PPP projects may be identified, evaluated, selected, prioritized, budgeted for, procured, monitored and accounted for; and who will perform each of these tasks, generally on a programmatic basis instead of an ad hoc nature.¹²²

The Ethiopian PPP framework is also comprised of policy and legal documents, and institutions that determine and explain the scope, identification, preparation and implementation of PPP

¹¹⁸ PPP Knowledge Lab, available at

<https://pppknowledgelab.org/guide/sections/5-establishing-the-ppp-framework/>

Accessed 9 February 2020

¹¹⁹ Verhoest, K., Petersen, O. H., Scherrer, W., Soepto, R.M., 2015. How Do Governments Support the Development of Public Private Partnerships? Measuring and Comparing PPP Governmental Support in 20 European Countries. *Trans. Rev.* 35 (2), 118-139, as cited in Caiyun Cui, Yong Liu, Alex Hope and Jianping Wang, 'Review of Studies on the Public-Private Partnerships (PPP) for Infrastructure Projects' (2018) *International Journal of Management*, 17

¹²⁰ PPP Knowledge Lab (n 118)

¹²¹ Kelly (n 25) 2

¹²² PPP Knowledge Lab (n 118); and

<https://ppplab.org/content/potential-infrastructure-ppps-ethiopia/>

Accessed 8 April 2020

projects. Moreover, manuals that govern detailed issues, implementation guidelines and regular bid documents relating to PPP projects are all part of the framework.¹²³

In this respect, the Ethiopian government issued the PPP Policy in August 2017 (hereinafter also referred to as PPP Policy), the PPP Proclamation No. 1076/2018 (hereinafter also referred to as PPP Proclamation) and the PPP Directive No. 55/2018 (hereinafter also referred to as PPP Directive).¹²⁴

(3.2.1) Ethiopian Public Private Partnership Policy

In establishing a PPP framework, the first step for governments is to articulate PPP policy. PPP policy can mean a government's statement of intent to use PPP as a course of action and governing principles to develop infrastructure and deliver public services. Governments use PPP policy statements to communicate their intention to the public and potential investors, and the reasons for their decision.¹²⁵

¹²³ FDRE (n 110) 2

¹²⁴ The Council of Ministers has issued no Regulation to implement the PPP Proclamation, so far. The Public Private Partnership Directive No. 55/2018 is issued pursuant to Art. 65(2) of the PPP Proclamation by the Ministry of Finance and Economic Cooperation.

The PPP Proclamation also indicates, under Art. 9(6), the PPP Board will issue a Guideline that prescribes its working procedure. The Proclamation further indicates, under Art. 12(4), that one of the responsibilities of the PPP Directorate General is to develop and implement a guidance relating to project preparation, procurement procedures, preparation of bid documents and project agreements or other topics to support the implementation of PPP. On the other hand, the PPP Directive states, under Art. 8(1), the PPP Directorate General will issue guidelines dealing with topics including at least:

- Identification and selection of potential PPP projects;
- Project feasibility screening and appraisal manuals;
- Value for money;
- Requirements for the request and use of government support;
- Model project agreements; and
- PPP contract management practices.

¹²⁵ The World Bank (n 6) 61

A PPP policy is expected to include its rationale and program objectives, scope and governance arrangements.¹²⁶

(3.2.1.1) Objective

The Ethiopian PPP Policy reveals that the use of PPP in the country has two-fold objectives and they are:

- To increase the financial resources available for the development and delivery of infrastructure services in the country through leveraging private sector investment and management; and
- To capture the benefits of private sector involvement in infrastructure development through the alignment of public and private sector incentives and the use of appropriate risk sharing, where such benefits exist.¹²⁷

¹²⁶ The World Bank (n 6) 61

¹²⁷ FDRE (n 110) 6-7;

The PPP Policy expects that the following benefits would be captured through involving the private sector in infrastructure development;

- Innovations in design or service delivery approach;
- Reduction in project delays and cost overruns;
- Implementation of a life cycle approach to infrastructure service costing;
- Improved quality or efficiency;
- Knowledge transfer to local private sector; and
- Increased asset utilization.

On top of the two-fold broad objectives, the following specific objectives are also mentioned in the PPP Policy:

- To promote an enabling environment to facilitate enhanced and systematic private investment in public infrastructure;
- To capture and share knowledge on the implementation of PPP projects, from both international and domestic experience, in order to support the development of successful PPP models in Ethiopia;
- To provide clarity and consistency for both public and private sectors with respect to the roles and responsibilities of all parties;
- To facilitate the project development process through providing clear guidance on development, implementation and monitoring of projects, including selection of private parties; and

(3.2.1.2) Scope

The Ethiopian PPP Policy determines scope of the PPP framework in two ways. The first is that it defines the government institutions to be bound by the framework and these institutions include public bodies and public enterprises (hereinafter also referred to as contracting authorities). The second is that it puts the criteria to select projects eligible to be procured and developed through the framework.¹²⁸

Under the PPP Policy, public bodies are those organs of the federal government which are partly or wholly financed by government budget, and public enterprises denote organizations in which the federal government has significant ownership and a project that meets PPP definition is undertaken.¹²⁹

The PPP Policy states projects that meet the general definition of PPP may not necessarily be implemented within the PPP framework. Projects must still be evaluated to ensure that the use of PPP delivery approach is the most economically advantageous to Ethiopia. As a result, projects will need to be assessed in terms of certain criteria. The PPP Policy provides about five key criteria and they are value for money, affordability, public interest, sustainability and institutional capacity.¹³⁰

— To provide for objective evaluation of the use of PPPs in Ethiopia to support the evolution of the PPP framework and the implementation of PPP projects.

With regard to the rationale for adopting PPP in Ethiopia, see above the discussion in the section 'Overview'.

¹²⁸ FDRE (n 110) 11

¹²⁹ FDRE (n 110) 12

¹³⁰ FDRE (n 110) 12-15.

According to the PPP Policy, the first criterion is value for money. Projects will be delivered through PPP approach if they are deemed to ensure value for money. Value for money is generally derived by comparing the expected cost for the government to implement a project under PPP framework to the expected cost for delivering the same project under a traditional public procurement approach.

The PPP Policy considers projects with contract value of more than USD 50 million are generally expected to be most likely to generate value for money. However, the Policy also takes projects below this threshold as suitable to be delivered within PPP framework as long as they exhibit sufficient potential to deliver value for money.

Irrespective of these criteria, the PPP Proclamation expressly excludes the following from the PPP framework, however:¹²¹

- Activities relating to oil, mines, minerals, rights of air space; and
- Privatization or divestiture of public infrastructure or public enterprises.

The second criterion has to do with affordability. As PPPs usually incur the government into a long-term payment obligation, and as PPPs make end users pay to the private sector for public services, capacity of the government and end users to pay for services must be evaluated before a project is decided to be delivered through PPP.

The third criterion concerns public interest and it states projects need to be studied to understand their impact from environmental, health, safety and development perspectives.

The fourth is about project sustainability which is best assured by potential of the project to benefit both parties over its life time. In this regard, projects need to be adaptable to changing circumstances of both foreseen and unforeseen. To this end, PPP agreements need to be as flexible as possible to enable public and private parties to adapt to changes.

The last criterion deals with ability of the contracting authority to discharge its obligations in the PPP agreements.

The Policy further indicates that guidance on how to undertake studies to understand observance of each of these criteria will be provided in the PPP framework.

¹²¹ Public-Private Partnership Proclamation No. 1076/2018, Federal Negarit Gazeta, 24th Year No. 28, Addis Ababa, 22nd February, 2018, Art. 4(2); ESCAP (n 3) 15; and Albalade, Bel and Giddes (n 13) 2;

Certain projects may not be allowed to be implemented as PPPs. The private sector can be precluded from holding majority stake in a joint venture with the government. Looking at the strategic significance of ports and airports or large power projects, for instance, some governments limit, if not prohibit, the maximum allowable percentage of stakes.

Perhaps, the other point related to scope of application of the Ethiopian PPP framework is that it acknowledges both greenfield and brownfield projects. Greenfield projects refer to PPPs for new infrastructure whereas brownfield to existing ones. In this respect, the PPP Proclamation makes clear, under Art. 5(1), that PPPs can be applied to:

- The design, construction, financing, maintenance or operation of new infrastructure facilities;
- The rehabilitation, modernization, financing, expansion, maintenance or operation of existing infrastructure facilities; or
- The administration, management, operation or maintenance pertaining to new or existing infrastructure facilities.

This reveals that the Ethiopian PPP framework embraces both greenfield and brownfield projects.

(3.2.1.3) Governance

As far as governance of the framework is concerned, the Ethiopian PPP Policy states a PPP Board, and a PPP Unit within the Ministry of Finance and Economic Cooperation (hereinafter also referred to as Ministry) will be responsible.¹³²

The PPP Board will assume the responsibility to approve PPP projects prior to tender and award. The Board will also have the power to instruct a contracting authority to make use of PPP delivery approach for projects. The Board shall be chaired by the Ministry and composed of other relevant Ministers, public officials and the private sector.¹³³

The PPP Unit in the Ministry, which is designated as PPP Directorate General under the PPP Proclamation, shall have responsibilities such as:

- Supporting the Ministry in the management and development of the PPP framework;
- Supporting the development of a PPP program and individual PPP projects through provision of assistance to the PPP Board and contracting authorities in the identification, analysis, evaluation, approval, development, implementation, monitoring of PPP projects, and promoting the participation of the private sector in the delivery of infrastructure services.¹³⁴

The PPP Policy further states the Ministry and a contracting authority will also have key roles in the governance of PPP framework. The Ministry will be the owner of the framework and chairman of the PPP Board. The Ministry will also have other responsibilities including:

- The designation of a project as PPP and this will be done in consultation with the National Planning Commission; and

¹³² FDRE (s 110) 16-18.

¹³³ FDRE (s 110) 16-17.

The PPP Proclamation establishes the PPP Board and lists its members under Art. 8(1). The Board members are the Ministry, National Bank of Ethiopia, Ministry of Water, Irrigation and Electricity, Ministry of Transport, Ministry of Public Enterprises, National Planning Commission, Ministry of Federal and Pastoralist Affairs and two members from the private sector appointed by the Ministry.

¹³⁴ FDRE (s 110) 18, and PPP Proclamation, Art. 10(1)

— The approval of any proposed government support, particularly any request for the provision of a guarantee for payment of obligation of a contracting authority.¹³⁵

A contracting authority, on its part, will be the owner of an individual PPP project. Hence, it will be responsible for the development and implementation of the project by forming a Project Management Team. A contracting authority will also have the responsibility to implement a procurement process in accordance with law, i.e., it has the power to enter into and sign PPP contracts.¹³⁶

(3.2.2) Ethiopian Public Private Partnership Legal Regime

While some countries create special laws and regulations that are designed for PPP projects, others may not require separate legal acts.¹³⁷ Many countries have special laws, indeed. In countries where no special PPP laws exist, governments normally follow regulations that concern the general public procurement process.¹³⁸

However, the legal regime for PPP includes not only special PPP legislations, but also all other legal instruments that affect PPP contracts, decision making processes, and implementation and monitoring procedures – since all laws and regulations that govern PPP project life cycle constitute the legal framework.¹³⁹ This reveals successful PPP implementation requires

¹³⁵ FDRE (n 110) 17

¹³⁶ FDRE (n 110) 18-19.

With regard to the federal structure in the country, the PPP Policy indicates on page 12 that national regional states have the power to issue, based on the Policy, their own implementation framework for the development of PPP projects.

¹³⁷ Harro Kassarjian, *Public-Private Partnership for Sub-Saharan Africa: Advances in African Economic, Social and Political Development* (2019) 22

¹³⁸ ESCAP (n 5) 18

¹³⁹ The World Bank (n 6) 46; and ESCAP (n 7) 14.

It is important to note that the legal regime for PPP may be derived from different legal instruments including private contract law, infrastructure sector laws, company law, property law, foreign investment law, intellectual property law, environmental law, public procurement law and rules, pledge law, acquisition or appropriation law and others.

consistency and synergy between PPP specific laws and other laws, procedures and practices impacting on PPP projects.¹⁴⁰

As indicated under the discussion on Ethiopian PPP framework, the legal regime for PPP in Ethiopia bases itself on the PPP Policy which is a new introduction to the country.¹⁴¹ The legal

¹⁴⁰ Kelly at 2513

¹⁴¹ Ethiopia had no prior policy specifically defined for PPP before the coming into force of the existing PPP Policy in August, 2017

Though the existing PPP Policy is the first of its nature to the country, the subsequent PPP Proclamation is not the pioneer legal instrument to have introduced the concept of PPP. The Ethiopian Federal Government Procurement and Property Administration Proclamation No. 649/2009, Federal Negarit Gazeta, 15th Year No. 60, Addis Ababa, 9th September, 2009, hereinafter also referred to as Procurement Proclamation, has stipulations concerning PPP.

On one hand, the Procurement Proclamation defines PPP, under Art. 2(27), as an investment through private sector participation by a contractual arrangement between a public body and a private sector enterprise. The private party that enters into a PPP contract is designated as concessionaire, by virtue of Art. 2(28) of the Proclamation.

In defining PPP, the Procurement Proclamation lists key roles for the private party concessionaire and they include:

- Undertaking to perform any construction project or service or lease concession;
- Assuming substantial financial, technical and operational risks in connection with the performance of a public function or use of government property; and
- Receiving compensation for performing a public function or utilizing government property in the interest of the public, by way of fees from any public funds, user levies collected from users or customers for a service provided.

On the other hand, the Procurement Proclamation indicates that the formation and implementation of PPPs await issuance of prescription Directive by the Ministry, according to Art. 34. This reveals the Proclamation does not suffice to design and implement PPP projects until the Ministry issues a Directive.

In this connection, it is worthy to see how the PPP Proclamation understands PPPs. The PPP Proclamation defines, under Art. 2(12), PPP as a long-term contractual agreement between a contracting authority and a private party that:

- Undertakes to perform a public infrastructure;
- Assumes responsibility for risks arising from performance of the project contracted; and
- Executes benefit by way of compensation from the contracting authority or tariffs or service fees collected from users and consumers or both compensation and service fees.

At this very juncture, it is possible and also important to compare and contrast these two definitions in the two legislations – the Procurement Proclamation and PPP Proclamation. The comparison may be summarized as follows:

- Under both legislations, PPP refers to a contractual arrangement between the government and private sector.

regime consists of legal instruments of both already in force and yet to be issued. The legal regime includes the PPP Proclamation and PPP Directive already in force, and Regulation, Directives, Guidelines, Guidance and Manuals to come.¹⁴²

These legal acts are not the only ones to constitute the country's PPP legal regime, however. For the reason that a legal regime for PPP includes not only specific legal acts, but also others impacting on PPP projects, the legal regime in Ethiopia can extend to encompass other instruments.¹⁴³

A legal regime for PPP generally needs to have provisions that carefully consider the following four aspects:¹⁴⁴

— Interests or concerns of both the public and private parties;¹⁴⁵

-
- Under both legislations, the private sector is supposed to agree to undertake the development of a project that will provide public service;
 - Under both legislations, the private sector is supposed to agree to bear significant risks relating to performance of the project; and
 - Under both legislations, the private sector is supposed to agree to receive consideration in the form of payment from the government or service fees to be collected from users and customer or a combination of the two.

This shows the Procurement Proclamation and PPP Proclamation understand PPPs in a very similar way. Hence, it seems to be for this reason that the PPP Proclamation acknowledges, under Art. 64, the Complaints and Review Mechanism in the Procurement Proclamation applies *mutatis mutandis* to the PPP scheme.

¹⁴² See above the discussion at note 124.

¹⁴³ The PPP Proclamation expressly states, under Art. 60, that the laws of the Federal Democratic Republic of Ethiopia will be applied to govern PPP project agreements so long as they are relevant.

The PPP Proclamation indicates, under Art. 44(1), that a private party that won bidding will establish a Project Company to be incorporated under the laws of the Federal Democratic Republic of Ethiopia.

Moreover, the PPP Proclamation and PPP Directive specifically indicate, under Arts. 64 and 30 respectively, that the Complaints and Review Mechanism incorporated under the Procurement Proclamation will be applicable to PPPs.

¹⁴⁴ ESCAP (n 3) 14.

¹⁴⁵ Kelly (n 25) 3-4.

Contractors and investors that participate in PPPs as private parties may have different concerns including, among others: cost, time and quality of the PPP bidding process; clarity and stability of the PPP framework; criteria for assessing bids; quality of the project management team in the public sector; effectiveness and enforceability of the

- Structure of contracts in view of other applicable laws;¹⁴⁶
- Enforceability of the rights of the parties; and
- Governmental organs with the power to enter into contracts and approve projects.¹⁴⁷

The legal regime for PPP in Ethiopia treats matters relating to the rights and interests of the public and private parties separately. With regard to contracting authorities, the legal regime provides, among others:¹⁴⁸

- A contracting authority may require the private party to provide security to guarantee the performance of its obligations under the PPP contract;
- A private party cannot assign its rights and obligations under the PPP contract to a third party unless the contracting authority consents in writing;
- When a private party fails to perform its obligations under the PPP contract and remains unable to rectify the failure, the contracting authority has the right to temporarily take over a facility in order to ensure its effective and uninterrupted delivery; and

PPP agreements, allotment of risks between the public and private parties; benefits commensurate with the risks assumed under the PPP contract, and effectiveness with which the public sector will manage the PPP contract and make decisions.

¹⁴⁶ The PPP Proclamation deals with structure of PPP contracts in the light of other relevant laws. Without prejudice to different provisions that govern structure of contracts, PPP contracts are required, under Art. 44(1), to establish a Project Company that is supposed to be formed as per other relevant laws of the country. In addition to this, structure of PPP project agreements is also determined in accordance with other relevant laws, by virtue of Art. 60. These provisions, among others, enable to assert that the Ethiopian legal regime for PPP governs PPP contract structures being consistent to other relevant laws of the country.

¹⁴⁷ The provision under Art. 9(1) of the PPP Proclamation reveals the PPP Board has the power to approve PPP projects. And the provisions under Arts. 2(2), 6(1), 7 and 13(2)(d) of the Proclamation show that the power to enter into and sign PPP contracts resides in a contracting authority which has the inherent responsibility to provide the infrastructure being contracted.

As a result, the Ethiopian legal regime for PPP can be said to have made it clear with regard to what government organ approves a PPP project and what government organ enters into and sign a PPP contract.

¹⁴⁸ PPP Proclamation, Arts. 51(1), 54(1), 56, 57

- When a private party commits a serious breach of its obligations under the PPP contract or in case of events that could justify termination of the contract, the contracting authority can substitute the private party with a new one.

As far as the rights and interests of the private sector are concerned, the legal regime provides, among others:¹⁸⁰

- A private party has the right to charge, receive or collect tariffs or service fees for the use of a facility;
- A private party receives financial gain by way of compensation from the contracting authority;
- In order to ensure the implementation, sustainability and viability of a PPP project, a private party may be granted economic support from the government in different forms including: (a) direct payments as a substitute for or in addition to tariffs or fees; (b) contributions in kind such as asset transfers and land usage rights; (c) payment guarantees or other securities; and (d) guarantees for the performance of obligations of the contracting authority;
- To the extent necessary for the implementation of a PPP project, a private party will have such rights over land to possess, use and mortgage any immovable property thereon, and the government has the responsibility to make available such rights over land;
- When there are changes in legislations or regulations that are applicable to a project in the PPP contract and that increase its costs or decrease its revenue, the private party will be entitled to compensation;

¹⁸⁰ PPP Proclamation, Arts. 42(3), 43(4), 46(1)(2), 47, 49(1)(3)(4), 50(2), 52(1)(2)(3), 55; and PPP Directive, Art. 25. Furthermore, private parties that submit unsolicited project proposals to the government within the meaning of Chapter Nine of the PPP Proclamation would still enjoy their intellectual property rights, trade secrets and other exclusive rights.

On top of this, proponents of unsolicited proposals may be given bonus or financial compensation for their studies undertaken from the government if they are not awarded the project.

- A private party has the right to issue and enforce its own rules to govern the use of public service, subject to approval of a contracting authority or other public organ so authorized;
- When the private party is required to provide security to guarantee the performance of financial obligation under the PPP agreement, it has the right to establish security interests over any of its assets and rights such as interests over the project and its shares therein.

(3.3) The Use of Public Private Partnership as an Instrument of Regulation in Ethiopia

Under the section entitled 'Public Private Partnership as Market Regulatory Mechanism' in the preceding chapter, it has been specifically discussed, on one hand, that in PPPs governments assume different responsibilities such as to choose the right project, to select the competent private partner, to set and enforce the parameters in which the private partner operates, to establish the processes and institutional responsibilities in developing and implementing projects, and to define the requirements for delivery of public services. In so doing, the discussion has shown a PPP framework generally serves as an instrument of regulation.

On the other hand, it has also been particularly indicated in the discussion that PPP agreements can be used to determine tariffs or service fees, tariff adjustments and other standards like quality of service, thereby serving as an instrument of regulation.

By the same token, the use of PPP as an instrument of regulation in Ethiopia will be analyzed under two parts, i.e., the first in terms of the country's PPP framework generally and the second in respect of PPP contracts within the framework.

(3.3.1) Using the Public Private Partnership Legal Regime as an Instrument of Regulation

The process of developing a PPP project is complex and dynamic throughout the different phases in the project life cycle. A project's life cycle starts with the identification of a project and extends to include the preparation, procurement, implementation, transfer and post transfer

phases.¹⁵⁰ Analyzing a PPP legal regime as a regulatory instrument may therefore be the study of government intervention into each phase of a project life cycle.

The Ethiopian PPP legal regime has important provisions concerning the different phases in project life cycle. The PPP Proclamation governs the project development, approval process, selection of private party and content and implementation of PPP arrangements, among others.¹⁵¹

For the purpose of studying the Ethiopian legal regime from regulatory perspective, the focus will be particularly on the selection and operation of private parties.¹⁵²

(3.3.1.1) Selection of a Competent Private Party

Under the Ethiopian PPP legal regime, there are five methods to select a private partner for the development and implementation of PPP projects, and they are open bidding, two-stage bidding, competitive dialogue, direct negotiation and unsolicited proposals.¹⁵³ The government uses each of these methods on different conditions which also require private parties to comply with certain standards and fulfill competence criteria.

In the open bidding selection and procurement process, private parties that intend to develop infrastructure and deliver public services in partnership with the government under PPP

¹⁵⁰ *Das* (n 15) 1

¹⁵¹ PPP Proclamation, From Chapter Four to Chapter Ten

¹⁵² The project development and approval phases under chapter four of the PPP Proclamation deal with activities relating to identification of a potential PPP project by a contracting authority or the PPP Directorate General (Art. 15), a preliminary approval of the potential PPP project by the Ministry (Art. 16), a feasibility study of the PPP project by a contracting authority (Art. 17), and a final approval of the PPP project by the PPP Board (Art. 18). All these activities in the project identification, development and approval phases are undertaken solely by the government. The government institutions indicated hereinabove perform these activities in the form of their administrative function. The activities are not intended to regulate the actions or behaviour of market actors. Hence, *the thesis does not study the activities under the existing section.*

On the other hand, the study of PPP agreements from a regulatory perspective will be made independently in the next section.

¹⁵³ The PPP Proclamation establishes, through Chapter Five to Chapter Ten, five methods for the procurement of PPP projects and they are open bidding, two-stage bidding, competitive dialogue, direct negotiation and unsolicited proposals.

arrangement must meet prequalification criteria.¹⁵⁴ Private parties that fulfill the prequalification criteria will further be required to complete and submit both technical proposal and financial proposal.¹⁵⁵

Private parties participating in the open bidding process may also be required to demonstrate for the second time their qualifications. Failure to do so will result in disqualification from the bidding process.¹⁵⁶ Moreover, the private parties are required to submit bid securities.¹⁵⁷

In the two-stage bidding selection and procurement process, private parties are required to submit, in the first stage of the procedure, initial proposals relating to project specifications, performance indicators, financial requirements and other features of the project as well as the main terms and conditions of the project agreement.¹⁵⁸ In addition, private parties are also required to submit, in the second stage of the procedure, final proposals with regard to similar project specifications, performance indicators and other contractual terms.¹⁵⁹

After all these processes, the private party will be selected and granted the procurement of a PPP project under each of the bidding proceedings.

¹⁵⁴ PPP Proclamation, Art. 21.

The open bidding process is supposed to be a procurement approach for all PPP projects except for those projects that are determined to be procured through other methods.

The PPP Directorate General prepares the prequalification criteria to ensure that bidders demonstrate sufficient financial and technical capacity to undertake the project through evidence of net worth or appropriate experience.

¹⁵⁵ PPP Proclamation, Arts. 24(2), 27.

The PPP Directorate General requests those bidders that already succeeded the prequalification criteria to submit technical and financial proposals which should provide detailed information about the project.

¹⁵⁶ PPP Proclamation, Art. 30(1)(2).

¹⁵⁷ PPP Proclamation, Art. 25, and PPP Directive, Art. 19.

The PPP Directorate General has the responsibility to ensure that the nature, form and amount of securities required from private parties are within market practice and affordable.

¹⁵⁸ PPP Proclamation, Art. 25(3), 30(3).

The two-stage bidding selection and procurement process is used when it is not feasible to formulate a request for proposals with adequate project specifications, performance indicators or contractual terms.

¹⁵⁹ PPP Proclamation, Art. 30(4).

When the PPP Directorate General decides to engage in a competitive dialogue for the selection of private parties, those private parties that already succeeded fulfilling the prequalification criteria will be required, if they still intend to continue to participate in PPP, to submit their final proposals which should contain all the elements necessary for the performance of the projects. Private parties may also be required to accept prices and payments in the dialogue if the PPP Directorate General specifies so.¹⁶⁰ In direct negotiations, private parties that intend to participate in PPPs may be required, as the case may be, to meet prequalification proceeding.¹⁶¹

Private parties that have their own project proposals and desire to implement projects under PPP framework can submit their unsolicited proposals to the government within the process established for that purpose.¹⁶² However, unsolicited project proposals are required to have a project which has not been already approved as PPP project and which is considered to be in the public interest. Private parties that already submitted unsolicited proposals will further be required to provide as much information on their proposed project as possible.¹⁶³ When the unsolicited proposal is accepted by the government, both parties are required to enter into an agreement concerning the intellectual property, trade secrets and other rights of the proponent, and confidentiality of the project, among others.¹⁶⁴

¹⁶⁰ PPP Proclamation, Arts. 37(1), 38(7)(11); and PPP Directive, Art. 22;

The PPP Directorate General may engage in competitive dialogue, upon approval of the PPP Board, only for particularly complex projects for which both open bidding and two-stage bidding processes are considered to be inappropriate.

A PPP project will be considered to be 'particularly complex' where the PPP Directorate General and the contracting authority become unable to objectively define the technical means capable of satisfying their needs or objectives and specify the legal and/or financial make up of a project.

¹⁶¹ PPP Proclamation, Arts. 39, 40(1);

The PPP Directorate General may engage in direct negotiations, upon approval of the PPP Board, with private parties when there is an urgent need for the public service, the project is of short duration, the project relates to national defense or security, there is only one source capable to provide the public service, and no application was submitted in response to requests for prequalification and proposals, among others.

¹⁶² PPP Proclamation, Chapter Nine

¹⁶³ PPP Proclamation, Arts. 41, 42(1)(2)

¹⁶⁴ PPP Directive, Art. 24

(3.3.1.2) Operation of the Competent Private Party

Once the competent private party has been selected through one of the selection and procurement processes, the contracting authority and the private party will sign the PPP contract.¹⁶⁵ Then, the private party will embark on performance of its obligations and operate according to the contract.

In the discharge of its obligations under the PPP contract and operation of the public service, the private party is required, among others,

- To establish a Project Company¹⁶⁶ for the implementation of the PPP agreement
- To meet the demand for the service;
- To provide the service under essentially same conditions for all users and customers;
- Not to assign its rights and obligations to third parties without the written consent of the contracting authority;
- To establish, when the contracting authority so requires, a simplified and efficient mechanism for handling claims submitted by users and customers of the service;
- To observe rules of ethics.¹⁶⁷

(3.3.2) Using Public Private Partnership Agreements as an Instrument of Regulation

Under the legal regime for PPP in Ethiopia, the execution or implementation of PPP projects is required to be undertaken by a Project Company. The Project Company is thought to be incorporated under the federal laws of the country. And it is the duty of the private party in the PPP agreement to establish the Company.¹⁶⁸

¹⁶⁵ PPP Proclamation, Art. 34, and PPP Directive, Art. 21

¹⁶⁶ See below the discussion at note 168

¹⁶⁷ PPP Proclamation, Arts. 44(1), 50(1), 54(1), 62; and PPP Directive, Art. 29

¹⁶⁸ PPP Proclamation, Art. 44(1).

The PPP Proclamation states, under Art. 44(3), that the contracting authority can be a minority shareholder in the Project Company.

Without prejudice to the federal laws, PPP agreements are empowered to regulate different matters relating to Project Companies. This enables PPP agreements to have significant role in the regulation of PPPs.¹⁰⁷

The PPP Proclamation empowers PPP agreements to:

- Determine the amount of the share capital of the Project Company;
- Require changes to articles of association or shareholders' agreements or other related agreements concerning the Project Company should be approved;
- Impose restrictions on the transfer of ownership interests, such as share, in the Project Company.¹⁰⁸

On the other hand, PPP agreements also regulate matters relating to provision of public services, securities, compensation and dispute settlement mechanisms, among others.

In addition to this, the PPP Proclamation defines, under Art. 2(8), Project Company as a legal entity incorporated under the laws of the Federal Democratic Republic of Ethiopia by the successful bidder whose sole purpose shall be to execute and implement the PPP agreement and other project agreements, if any.

Unfortunately, this definition expounds nothing – rather it is a mere repetition of what is stated under Art. 44(1) of the Proclamation. As a result, it is not possible to tell the details of the so called 'Project Company' on the basis of the PPP Proclamation.

In connection with this, it is imperative to see the relevant laws that govern companies in Ethiopia. The Commercial Code Proclamation of Ethiopia (1980) is the most relevant and provides, under Title Six and Seven, for two types of companies - Share Companies and Private Limited Companies - and Project Company is a new introduction; and Fekadu Petros Gebremeskel, *Ethiopian Company Law* (2nd edn, 2008) 57;

Literature review also shows that in Ethiopia companies are incorporated either as Share Companies or Private Limited Companies.

¹⁰⁷ Only few aspects of Project Companies are regulated directly by the PPP legal regime. The PPP Proclamation provides, under Art. 53, that a Project Company has the duty to keep books of accounts and records relating to its project and submit audit reports.

¹⁰⁸ PPP Proclamation, Art. 44(2)

PPP agreements fix tariffs or service fees for the use of services to be collected from users and customers. Besides, PPP agreements also set the methods and formulae for the establishment and adjustment of the tariffs or service fees that need to be affordable, indeed.¹⁷¹

PPP agreements may require the private party to provide performance guarantee to secure the performance of its obligations. When such a guarantee is required, the PPP agreements further set forth requirements on the nature, form and amount of the guarantee and the issuer.¹⁷²

PPP agreements also regulate how compensation will be calculated and paid in case of termination of project agreements, especially for the works performed, costs incurred or losses sustained and profits lost by either party.¹⁷³

¹⁷¹ PPP Proclamation, Art. 46(2)(7)

¹⁷² PPP Proclamation, Art. 51

¹⁷³ PPP Proclamation, Art. 39

Conclusion

PPPs have been presented as viable implementation mechanism for the development of infrastructure projects and delivery of public services. As they cannot finance infrastructure projects to the extent that satisfies the demand for public services, governments apply PPPs mainly to extract both financial and technical advantages from the private sector. Hence, PPPs are understood and applied as partnerships emanating from contracts between governments and the private sector for the development and provision of public services for a fairly long period of time in which the private sector assumes significant financial risks.

However, the thesis tried to view PPPs not as project implementation mechanism only, but from the perspective of market regulatory mechanism also.

PPPs are mainly used to develop public services and governments need to regulate the development and delivery of public services on account of public interest and market failure. On one hand, public services serve public interest, and on the other hand, public services usually create monopolistic or oligopolistic market situations where public service providers assume market power to act as price maker. In other words, governments need to regulate those private entities that develop and deliver public services under PPP approach.

The thesis investigated into how governments can use PPPs themselves to regulate the development of infrastructure and provision of public services. The thesis held that under PPPs governments have responsibilities to identify the right project, to select the competent private partner, to develop the standards in which the private partner operates, to establish the processes for developing and implementing projects, and to determine the conditions for delivery of public services. In order to perform these responsibilities, governments adopt rules and procedures that will in effect regulate which private entities can develop and deliver public services under PPPs, and the conditions in which the private entities operate. Besides, the thesis also held that governments can use PPP contracts to regulate private entities while they deliver public services. PPP contracts determine tariffs or service fees, tariff adjustments, and standards of service like quality.

Then, the thesis investigated into the existing framework for PPPs in Ethiopia and identified that the country's PPP Policy, PPP Proclamation and PPP Directive are governing the framework currently. The thesis found that these PPP specific policy and legal instruments are not the only ones to govern the framework, however. The Ethiopian PPP framework further consists of other PPP specific instruments such as Regulations, Manual, Guidelines and Guidance that concern detailed issues to implement the PPP Policy and PPP Proclamation although these instruments have not yet been prepared. In addition to these PPP specific instruments, other laws and regulations which have impact on PPP projects life cycle also form the framework. In this regard, the Procurement Proclamation would be a good example. Contract laws that govern agreements in PPP projects and company laws concerning the incorporation of Project Companies, whose sole purpose is to implement PPP agreements, are also part and parcel of the country's PPP framework.

The thesis analyzed each of these instruments from the point of view of regulation and found that Ethiopia can use its PPP framework in general and PPP agreements in particular as an instrument to regulate private entities that develop and deliver public services under PPP approach. At this stage, the thesis tried to address its central question 'Is Ethiopia Using PPP as an Instrument of Regulation?', and examined the country's PPP framework in terms of the existing policy and legal instruments.

The thesis found that Ethiopia uses its PPP framework to regulate, on one hand, which private entities would be able to develop infrastructure projects and deliver public services in partnership with the government, and, on the other, how private entities should act in developing and providing public services. The thesis also found that Ethiopia uses PPP agreements to regulate tariffs or service fees for the use of public services, and the methods and formulae for adjustment of the tariffs, among others.

Nevertheless, there are still legal gaps that may preclude the country from using PPPs as an instrument of regulation properly.

Both the PPP policy and legal instruments of the country presuppose that PPPs would be developed not only under the umbrella of these few legal instruments in force, but also within the

ambit of Regulations, Directives, Manuals, Guidelines and Guidance. Unfortunately, such kind of instruments are still missing so that the thesis recommends that the Ministry as owner of the PPP framework and the PPP Board and PPP Directorate General as PPP governing organs should work toward the fulfillment of their duties in this respect.

The other legal gap the thesis identified relates to Project Companies. Under the Ethiopian PPP framework, projects are thought to be executed and implemented by Project Companies. The PPP Proclamation requires private entities that already signed PPP contracts with the government to establish Project Companies. The PPP Proclamation states that Project Companies are incorporated under the laws of the country. In Ethiopia, no company is designated as Project Company. Neither the country's company law nor other laws recognize the so called 'Project Company'. The terminology is so ambiguous that private parties will inevitably come across challenges during the establishment of the Company and in the execution of PPP agreements. Therefore, the thesis recommends that the Council of Ministers should come up with a PPP Regulation to address the problem.

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