

# Regulation and implementation of public-private partnerships

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## Summary

PPPs are increasingly used to provide public works and services in infrastructure projects. This thesis compares how PPPs are regulated and implemented in China and the EU to give readers more of an insight into how PPPs function and assess whether the regulatory framework and implementation process in these two jurisdictions contribute to using PPPs effectively. As a first attempt to systematically compare PPPs in China and the EU, this thesis aims to provide a better understanding of the concept of PPPs, which may contribute to reducing transaction costs in cross-border PPP infrastructure projects and become a useful reference to improve and transform how PPPs are regulated.

This thesis has six chapters. Chapter 1 provides the background, introducing how PPPs developed as an arrangement of cooperation between the public and private sectors and how they are widely used for infrastructure projects. It then explains why China and the EU have been chosen as the jurisdictions to compare PPPs. Based on the background introduction, this first chapter raises the main question of this research: What are the similarities and differences in how China and the EU regulate and implement PPPs to facilitate their effective use in infrastructure projects? This question is further divided into three sub-questions: (1) What are the underlying theoretical frameworks to regulate PPPs in China and the EU? (2) How are PPPs regulated in China and the EU, and to what extent do they meet the theoretical criteria for using PPPs effectively? (3) How are PPP projects implemented in China and the EU within their regulatory frameworks, and to what extent do they meet the theoretical criteria for using PPPs effectively? The following chapters answer these questions. Chapter 1 outlines the methodology, structure, and limitations of the thesis.

Chapter 2 establish a theoretical framework for effective PPP regulation. It first introduces definitions of PPPs given by typical international institutions. This chapter further discusses the differences between PPPs and other methods of cooperation for infrastructure projects and establishes the criteria for using PPPs effectively from the rationale and shortcomings of adopting PPPs.

Chapter 3 summarizes the answers to sub-questions (1) and (2) in relation to China, including how China defines PPPs and the PPP regulatory framework in China, to provide an integrated introduction to PPPs in China. It first explains the reasons why PPPs are on the rise in China, which has much to do with its administrative framework, specifically how administrative powers are divided between the central and sub-central governments. This chapter then explains the concept of PPP, its characteristics, and the differences between PPPs and other

concepts in China, following the structure used to introduce PPPs in Chapter 2. Thirdly, it provides a historical perspective to trace how China's PPP regulatory framework has developed before then describing China's current PPP regulatory framework. Among the formal sources of law on PPPs, the Government Procurement Law, the Bidding Law, and the Foreign Investment Law are the three main national laws on PPP. In 2017, the State Council proposed the PPP Regulation Draft, which was expected to be the highest-ranking PPP-specific regulation. Due to differences between scholars and practitioners on the final legal text and participants becoming more cautious about participating in PPPs, this draft administrative PPP regulation has not been officially passed. Besides this PPP Regulation Draft, the administrative regulation of the Government Investment Regulation may also affect the government's decision-making stage in PPPs. Moreover, many ministerial administrative rules on PPPs focus on regulating specific PPP issues.

Chapter 4 describes PPPs in the EU following the same structure as Chapter 3 to answer sub-questions (1) and (2) in relation to the EU. It explains their rise in the EU, how they are defined, how competences are allocated between the EU and its Member States, and how PPP regulations have developed there. Due to each Member State's level of economic development, PPPs have developed unevenly across the EU. To create a competitive environment for the economic operators to participate in PPPs in all Member States, the EU has tried to promote and regulate PPPs at the EU level. PPPs are economic activities carried out in the internal market, which fall within the scope of the EU's shared competence. As the EU has established a PPP regulatory framework based on its procurement directives, Member States must follow these directives when carrying out PPP projects. In the EU, PPP project implementation is based on general EU treaty principles, secondary legislation, and some soft laws proposing regulatory approaches to PPPs.

Chapter 5 attempts to answer sub-question (3) by carefully analyzing the applicable rules at each stage of a PPP project based on the regulatory frameworks described in Chapters 3 and 4. As there is no uniform worldwide process to implement a PPP project in practice, at the start of Chapter 5, the PPP implementation process that the World Bank designed is selected as a benchmark to compare the PPP implementation processes in China and the EU from that perspective. The PPP implementation processes are then compared with a focus on five essential issues: project initiation, project appraisal, project procurement, criteria for selecting the economic operator and awarding the project, and post-contractual management. To provide readers with an accurate view of PPP

implementation processes in practice, Chapter 5 also presents a fictional case study to understand how a PPP project would be implemented in China and the EU.

Chapter 6 provides the conclusions of this thesis. The first part answers the three sub-research questions together while summarizing the entire research. The second part answers the general research questions by exhaustively comparing the PPP systems in China and the EU based on the answers to the three sub-research questions, coming to the conclusion that both China and the EU expect to promote using PPPs effectively by revising their regulatory frameworks. And there is room for improvement in both regulatory frameworks. As for effectiveness, the EU's regulatory framework is more effective than China's. Not having issued the PPP Regulation makes PPP implementation in China lack legal certainty. This paper recommends that China speeds up its official issue of the PPP Regulation and to learn from the EU in relation to some specific rules.

## 总结

近十年来在全球范围内，Public-Private Partnerships (PPPs，“政府和社会资本合作”)越来越多地用于基础设施项目来提供公共工程和服务。本文通过系统阐述以及对比中国和欧盟 PPPs 的法律规范框架和实践运作方式，并进一步对比和分析其是否有助于实现 PPP 的有效利用，使读者可以更全面和深入地了解 PPPs 在基础设施项目中的应用。作为系统对比中国和欧盟 PPPs 的首次尝试，本文旨在增进中国和欧盟之间的对于 PPPs 的理解，从而降低双方进行跨境基础设施 PPPs 项目合作时的交易成本，并为其改进和创新域内 PPPs 立法规范提供有益参考。

全文共六章。第一章介绍了研究背景，包括 PPPs 作为公共和私营部门合作方式是如何发展起来的，以及它们如何被广泛用于基础设施项目，同时解释了为什么选择中国和欧盟作为比较 PPPs 的代表性法域。在背景介绍的基础上，第一章提出了本论文的主要研究问题，即基础设施类 PPPs 项目在中国和欧盟是如何规范和运作的，以及它们之间的相似性和不同性。这个问题进一步分为三个子问题：（1）中国和欧盟监管 PPP 的理论框架是什么；（2）中国和欧盟 PPPs 适用的法律规范框架是什么，包括哪些法律规范，这些法律规范对域外私人部门参与本地 PPPs 项目的影响，以及这些法律框架在多大程度上可以规范 PPPs 在实践中的有效适用；（3）PPPs 项目在中国和欧盟如何在其监管框架内实施？这些问题将在随后的章节中得到一一解答。此外，第一章还简要介绍了本文的研究方法、结构和局限性。

第二章建立了有效规制 PPP 的理论框架。首先介绍了一些国际机构对 PPP 的定义，其次，本章进一步讨论了 PPP 与其他基础设施项目合作方式的区别，并从解决采用 PPP 的理由和不足之处确立了有效使用 PPP 的标准。

第三章综合介绍了中国的 PPPs，总结回答了第一章子问题（1）和（2）中有关中国部分，包括中国如何定义 PPPs 和中国针对 PPPs 的规范框架。本章首先解释了 PPPs 在中国兴起的原因——这与中国的行政架构有很大关系，特别是中央和地方之间的行政权力的划分。关于 PPPs 在中国的定义的阐述，本章沿用了第二章的结构，介绍了 PPPs 的概念、特征以及与其他公共部门和私人部门合作方式的区别。在 PPPs 规范框架中，政府采购法、招标法和外商投资法是三部主要的法律。2017 年，国务院公布了《基础设施和公共服务领域政府和社会资本合作条例(征求意见稿)》并向社会广泛征求改进意见。根据 2018 年国家立法计划，本条例原本有望成为于 2018 年底或者 2019 年初

正式出台，成为专门针对 PPPs 的最高级别的法规。但由于学者和实践从业者对最终法律文本的分歧，以及公共部门和私人部门对使用 PPPs 模式的态度越来越谨慎，本 PPPs 行政法规草案尚未正式通过。除上述法律法规外，针对 PPPs 项目实施中具体问题的规定多见于部门规章。

沿用第三章的结构，第四章系统描述了 PPPs 在欧盟层面的发展，并回答子问题（1）和（2）中有关欧盟的部分，解释了 PPPs 在欧盟的兴起，定义和特征，欧盟制定 PPPs 规范的法律权限，以及欧盟规范 PPPs 的历史发展。由于欧盟成员国之间经济发展水平的不平衡，PPPs 在各成员国之间的发展并不平衡。为了给所有成员国企业参与欧盟境内 PPPs 项目创造公平的竞争环境，欧盟试图在欧盟层面规范 PPPs 在欧盟统一市场内的适用。目前，欧盟针对 PPPs 的规范框架主要建立在 2014 年更新的一系列公共采购指令的基础上，同时遵循欧盟条约中的原则，案例法，以及欧盟主要机构发布的指导性文件。

第五章试图根据第三章和第四章介绍的立法框架，详细分析 PPPs 项目实施的各个阶段来回答子问题（3）。由于在实践中实施 PPPs 项目没有全球统一的流程，第五章选取了世界银行设计的 PPPs 实施流程作为基准，并选取实施流程中的五个步骤比较了中国和欧盟的 PPPs 实施过程，包括项目发起、项目评估、项目采购、选择私人合作部门，以及合同后项目管理。为了让读者准确了解 PPPs 的实施过程，第五章还提供了一个虚构的案例研究，方便读者了解类似 PPPs 项目如何在中国和欧盟实施。

第六章给出了本文的结论，共分为两个部分。第一部分回顾总结整个研究，同时概括性回答了三个子研究问题。第二部分在回答子研究问题的基础上，通过详尽比较中国和欧盟的 PPPs 来回答主要研究问题，并得出的最终结论——中欧双方都旨在通过修订监管框架来推动 PPP 的有效使用。并且他们的监管框架中都在可以改进的地方。比较它们的有效性，欧盟的法律监管框架总体上优于中国。中国未能正式出台的 PPP 法规使得目前国内 PPP 实施缺乏法律确定性。本论文建议中国加快出台 PPP 法规，同时在涉及具体法条和规定是可以考虑欧盟的规定。