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## **THE MAIN MODELS AND FORMS OF PUBLIC AND PRIVATE PARTNERSHIP IN MODERN CONDITIONS**

### **Abstract**

In modern practice, in the process of searching for the most optimal variant of interaction between the state and private structures, there is a wide variety of forms, types and models of public-private partnership (PPP). Throughout the entire period of transformation of the economy of Kazakhstan, many of them were underestimated, even though they cover the essential aspects of society and ensure their harmonious development. In conditions of innovative development, this type of interaction between government and business will receive a new impetus in the development and application of new forms of public-private partnership that meet modern realities. It should be noted that the conditions of contractual relations in our country, as a rule, are incredibly complicated and unstable. All this requires the creation of such a contractual procedure, which would incorporate the whole general scheme of the main elements of such agreements, taking into account their features. Compared with foreign countries that are at the same stage of development of the public-private partnership market with Kazakhstan, there are some features in the Kazakhstan economy. This is a reasonably stable national economy; the state has funds and a desire to invest them in infrastructure projects. In terms of legislation and guarantees to investors, some significant reforms have been carried out; the state is quite ready to take on the commercial risks of the project. All this as a whole creates favourable conditions for the investor, which can now focus on minimizing other risks and solving other problems.

Key words: public-private partnership, concession, contract, lease, leasing, mixed enterprises, infrastructure project, commercial risk.

Modelling the interaction of public-private partnerships (PPP) is of great importance for successful development. In modern practice, there are many different forms, models, types and specific options for implementing partnerships between the state and business. Moreover, in the literature, there is a wide variety of approaches to understanding the essence of such concepts as the form of PPP and the PPP model. PPP, as a form, reflects the legal basis for the functioning of the relevant partnership model and can appear in the form of a contractual and mixed one. As for the PPP model, this is a specific partnership product that arose as a result of competitive selection for the solution of specific clearly defined state targets.

So, for example, E. Yasin offers a three-zone model of interaction between government and business [1].

1. The “White Zone” covers formal practices, such as the regulation of tax relations by the legislation, administrative and economic regulation of business (registration, licensing, control and enforcement of established norms, etc.), competitions on the distribution of state orders. This zone of relations between government and business is based on the creation of uniform game rules for all entrepreneurs and on their indiscriminate coercion by the state to fulfil these rules in case of violations committed by anyone.

2. The “Gray Zone” covers informal practices of levies on business that are not directly related to corruption, and the practices of its informal bargaining with the authorities regarding the functioning of a particular business. The relations of the “Gray Zone” are based on the interest of the parties in the survival of the territory, a voluntary or voluntary compulsory contribution to additional financing of the territory of its location becomes an instrument to achieve the interests of the entrepreneur.

3. The “Black Zone” covers informal criminal practices, primarily corruption. The relations of this zone are based on the individual mercenary interests of an individual official, and a tool to achieve the interests of the entrepreneur is a bribe, involvement of an official in the business.

Many researchers of this aspect identify several basic models of interaction between government and business:

- ◆ models of “suppression” and “coercion” provide for administrative pressure. The government requires certain investments from the business in the implementation of its social programs and projects, using the administrative apparatus and structures designed to exercise control over the business;

- ◆ the “patronage” model involves the compensation of business expenses for the implementation of social programs and projects due to secure access for the business to resources controlled by the government. This model implies the possibility of bargaining around the conditions for support by the business of social programs and power projects;

- ◆ a model of “non-interference” of power. The government does not take an active position to social policies pursued by business;

- ◆ a model of “partnership”, in which representatives of government and business reached a compromise. In new Kazakhstani conditions, it is the most acceptable, working on the principle of “beneficial to everyone is beneficial to all”.

The whole set of existing and emerging forms of partnership can be divided into the following models: organizational, financing and cooperation models. In many cases, partnerships use forms based on the benefits of different models and their combination.

A variety of goals and solution methods leads to a variety of forms of PPP. Based on international experience, all forms of PPP fall into one of the following categories, depending on the purpose of their creation [2]:

- ◆ partnerships designed to expedite the implementation of high priority projects;

- ◆ partnerships that provide specialized facility management under long-term and comprehensive programs;

- ◆ partnerships whose subject is assistance in the transfer of new technologies used by the private sector;

- ◆ partnerships using the experience of the private sector in accumulating resources and organizing financing schemes;

- ◆ partnerships to apply and promote private entrepreneurial methods of managing.

For a long time, the state cannot fully implement large infrastructure projects in the country. In many ways, this form of partnership as a concession would help to solve this problem. Since the modernization of the production infrastructure built during the Soviet era, the implementation of many large projects related to the construction of roads, airfields, energy and utility systems is possible only with the involvement of responsible and international capital based on PPPs.

The concession is the specific and most common form of relationship between the state and a private partner. In the conditions of innovative development of the economy, it receives a new impetus. Its feature is that the state, in the framework of partnerships, remains the full owner of the property constituting the subject of the concession agreement. The state authorizes the private partner to carry out the functions specified in the agreement for a specified period. It gives it the appropriate powers necessary to ensure the normal functioning of the concession facility.

The main reason for the difficulties in concluding concession agreements for infrastructure facilities is the insufficient protection of the rights of the concessionaire. So, the risks that he carries, the high costs associated with the concession activity itself, are also aggravated by the need to pay a high concession fee to the state. At the same time, the penalty for violation of obligations by the latter is not provided by law.

It should be noted that, as the analysis shows, the profitability of a business in the form of a concession is insignificant – from 5% to 20%. However, given the large volumes of capital investments for large projects, the multiplier effect from them can be hundreds of millions of dollars. One cannot fail to see that Kazakhstan still has a distorted idea of the essence of concessions, the practice of their application, and the possible socio-economic consequences. Most often, the economic literature indicates the unresolved legal issues and does not pay due attention to economic and social problems, the mechanism of functioning and regulation of concessions. However, it has long been known that the formation of a system of concession relations does not boil down to one or more laws. A complex

institutional nature characterizes it, and it should be decided based on a systematic approach. This should include the entire totality of financial, economic and social problems.

It is the absence of the above mechanisms that do not allow to effectively implement the concession agreements that were concluded in the late 90s of the last century. At that time, there was an active process of transferring subsoil use objects and, to a much lesser extent, electric power, transport, airport ports, etc. This process today is not going as intensively as is required for economic development. They, as a rule, are not provided with the design and methodological support, are accompanied by instability of relations between the state and business, etc.

However, with the adoption of the “Law on Concessions” of the Republic of Kazakhstan dated July 07, 2006 (with amendments and additions as of December 26, 2019), some of the deficiencies mentioned above were eliminated. Changes were made to the definition of the object of the concession agreement; parties to the concession agreement; terms of concession agreements and tariff regulation [3].

However, the law has not been fully developed in terms of protecting the rights of the concessionaire. So, in case of early termination of the agreement, the concessionaire has the right to demand from the grantor the only reimbursement for the creation and (or) reconstruction of the object of the concession agreement. Moreover, the Law does not directly provide for the reimbursement by the grantor of expenses related to the operation, maintenance of the facility and demobilization after the termination of the concession agreement.

Generally speaking, the concession form of management has the following advantages:

- ◆ firstly, it allows attracting private capital, including foreign capital, to long-term and unprofitable projects, without losing strategic control over the country’s vital systems and facilities;
- ◆ secondly, concessions remove the financial burden from the state, as the concessionaire assumes the obligation to cover all costs of financing, management and maintenance of structures transferred to the concession;
- ◆ thirdly, concessions establish rather rigid, long-term, legally formalized relations between the state and the concessionaire;
- ◆ fourthly, it provides long-term financing of large investment projects. Their implementation enables these regions to more actively engage in the single economic space of the country, solve the problem of creating jobs and containing the outflow of the population.

A somewhat developed form of PPP in Kazakhstan is contractual. A contract is an administrative contract concluded between a state and a private company for the implementation of certain socially necessary and useful types of activity. When considering this form of partnership, a clear delineation of property rights is observed, which encourages the parties to invest in the assets that are of the highest value when used in the framework of this transaction, which is also considered as an effective way to maintain stable bilateral relations.

However, it should be emphasized that not all contracts can be attributed to the PPP mechanism firstly if the execution of contracts does not involve co-financing, the joint distribution of risks between partners, their insurance. Secondly, government contracts regulate many of the characteristics of a contractor that are not found in PPP contracts. PPP relations under a state contract arise only if extrabudgetary sources of financing are attracted to satisfy state needs. Currently, the contract form of interaction between the state and business is widespread in the world.

We agree with the point of view of A.M. Musaeva, who believes that the contract acts as a channel for transferring property rights, in which he contributes to their most efficient distribution [4]. In the contract, in our opinion, legal relations are born that are the result of the optimal choice of each of the parties and are determined by their economic interests. There is a fundamental difference between the state contract and the concession. The contract system operates within the framework of the civil law field, and the concession system also operates within the framework of public law. Nevertheless, in some countries, these concepts are identified. In the EU, for example, a concession acts as a kind of administrative contract in the field of infrastructure. By the rules of law of developed countries, a concession is a “global contract”.

The international practice has shown that each form of PPP has its advantages and disadvantages, and the choice of PPP form depends on the goals pursued a particular project.

A new type of contract for Kazakhstan is a life cycle contract, which is characterized by the following features. The Contractor (Management Company) undertakes the creation of design estimates, construction, repair, maintenance and operation of the facility throughout the entire life cycle; financing of all these works. The customer (State) guarantees payment of the “working road service” in equal instalments throughout the entire service life of the facility and starts paying for the service only from the moment of its availability, that is, from the moment the facility is commissioned. The amount of payment depends on the level of compliance with the exposed functional requirements for the facility, including, for example, the quality of the road and the safety of movement on it.

Often, Kazakhstani PPP experts claim that the life cycle contract is a concession with the so-called “hidden payments” (shadow toll). However, it is not. The main difference between a life cycle contract and a concession is the ability to create and modernize facilities that cannot be paid, that is, the investor’s income is generated not from the fee for using the facility, but from budget allocations for the provision of service to a functioning facility. The format of the life cycle contract is equally beneficial both to the state, which is spending budget funds more efficiently and to the investor, who receives a long-term contract with the treasury, independent of the risk of demand and other market factors.

It is worth mentioning that in international practice both the life cycle contract and the concession are subspecies of the concession forms of PPPs providing for a different level of distribution of rights and obligations of the public and private parties.

In Kazakhstani practice, under the current law “On Concession Agreements”, only one concession form is provided, respectively, this normative act does not formally cover other types of PPPs. A concession is a form of creating a paid infrastructure for the end-user (toll road, express train, utilities), and a life cycle contract can be used to create a free public infrastructure (hospitals, schools, kindergartens and others).

We believe that the procedure for concluding a concession agreement is closer to the procedure for concluding a life cycle contract than the procedure for concluding a state contract. Therefore, subject to some amendments to the Law on Concessions, the conclusion of a life cycle contract is possible based on this particular law. Of course, given the introduction of appropriate adjustments to budget legislation. On the other hand, we believe that such forms of PPPs, such as the life cycle and concession contracts, are mutually complementary and can be used depending on the financial and economic model of a particular PPP project (paid or free infrastructure) within the existing regulatory field.

One form of PPP is a production sharing agreement (PSA), a contract concluded between the state and an investor in which production sharing is carried out. The state acts as the owner of the subsoil and has the right to receive a specific part of either profit or production.

In our opinion, PSAs are, in fact, a form of concession. It is an independent form of partnership between the state and the private sector, close, but not related to the traditional concession. Under this agreement, the state’s partner owns only a part of the manufactured products, and in concessions, the concessionaire is the owner of all manufactured products. Even if, under a concession agreement, the state receives part of taxes and other payments, for example, concession payments, in kind, this is not a product division, but only a replacement of one form of payment with another, more convenient and convenient for both contracting parties.

Nevertheless, concessions and PSAs in Kazakhstani legislation are neither terminologically, nor organizational, nor linked, which gives rise to all kinds of interpretations and assumptions. The question of what legal norms govern PSAs also remains open. This largely explains the emergence of different points of view regarding projects implemented in our country under the terms of the PSA. Supporters of the opinion that PSAs are unprofitable are united by the fact that there is no reasonable goal on the part of state authorities.

However, our studies show that there are still many problems. According to A. Melnikov, in the process of implementing PSA projects, there are three main problems [5]:

- ◆ the dissatisfaction of the state with the number of royalties paid and (or) the scale of production sharing;
- ◆ increase in project costs;
- ◆ shortage of trained domestic personnel.



Close to the concession is also such a form of PPP as rent. Under lease terms, the state also transfers its property to the private sector for temporary use and a fee. However, unlike a concession, the power to own and use property is not transferred to a private partner. Another distinguishing feature of the lease is that in specially stipulated cases, the lease may result in the redemption of the leased property.

To date, there is no single answer to the question “what is better: rent or concession?”. With proper preparation of the contract within the framework of the concession, it is possible to remove more risks of the operator than under the lease. The concession design is more stable, less risky, but requires more time and money to prepare a tender.

In our opinion, in order to attribute lease agreements to PPP forms, they should have the following features:

- ◆ have a socially significant goal;
- ◆ be concluded for an extended period;
- ◆ be public property specified in regulatory legal acts as a potential object for lease.

The quality of partnerships largely depends not only on the conditions for the implementation of this mechanism but also on the ability of the parties to provide effective contractual relations. “A good contract is a model of relations with a partner” is a central starting position, since each type of partnership cannot work according to standard forms of contracts, but must realize its specific tasks. Unfortunately, the conditions of contractual relations in Kazakhstan, as a rule, are incredibly complicated and unstable, which requires the creation of a new contractual technology that would include both a general scheme of the main elements of contracts and taking into account their features.

An essential form of PPP is leasing. It represents – “a type of investment activity for the acquisition of property and its transfer based on a leasing agreement to individuals or legal entities for a certain fee, for a certain period and on certain conditions stipulated by the agreement, with the right to buy property by the lessee”.

The main thing is the difference between the last two forms of transfer of property rights – the scope of the lease and concession under the law. The concession extends its effect only to objects and types of activity for which there is a state monopoly. The advantage of leasing is that the lessee has the right to repurchase property under the contract, and in concessions, state property does not pass to the concessionaire. The similarity of these two forms is the repayment of the subject of relations, as well as the preservation of the right to dispose of property by the owner.

At the same time, the leased form of PPP has certain disadvantages. The main ones are:

- ◆ the lessee is responsible for the condition of the leasing facility, that is, there is a risk of property ageing;
- ◆ the lessor is obliged to pay lease payments regularly, also, sometimes the cost of leasing is more than the purchase price or bank loan;
- ◆ before the conclusion of the leasing transaction, preliminary work on its examination is ahead;
- ◆ the lessee is not the owner of his fixed assets; he cannot use them as collateral in obtaining a loan.

Thus, before making a leasing transaction, it is necessary to weigh all the pros and cons, draw up a business plan, calculate the free funds that can be spent on business development.

One of the widespread forms of PPP in Kazakhstan, in which the private sector is involved in the capital of a state-owned enterprise, are mixed enterprises. For example, joint-stock companies are a variety of this form of interaction between government and business.

The risks of the parties and the private sector’s ability to make decisions directly depend on its share in the share capital. A feature of this form of interaction is the constant participation of the state in the current production, administrative, economic and investment activities. The independence of the private partner in decision-making here is more limited than, for example, in concessions.

The development of mixed entrepreneurship as a form of public-private partnership can significantly reduce the transaction costs associated with connecting a private business to medium and long-term macroeconomic manoeuvres (for example, to implement national, regional programs); to ensure “transparency” of organizational ties between the state and private business, and, therefore, to a certain extent reduce the risks of jointly conducted financial transactions. As a result, each of the

participating parties receives certain benefits, costs are reduced, and priorities of state economic policy are adjusted.

Thus, in our opinion, it is impossible to unequivocally state that this or that form of PPP is optimal. The partnership form should be selected depending on the specific task being solved and the sector of the economy in which the PPP project will be further implemented; on the conditions of the project, its participants, the volume of state participation in the project, and many other criteria.

In general, considering the international experience, there are no fundamental differences in terms of forms of partnership and approaches to choosing projects with countries located in Kazakhstan at approximately the same stage of development of the PPP market. There are small features. On the one hand, this is a relatively stable economic situation in the country, the availability of funds from the state and the desire to invest them in the development of infrastructure. On the other hand, this is the traditional perception of Kazakhstan as a perilous country, which does not always correspond to the real state of affairs. In terms of legislation and guarantees for investors, our economy is ahead of many countries at a similar stage of development. For example, the state is ready to take on the commercial risks of the project. This creates exceptionally favourable conditions for the investor, who can now concentrate on minimizing other risks and solving other problems. Moreover, in order to attract attention from first-class investors and the successful development of PPPs in the future, the country must demonstrate the presence of a portfolio of attractive projects in development.

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#### Аңдатпа

Қазіргі практикада мемлекет пен жеке құрылымдардың өзара іс-қимылының барынша оңтайлы нұсқасын іздеу процесінде мемлекеттік-жеке меншік әріптестік (МЖӘ) нысандарының, түрлері мен модельдерінің алуан түрлілігі байқалады. Қазақстан экономикасын трансформациялаудың барлық кезеңінде олардың көбі социумның базистік аспектілерін қамтып, олардың үйлесімді дамуын қамтамасыз ететініне қарамастан бағаланбаған болатын. Инновациялық даму жағдайында билік пен бизнестің өзара іс-қимылының мұндай түрі қазіргі заман талаптарына жауап беретін МЖӘ жаңа нысандарын дамыту мен қолдануда жаңа серпін алады. Біздің елдегі шарттық өзара қарым-қатынастар талаптары, әдетте, өте күрделі және тұрақсыз екенін атап өтуге болады. Мұның бәрі осындай шарттардың негізгі элементтерінің барлық жалпы схемасын, олардың ерекшеліктерін ескере отырып, өзіне алатын шарт процедурасын құруды талап етеді. Қазақстанды МЖӘ нарығының дамуының бір сатысында тұрған шет мемлекеттермен салыстырғанда қазақстандық экономикада кейбір ерекшеліктер бар. Бұл айтарлықтай тұрақты ұлттық экономика, мемлекеттің қаражатының болуы және оларды инфрақұрылымдық жобаларға инвестициялау ниеті. Заңнама мен кепілдіктер тұрғысынан инвесторларға бірқатар маңызды реформалар жүргізілді, мемлекет жобаның коммерциялық тәуекелдерін өзіне алуға әбден дайын. Осының бәрі жалпы инвестор үшін қолайлы жағдай жасайды, ол енді қалған тәуекелдерді азайтуға және басқа да міндеттерді шешуге назар аудара алады.

Тірек сөздер: мемлекеттік-жеке меншік әріптестік, концессия, келісімшарт, жалға беру, лизинг, аралас кәсіпорындар, инфрақұрылымдық жоба, коммерциялық тәуекел.

#### Аннотация

В современной практике в процессе поиска наиболее оптимального варианта взаимодействия государства и частных структур наблюдается большое разнообразие форм, видов и моделей государственно-частного партнерства (ГЧП). На протяжении всего периода трансформации экономики Казахстана многие из них были

недооценены, несмотря на то что они охватывают базисные аспекты социума и обеспечивают их гармоничное развитие. В условиях инновационного развития такой вид взаимодействия власти и бизнеса получит новый импульс в развитии и применении новых форм ГЧП, отвечающих современным реалиям. Необходимо отметить, что условия договорных взаимоотношений в нашей стране, как правило, крайне сложны и неустойчивы. Все это требует создания такой договорной процедуры, которая вбирала бы в себя всю общую схему основных элементов таких договоров, учитывая их особенности. По сравнению с зарубежными странами, находящимися с Казахстаном на такой же стадии развития рынка ГЧП, в казахстанской экономике есть некоторые особенности. Это довольно стабильная национальная экономика, наличие у государства средств и желание инвестировать их в инфраструктурные проекты. В плане законодательства и гарантий инвесторам проведен ряд существенных реформ, государство вполне готово брать на себя коммерческие риски проекта. Все это в целом создает благоприятные условия для инвестора, который теперь может сосредоточиться на минимизации остальных рисков и решении других задач.

Ключевые слова: государственно-частное партнерство, концессия, контракт, аренда, лизинг, смешанные предприятия, инфраструктурный проект, коммерческий риск.