

## Introduction

In the Address dated 29 January 2010, "New Decade - New Economic Growth - New Opportunities for Kazakhstan," the President of the Republic of Kazakhstan N.A. Nazarbayev, said, "A great potential of raising private investment belongs to the public private partnership. We have launched this mechanism in Kazakhstan, but it requires improvements to comply with the best world practice."

In order to implement this Address, a programme for the development of public private partnership in Kazakhstan for 2011-2015 was adopted in the Resolution of the Government of the Republic of Kazakhstan No. 731 dated 29 June 2011, and the Government of the Republic of Kazakhstan - represented by the Ministry of National Economy - issued a legislative initiative on development of a new law 'On Public Private Partnership'.

Adoption of the Law 'On Public Private Partnership' is expected before the end of 2015, and the next year or two will show the changes in the ratio of concessional and non-concessional public private partnership projects in Kazakhstan, and the attractiveness and effectiveness of the institution of the public private partnership contract for both for businesses and the state, as compared to a concession agreement.

Thus the study of the institution of public private partnership contract has become especially important. Even at the stage of consideration of the draft Law 'On Public Private Partnership' it is important to avoid mistakes by finding the right definitions for terms, including the subject, parties, and content of the public private partnership contract.

This Article is, therefore, aimed at the following:

- ✓ to identify the legal essence and main features of the public private partnership contract;
- ✓ to define the subject and other material terms of the public private partnership contract;
- ✓ to develop proposals on improvement of the draft Law 'On Public Private Partnership'.

# Public Private Partnership Contract

as a New Civil Law Institution  
in the Republic of Kazakhstan

## Chapter 1. The Concept and General Description of a Public Private Partnership Contract

### § 1.1. Public private partnership contract within the framework of the current legislation

The current laws of the Republic of Kazakhstan (hereinafter – ‘Kazakhstan’) do not provide for a legal definition of the contract on public private partnership (hereinafter – ‘PPP Contract’).

At the same time, Article 1.19 of the Law of the Republic of Kazakhstan No. 167-III dated 7 July 2006 ‘On Concessions’ (hereinafter – the ‘Concession Law’) defines the concept of public private partnership as a *form of cooperation between the state and private entrepreneurship entities* aimed at the financing, creation, reconstruction and (or) operation of *social and vital infrastructure facilities*.

Article 7-2 of the Concession Law provides for the following exhaustive list of public private partnership principles in Kazakhstan (hereinafter – ‘PPP Principles’):<sup>1</sup>

- “1) a principle of consistency – formation of mid-term or long-term mutual relationships between public private partnership participants on a contractual basis;
- 2) a principle of contentionsness – determination of private partner on a basis of competitive tender;
- 3) a principle of balance – mutually advantageous distribution of risks, profits, guarantees and obligations between the public and private partnership participants;

4) a principle of efficiency – establishment of criteria and indices, permitting assessment of public private partnership results.”

Finally, Article 7-1.1 of the Concession Law clearly outlines that a public private partnership (hereinafter – the ‘PPP’) in the Republic of Kazakhstan is divided into *institutional* and *contractual*. It is noteworthy that according to Article 7-1.3 of the Concession Law, “*contractual public private partnership is implemented within the framework of concession agreements, tenancy and trust management of state property in the procedure prescribed by this Law or other laws of the Republic of Kazakhstan.*”

Since the list of possible forms of contracts is exhaustive, according to a literal interpretation of the current edition of the Concession Law, a contractual public private partnership can only be implemented within the framework of concession agreements, tenancy and trust management of state property.

Below we briefly discuss currently available contractual forms of PPP in Kazakhstan:

#### Concession Agreement

Under Article 1.18 of the Concession Law, “a concession agreement is a written agreement between concessor and concessionary, which determines the rights, obligations and liability of the parties, conditions for implementation of the concession.”

Legal terms and conditions of concession, types of state support to the concessionary and social relations arising in entering into, performing and terminating concessions agreements shall be governed by the Concession Law.

In particular, pursuant to Article 1.6 of the Concession Law, “a concession is an activity aimed at the construction (or reconstruction) and operation of concession facilities, and performed at the expense of concessionary funds or on conditions of co-funding by a concessor.”

A concession facility in Kazakhstan can only be for the so-called “social and vital infrastructure facilities included into the list, which shall be constructed (or reconstructed) and operated under a concession agreement<sup>2</sup>.” Under Article 1.2 of the Concession Law, “social and vital infrastructure facilities are facilities [or] complexes of facilities used for the satisfaction of public needs, the securing of which is imposed on state authorities in accordance with the legislation of the Republic of Kazakhstan’.

The term “concession project,” pursuant to Article 1.8 of the Concession Law, means “a set of actions on carrying out of the concession implemented within the limited period and having terminated nature in accordance with the budget laws of Kazakhstan and this Law.” This term obviously means that any concession project must be completed within a period of time established in the concession agreement – being not more than thirty years<sup>3</sup>. As to the concept of the “terminated nature”, a legislator apparently meant that all actions performed by the parties to a concession agreement must be completed in full rather than terminated at a mid-stage.

Please note that the Concession Law<sup>4</sup> provides for a concessionary option to reserve the right to the concession facility upon completion of the concession project, and, therefore, under a concession agreement all available PPP schemes – *BOT, BOOT, ROT, BTO, BOMT, BOO*, etc – may be structured. In particular, according to Article 21-1 of the Concession Law, a concession agreement is signed in the following types:

“1) a concession agreement that provides for the construction of a concession facility by the concessionary with a subsequent transfer of the concession facility into the state property;

<sup>1</sup>It is interesting to note that this list of PPP principles differs from a list of concession principles given in Article 3 of the Concession Law (hereinafter – the ‘Concession Principles’):

‘1) publicity and accountability of activity of concessor and concessionary;

2) securing a balance of interests and risks of concessor and concessionary;

3) securing rights and legal interests of consumers of commodities (works, services), provided by a concessionary, according to concession agreement;

4) perfect competition;

5) equality of all the potential concessionaries and non-admission of discrimination’.

Since concession is one of the PPP forms in Kazakhstan, any concession project obviously must meet both Concession Principles and PPP Principles. However, a PPP project being not of the concession form, apparently, must meet only the PPP Principles.

<sup>2</sup> see Article 1.14 of the Concession Law

<sup>3</sup> see Article 23 of the Concession Law

<sup>4</sup> see Article 5.3



2) a concession agreement that provides for joint activity of concessionary and conessor on the construction (or reconstruction) and operation of a concession facility;

3) a concession agreement that provides for the transfer of a concession facility from the state property into trust management or into tenancy(lease) of the concessionary for the purpose of reconstruction and operation;

4) a concession agreement that provides for the transfer of a concession facility being in the property of the concessionary into the tenancy (lease) of the conessor or a person authorised thereby, as well as with the right of redemption of the concession facility by the conessor.”

A concession agreement may include elements of one or more of the above-mentioned types of agreements, as well as the elements of other agreements not prohibited by the legislation of Kazakhstan and aimed at the construction (or reconstruction) and operation of a concession facility.

Another distinctive feature of a concession in Kazakhstan is that the concession facilities during the term of the concession agreement cannot be the subject of a pledge and cannot be alienated for the period of validity of the concession agreement<sup>5</sup>.

#### *Agreements for tenancy and trust management of state property*

As to the agreement of tenancy of state property and agreement for trust management of state property (in the form

of a state enterprise as a single property complex or by management of a batch of shares/participatory interests in the charter capital), these kinds (types) of PPP Contracts are settled by the Law of Kazakhstan “On State Property.”

In particular, under Article 72 of the Law “On State Property,” state property<sup>6</sup> can be transferred for use on the basis of the following agreements:

- 1) tenancy (lease) of state property;
- 2) trust management of state property.

The principle of contentionsness (a PPP Principle) provided by the Concession Law is obviously met by the fact that, generally, state property facilities are transferred in tenancy (property lease) as well as in the trust management under a tender<sup>7</sup>.

It is important to note that pursuant to Article 74.5 and Article 75.6 of the Law “On State Property,” terms of an agreement for tenancy (lease) of state property and an agreement for trust management of state property are defined by standard contracts approved by the competent authority on state planning.

Under Article 382.1 of the

Civil Code of the Republic of Kazakhstan (General Part), dated 27 December 1994 (hereinafter – the ‘**Civil Code**’), “provisions of an agreement shall be defined at the discretion of the parties, except for the cases where the contents of a certain provision are prescribed by the legislation.”

Compliance with the provisions of a standards agreement is obviously a must.<sup>8</sup> The particular terms of the agreement have been defined by the legislation, and, as a result, the parties to the agreement are deprived of the right to define the terms of the agreement independently and at their discretion. Lack of opportunity to change the terms of the standard agreement and to establish contractually, *inter alia*, the criteria and indicators that allow assessing the results of public private partnership, as well as to establish an acceptable balance of risk and income allocation between the public and private partner, in practice, will not meet the principles of balance and efficiency, which are binding PPP Principles in Kazakhstan.

We believe, therefore, that under the current legislation of Kazakhstan, despite the explicit reference in Article 7-1 of the Concession Law, agreements for tenancy of state property and agreements for trust management of state property cannot be classified as contractual forms of PPP, since they do not meet all the PPP Principles specified by law<sup>9</sup>.

#### *Other possible contractual PPP forms*

A contract is an agreement between two or more persons for the establishment, change or termination of civil rights and obligations<sup>10</sup>.

Under the current legislation of Kazakhstan, a public private partnership contract does not have any particular distinctive features that allow it to be classified as an independent contractual obligation and distinguish it from all other civil contracts.

Based on the general qualification of contracts, it can be argued that, generally, a public private partnership contract is mixed, consensual, bilateral (mutual) and compensated.

In addition, a public private partnership contract is, in fact, an entrepreneurship (investment) agreement. In the legal literature,<sup>11</sup> an entrepreneurship contract is also defined not as



<sup>5</sup> See Articles 5.5 and 5.6 of the Concession Law.

<sup>6</sup> State property under Article 1 of the Law ‘On State Property’ includes republican property (i.e. property of the Republic of Kazakhstan, except for municipal property) and municipal property (i.e. property of administrative-territorial entities of Kazakhstan).

<sup>7</sup> see Articles 74.3 and 75.3 of the Law ‘On State Property’

<sup>8</sup> This position is supported by doctrinal interpretation. Ref.: Associate Editor M.K. Suleimenov. Civil Law. Volume 2. Material Law. Law of Obligations: College Textbook (educational course) – Almaty, 2013. Page 457.

<sup>9</sup> For the same reason, a public procurement contract within the framework of the Public Procurement Law cannot be used as a contract form of PPP. In particular, Article 14.11 of the Public Procurement Law requires the mandatory use of a standard contract of public procurement of goods, standard contract of public procurement of works and standard contract of public procurement of services.

<sup>10</sup> see Article 378.1 of the Civil Code

<sup>11</sup> Ref. S.P. Moroz. Investment Law: textbook. Almaty: Jurist, 2007. Page 167.



an independent type of contract, but as a kind of civil contract with a set of the following specific features:

- 1) parties thereto can only be entrepreneurship structures,
- 2) they are only used in the entrepreneurship and other economic area.

As a result, we agree with the position of M.K.Suleimenov: “[o]f interest is the consideration of the issue of complex formations in law, of an agreement as a complex institution. This issue is analysed within classification of agreements. Usually, there are types or kinds of agreements: sale and purchase, lease, hiring, services, etc. However, there are agreements that are classified not by their legal nature, but according to their area of activities. For instance, an investment agreement, agricultural agreement, foreign economic contract, etc. This is not a particular type of contract by analogy with the sale and purchase, lease, etc. This can be a sale and purchase, and lease, and hiring. Here, we are dealing with complex institutions in the legal system located in another plane under the theory of S.S. Alexeyev on the legal structure doubling.”<sup>12</sup>

A public private partnership contract is obviously pointless to be qualified somehow by its legal nature, since it may include elements of many types of contracts, and it rather should be treated as a complex institution and distinguished from the total mass of instruments by the area of activity (i.e. investment activities with the mutually beneficial participation of business and government).

Therefore, despite the absence of a legislative definition of a public private partnership contract in Kazakhstan, and in spite of the provision in Article 7-1 of the Concession Law limiting contractual public private partnership forms to three types of possible agreements, we believe that, in practice, there are other civil law contracts, which by all features shall be referred to the contractual public private partnership form.

For instance, in 2011 an agreement was signed between the Government of the Republic of Kazakhstan and MCC EuroChem OJSC for the implementation of the project on construction of the plant for the production of complex mineral fertilizers and development of deposits of phosphorite pool

‘Karatau’ in the Republic of Kazakhstan (hereinafter – the ‘Eurochem Project’). Within the framework of this civil agreement the Government of Kazakhstan, apparently on behalf of the Republic of Kazakhstan, assumed certain contractual rights and obligations associated with the assistance to a private investor in the implementation of the investment project in the territory of the Republic of Kazakhstan. The agreement was approved by the Resolution of the Government of the Republic of Kazakhstan No. 80 dated 17 January 2012. By the Resolution, the Government of Kazakhstan authorised the First Vice-Minister of the Ministry of Industry and New Technologies of the Republic of Kazakhstan to sign the agreement on behalf of the Government of the Republic of Kazakhstan.

As another example, to the best of our knowledge, in the last few years<sup>13</sup> Akimats of several cities and regions, state municipal enterprises, and the European Bank for Reconstruction and Development (hereinafter – the ‘EBRD’), on the other hand, have concluded the so-called agreements on project support (hereinafter – the ‘EBRD Project’). Within the framework of this civil agreement (i.e. project support agreement), the Akimat, acting apparently on behalf of the respective administrative-territorial unit (i.e. city or region) assumes<sup>14</sup> certain contractual rights and obligations<sup>15</sup> related to the implementation of an investment project including the obligation of the Akimat to support the state municipal enterprise, if the enterprise suffers any financial difficulties.

On the one hand, under Articles 111 and 112 of the Civil Code, respectively, the Republic of Kazakhstan and an administrative-territorial unit can act as subjects of law in relations regulated by civil law, on equal terms with other participants of these relations. In these cases, the state and administrative-territorial units are subject to the rules governing the participation of legal entities in relations regulated by civil law, unless otherwise provided by legislative acts (Article 114 of the Civil Code). The Republic of Kazakhstan is liable for its obligations by the property of the state treasury, while an administrative-territorial unit is liable for its obligations by the local treasury assets (Article 113 of the Civil Code).

On the other hand, the following questions remain open:

1) Whether the competence of the Government of the Republic of Kazakhstan and regional Akimat, respectively, include the right to enter into entrepreneurship (investment) contracts not provided by the laws with private partners on behalf of the Republic and the region?

2) Whether the Government and the Akimat must comply with the requirements of the Public Procurement Law when entering into such entrepreneurship (investment) contracts with private partners on behalf of the Republic and the region (i.e. is it required to carry out public procurement)?

3) Whether the above projects fall within the public private partnership definition within the framework of the current legislation of Kazakhstan?

4) What legal consequences are specified by the current legislation of Kazakhstan in the case of recognition of these projects as projects in the sphere of PPP?

Article 9.9 of the Law ‘On the Government of the Republic of Kazakhstan’ provides that the Government “organises management of state property, develops and implements measures for protection of right of state property.” Pursuant to the official interpretation,<sup>16</sup> the concept of “management of state property,” which is included in the competence of the Government, shall also mean exercising on behalf of the Republic of Kazakhstan of the powers of an owner of the state property within the laws.

Under Article 27.1 of the Law “On Local Government and Self-government in the Republic of Kazakhstan,” the Akimat of region, Almaty and Astana “shall manage the municipal property of region, city of republican significance, a capital city, and carry out the actions of its protection.” By analogy of law, we believe that the concept of “management of the municipal property of region, city of republican significance, a capital city” being within the competence of Akimat shall also mean exercising on behalf of the administrative-territorial unit of the powers of an owner of the municipal property within the laws.

Therefore, as to the first question, we believe that the competence of the Government of the Republic of Kazakhstan and Akimat of the region/city includes the right to

<sup>12</sup>Ref. M.K. Suleimenov. Private Law of the Republic of Kazakhstan: history and contemporaneity. Volume 5, 2011 <http://zangerif.com/ru/publications/205>

<sup>13</sup> <http://ru.autobuspark.kz/news/10-yzylorda-oblysy-kmdg-men-europaly-ayta-ru.html>

<sup>14</sup> [http://online.zakon.kz/Document/?doc\\_id=30518118](http://online.zakon.kz/Document/?doc_id=30518118)

<sup>15</sup> [http://online.zakon.kz/Document/?doc\\_id=30518523](http://online.zakon.kz/Document/?doc_id=30518523)

<sup>16</sup>Resolution of the Constitutional Council of the Republic of Kazakhstan, No. 4/2 dated 17 March 1999.

enter into an entrepreneurship (investment) contract with private partners on behalf of the Republic and the region/city, respectively, despite that this right is not directly provided by law. Apparently, M.K. Suleimenov supports the same position, at least with regard to the competence of the Government of Kazakhstan.<sup>17</sup>

As to the second question, then, first, the term “government procurement” involves the *purchase* by a customer *for a fee of goods, works and services* required for the functioning and performance of public functions or the authorised activity of the customer<sup>18</sup>. Neither the Government of Kazakhstan when entering into the agreement with MCC EuroChem OJSC, nor the Mangystau Akimat when entering into the agreement with EBRD, 1) paid any money (i.e. they did not pay for the purchase of something), or 2) purchased any goods, services and works required for the operation and performance of their public functions.

Second, the customers, in accordance with Article 1.32 of the Public Procurement Law, are, *inter alia*, “public authorities,” while, strictly speaking, the legal entities (i.e. a prospective customer) in the first case is not the Government of the Republic of Kazakhstan but the Republic of Kazakhstan, and in the second case – not Akimat, but the Mangystau region.

As for the third question, it is obvious that both projects involve a certain form of cooperation between the state and subjects of private entrepreneurship; however, only the EBRD Project is aimed at financing, construction, reconstruction and(or) the operation of facilities used to meet social needs, which is imposed on the state bodies in accordance with the relevant legislation (i.e. sewage, water and heating facilities). In addition, neither EuroChem Project, nor EBRD Project complies with the principle of contentiousness, as one of the essential PPP Principles.

Within the framework of the current legislation of Kazakhstan, accordingly, neither EuroChem Project nor the EBRD Project fall within the legal definition of a public private partnership under the Concession Law.

But even if these projects were to be officially recognized projects in the sphere of public private partnership,

unfortunately, the current legislation does not provide for special regulatory or governmental preferences for PPP projects are not concessions.

Even if these projects were officially recognised in the PPP area, the current legislation does not provide for specific regulation or state preferences for PPP projects being not concessions.

Based on the foregoing, one may come to the following conclusions with respect of the current regulatory legal framework applicable to contracts in the PPP sphere in Kazakhstan:

1) Within the framework of the current legislation of Kazakhstan, a public private partnership contract does not have certain distinctive features allowing it to qualify as an independent contractual obligation and distinguish it from all other civil contracts. In addition, a public private partnership contract is, in fact, an entrepreneurship (investment) agreement.

2) The concept of PPP in Kazakhstan is wider than the term “concessions,” and the PPP Principles shall apply to concessional projects in addition to the basic Concession Principles specified in Article 3 of the Concession Law.

3) Within the framework of the current legislation of Kazakhstan, a contractual form of public private partnerships can be represented, apparently, only in the form of a concession agreement, since in practice the conclusion of the agreement for tenancy of state property and agreement for the trust management of state property that meet all the PPP Principles is obviously impossible.

4) In practice, there are other kinds of civil contracts, which, according to the international practice, by all features shall be classified as the contractual form of public private partnership. However, they are not, due to the limit artificially established by Article 7-1.3 of the Concession Law.

5) The current legislation does not provide for a special regulation, benefits or government preferences for PPP projects being not concessions.

### **§ 2.1.A public private partnership contract within the draft Law ‘On Public Private Partnership’**

#### *Concept of PPP*

A draft Law ‘On Public Private Partnership’ (hereinafter – the ‘Draft Law’) and the accompanying draft Law on the introduction of amendments to some legislative acts are currently under consideration in the Parliament of Kazakhstan and their adoption is expected by the end of 2015.

Article 1 of the Draft Law gives a broader definition of public private partnership: “Public private partnership is a form of cooperation between a public partner and a private partner that complies with features defined in this Law.” The draft also

introduces a new legal definition of a public private partnership contract: “[a] written agreement defining the rights, obligations and liabilities of parties to a public private partnership contract, and other terms and conditions of public private partnership contract within the framework of realisation of a public private partnership project.”

Article 7 of the Draft Law enlists possible types of public private partnership contracts. However, the list remains open, so it would be possible to enter into “other agreements, which comply with the features of public private partnership.”

Thus, the Draft Law allows a solution to the above problem with a narrow range of possible types of PPP Contract under the current wording of the Concession Law, and will in the future allow entering into other contractual forms of PPP, even not provided by the Draft Law, but mainly meeting the following public private partnership features (hereinafter – the ‘PPP Features’) specified by Article 4 of the Draft Law:



<sup>17</sup>Ref. M.K. Suleimenov. PrivateLawoftheRepublicofKazakhstan: history and contemporaneity. Volume 5, 2011, <http://zangerlf.com/ru/publications/205>

<sup>18</sup> see Article 1.18 of the Public Procurement Law

“1) building relationships between a public partner and a private partner by entering into a contract of public private partnership;

2) mid-term or long-term period of implementation of a project of public private partnership (three to thirty years depending on the features of the project of public private partnerships);

3) joint participation of a public partner and a private partner in the implementation of a project of public private partnership;

4) combining resources of a public partner and a private partner to implement the project of public private partnership.”

At the same time, we would like to note that the Draft Law, apparently with the aim to extend the possibility of PPP application in all economic sectors, unconsciously creates a new problem, since it offers an unnecessarily broad understanding of the term ‘public private partnership.’ Thus, as of today, as mentioned above, a public private partnership is limited to the forms of cooperation between the state and business aimed at “financing, construction, reconstruction and(or) operation of social and vital infrastructure.”Due to this too narrow understanding of public private partnership, the EuroChem Project, as we concluded above, does not fall under the current definition of public private partnership given in the Concession Law. Therefore, the scope of PPP application must be extended, but with a clear understanding that “the public private partnership is a type of investment activity<sup>19</sup>,” and a public private partnership contract is, in fact, an entrepreneurship (investment) agreement.

If the Draft Law is adopted in the current wording, the public private partnership forms will formally include, for instance, charity, grants, student loans, scholarships, joint activities with the business community on improving educational programs and plans, etc., since to satisfy the above PPP Features is fairly easy for the many possible forms of cooperation between the state and businesses.

We share the opinion of Belitskaya<sup>20</sup> that “investment activity and charity cannot be subordinated to a single legal regulation. Accordingly, public private partnership as a type of investment activities and charity programs, which was attended by the state and business must be distinguished.”

As a good example from the perspective of both legal technique and logical presentation of the essence of PPP, we can cite the definition of a public private partnership given in the recently adopted Federal Law of the Russian Federation ‘On Public Private Partnership’:

*“public private partnership, or municipal private partnership, is the cooperation of the public partner, on the one hand, and private partner, on the other hand, which is legally perfected for a certain period and based on the pooling of resources and risk allocation, as well as is carried out on the basis of a public private partnership contract or municipal private partnership contract concluded in accordance with this Federal Law in order to attract private investment into the economy, to ensure by state authorities and local self-governments the access to goods, works, services and improve their quality.”*

This definition removes all questions as to what project can and what project cannot be referred to the public private partnership area. In particular, in Russia it was promptly determined that only projects that are expected to result in attracting private investment in the economy, along with the assurance by state authorities and local self-governments of access to goods, works, services and the improvement of their quality, can be qualified as a public private partnership.

Under Article 3 of the Draft Law of Kazakhstan, the basic tasks of public private partnerships include, *inter alia*,“(2) to attract investments in the economy of the country by pooling the resources of a public partner and a private partner for the development of infrastructure and life support system, and (3) to improve the availability and quality of the goods, works and services in view of the interests and needs of the population, as well as other interested parties.” However, without a direct reference to these tasks in the definition of public private partnership in the Kazakh Draft Law, they cannot be taken

into account when interpreting the concept of public private partnership.

*The Conflict of Provisions of the Draft Law and Concession Law*

According to the preamble to the Draft Law, the law will determine the “legal conditions of public private partnership, ways of its implementation, and regulate social relations arising in the process of preparing and implementing public private partnership projects, conclusion, performance and termination of public private partnership contracts.”

Pursuant to Article 7.3 of the Draft Law, one of the types of contractual public private partnership will be a concession and “in the implementation of certain types of contractual public private partnership, to the extent not regulated by this Law, the provisions of the relevant laws of the Republic of Kazakhstan, including the features provided by the Concession Law will apply.”



Our interpretation of the above provisions states that:

1) provisions of the Draft Law will have priority over the Concession Law, including in the implementation of concession projects.

2) in the case of the adoption of the Draft Law in the current version, there obviously will be a conflict between the Concession Law and the Draft Law. For instance, the Draft Law provides that the parties to a public private partnership contract (i.e. to a concession agreement as well) can be not only a public partner and a private partner, but also financial

<sup>19</sup>Ref. A.V. Belitskaya. LegalRegulationofthePublicPrivatePartnership: Monograph. – M.:Statut, 2012. Page 39.

<sup>20</sup>Ref. A.V. Belitskaya. LegalRegulationofthePublicPrivatePartnership: Monograph. – M.:Statut, 2012. Page 44.

and other organisations that provide financing, and industry operators<sup>21</sup>. At the same time, the Concession Law clearly states that the parties to a concession agreement can be only the concessionaire and concessor<sup>22</sup>. Since the Draft Law regulates relations of to the parties to a public private partnership contract, the provisions of the Concession Law on limiting the number of parties to a concession agreement would no longer be applicable.

We recommend, therefore, to revise the Draft Law in terms of legal technique and to consider the following points:

1) in the Draft Law it is necessary to clarify the term of public private partnership (including by incorporation of objectives in the public private partnership definition), or to extend the list of PPP Features, since the current version of the Draft Law offers unjustifiably broad interpretation of the term “public private partnership.”

2) it is necessary to adjust the relationship and priority of the Draft Law and the Concession Law, since the current version of the Draft Law will inevitably lead to legal conflicts.

## Chapter 2. Parties to a public private partnership contract

Since today, the only available form of contractual PPP is, evidently, a concession agreement. This is not the subject of this work, and so we will focus on an analysis of the provisions of the Draft Law.

As mentioned above, unlike a concession agreement, which involves only two parties (i.e. a concessor and a concessionaire), in a public private partnership contract the parties can be both one and several public and private partners. Moreover, the parties to a public private partnership contract can also be financial and other organisations that

provide funding for publicprivate partnership, as well as the so-called industry operators<sup>23</sup>.

Article 1.13 of the Draft Law introduces a new definition – the ‘public private partnership entities’ (hereinafter – the ‘**PPP Entity**’), which are defined as “a public partner and a private partner, and other persons involved in the implementation of a public private partnership project and specified by this Law.”The concept of PPP Entities is evidently wider than “parties to a PPP contract” (i.e., not every PPP Entity is a party to a PPP contract, but each party to a PPP contract is a PPP Entity).

Pursuant to Article 1.4 of the Draft Law, “A public partner is the Republic of Kazakhstan, on which behalf the Government of the Republic of Kazakhstan or local executive body, as well as other state authorities, and

entities of quasi-public sector, where fifty or more percent of voting shares (participatory interests in the charter capital) are directly or indirectly owned by the state, entered into a public private partnership contract.” As we understand, this definition excludes the possibility of public legal entities (i.e. state enterprises and state institutions) to act as a public partner, since state legal entities are understood as legal entities (enterprises and institutions), the property of which is not divided into shares or participatory interests, but as a whole belongs to the state under right of ownership<sup>24</sup>.

We believe there may be situations where, for instance, the object of a PPP contract will be the property owned by the state enterprise under the right of economic management, and therefore, such enterprise shall have the right to participate on the side of a public partner and exercise certain powers to transfer the PPP object and sign relevant transfer-delivery acts. Thus, the concept of a public partner should be extended in the Draft Law by including state legal entities into the list.

The Draft Law also introduces the concept of a private partner, which can be an “individual entrepreneur, simple partnership, consortium or legal entity, except for entities acting as public partners under this Law, entered into a public private partnership contract.”<sup>25</sup>

Since in Kazakhstan, commercial organisations can only be established in the form of a joint stock company, economic partnership, production cooperative, or state enterprise, it is obvious that a private partner can be a subject of private entrepreneurship of any of the above organisational legal forms.

In addition, the definition is so broad that a private partner can be non-profit organisations (overseas they already have experience of public private partnership projects with the participation of non-profit organisations, mainly in the area of public services)<sup>26</sup> or even foreign legal entities.

## Chapter 3. Form and Material Terms of a Public Private Partnership Contract

### § 3.1. Material terms of a PPP contract

According to Belitskaya,<sup>27</sup> “A contractual legal form of public private partnerships can be represented by a wide range of agreements, which in different countries have different names. In foreign practice a model contract for public private partnership does not exist, but one can talk about the provisions that need to be fixed in the terms of agreements.”

By virtue of Article 393 of the Civil Code, a contract is deemed concluded when parties have each an agreement on all material terms and conditions in the required form.

Recognition of a contract as not concluded due to lack of material conditions or because the failure of the parties to reach an agreement on such conditions entails the same consequences as in case of invalidation of a transaction (Article 157 of the Civil Code).

Article 46.4 of the Draft Law affirms that “a contract of public private partnership is a contract containing elements of



<sup>21</sup> see Article 5 of the Draft Law  
<sup>22</sup> see Article 1.18 of the Concession Law.

<sup>23</sup> see article 5 of the Draft Law  
<sup>24</sup> see Article 102 of the Civil Code

<sup>25</sup> see Article 1.1 of the Draft Law  
<sup>26</sup> Ref. A.V. Belitskaya. Legal Regulation of the Public Private Partnership: Monograph. – M.: Statut, 2012. Page 82.  
<sup>27</sup> Ref. A.V. Belitskaya. Legal Regulation of the Public Private Partnership: Monograph. – M.: Statut, 2012. Page 97.



different contracts provided by the legislation of the Republic of Kazakhstan. The relations of the parties to a contract of public private partnership are subject to the relevant parts to the laws on contracts, the elements of which are contained in the contract of public private partnership, unless otherwise provided by agreement between the parties or the essence of the public private partnership contract.”

Given the fact that a public private partnership contract is a mixed agreement, four groups of conditions that are material for any public private partnership contract can be distinguished:

- 1) Conditions on the contract subject.
- 2) Conditions treated as material by the laws. Under Article 47 of the Draft Law, a public private partnership contract must contain, *inter alia*, the following provisions:
  - i) details on a public private partnership object and property rights (including the right of ownership) to the object for the term of implementation of a public private partnership project;
  - ii) term of a public private partnership contract;
  - iii) other terms and conditions of implementation of a public private partnership project.
- 3) Conditions required for contracts of this type, for instance, the amount of rental fee in the contract of tenancy (lease). Since a public private partnership contract is a mixed agreement, it contains elements of various contracts provided by the legislation (Article 381 of the Civil Code), therefore all conditions required for these types of contracts shall be reflected in a public private partnership contract.
- 4) Conditions, which at the request of either parties shall be agreed upon. For instance, a private partner requires including in a contract the provision on the need to supply fuel required for the project not by railway, but by road transport.

### **§ 3.2. Form of a public private partnership contract**

Article 46.3 of the Draft Law clearly confirms that “a contract of public private partnership shall be in writing. Failure to comply with the written form of a public private partnership contract entails the invalidity of the public private partnership contract.”

Parties may provide that a public private partnership contract shall be notarised, however the laws do not require notarisation of this type of contracts.

#### **Conclusion**

**W**e have come to the conclusion that a public private partnership contract cannot be qualified by its legal nature, since it may include elements of many types of contracts, and it is necessary to treat it as a complex institution and distinguish it from the total mass of instruments by the area of activity (i.e. investment activities with the mutual beneficial participation of business and state).

We have also identified gaps in the current legislation regarding the definition of possible contractual forms of public private partnership, and have found out that in practice in Kazakhstan transactions with state participation, which meet all PPP features but not being PPP de-jure, have been already concluded.

Finally, taking into account the shortcomings we noticed in the Draft Law, we believe it is necessary to ensure that the final version of the Draft Law will form a coherent system of rules governing the public private partnership area. This is unlike the PPP law, which does not work from its inception due to many conflicts with the Concession Law.

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