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AmurCon 2021: International Scientific Conference**CONCESSION AGREEMENTS AS A MODEL OF INTERACTION
BETWEEN THE STATE AND BUSINESS**

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Abstract

A concession agreement is a contract that gives a company the right to conduct a particular business within a state jurisdiction or on another firm's property under certain conditions. Concession agreements often include contracts between the out-of-state owner of a facility and the concessionaire or concessionaire. The agreement grants the concessionaire exclusive rights to conduct its business at the facility for a specified time and under certain conditions. Concession agreements cover a variety of industries and come in different sizes. They include mining concessions valued at hundreds of millions of dollars, as well as small food and beverage concessions at a local movie theater. Regardless of the type of concession, the concessionaire usually must pay concession fees to the party granting it. These fees and the rules under which they may change are usually described in detail in the contract. Concession agreements usually specify the period of operation and insurance requirements, as well as the amount of commission. Payments to the property owner may include a location rent, a percentage of sales revenue, or a combination of both. The terms of a concession agreement depend largely on its desirability. This article presents the regulation of concession agreements as a model of interaction between government and business in various, most often-economic activities

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1. Introduction

In English, the term «public-private partnership» sounds like a public-private partnership (PPP) – literally public-private partnership, while public should be understood not as public or civil, but as several public sectors, in other words, as a set of bodies exercising public power and the public (Kaletnik & Lutkovska, 2021).

There is no consensus about the first use of the term itself: some attribute its emergence to the practice of co-financing of public and private education programs in the 1950s in the United States, others to the privatization of natural monopoly markets: public infrastructure, transport and electricity in the 1980s in Europe, in particular in the UK.

The definition also differs from country to country and many go their own way. In the normative legal acts of North America, a public-private partnership is understood as a contractual agreement between the state and a private company that allows the latter to participate in public property and perform functions that are the responsibility of the public authorities (Nguyen & Sun, 2021).

In the European Union Green Paper «on Public Partnerships and Public Law on Public Contracts and Concessions» or as it is more commonly referred to in the European Union Green Paper, Public-Private Partnerships are positioned as a «phenomenon» and perceived as a form of cooperation between public authorities and business to provide financing, construction, repair, management, operation of infrastructure or service provision (Smirnova & Shuvalova, 2020).

The World Bank defines Public-Private Partnership as:

an agreement between the public and private sector on the production, as well as the provision of infrastructure services that are necessary for the purpose of attracting additional funding and, most importantly, as an opportunity to increase the effectiveness of public investment. (Cui et al., 2020, p. 2)

In Russia, in accordance with Federal Law №. 224-FZ of July 13, 2015 «On Public-Private Partnership, Municipal-Private Partnership in the Russian Federation», a public-private partnership is defined as legally formalized for a specified period and based on pooling resources, sharing risks cooperation between a public partner, on the one hand, and a private partner, on the other (Akhmetshina et al., 2017), which is implemented on the basis of a public-private partnership agreement, municipal-private partnership agreement.

2. Problem Statement

In the law-enforcement practice of foreign countries, different types of concession agreements are used, defined depending on the tasks that need to be solved by the state and the principles of their implementation (Chizhikova et al., 2022). The main ones are represented by two models of building the relationship between public and private partners, developed by the beginning of the second millennium in world practice: British and French (Concession., 2014).

The British model is positioned with PFI contracts, which were first tested in the UK in 1992 (Ismagulova & Aydaralieva, 2011).

It should be noted that the acronym «PFI» is not unambiguous and is perceived, on the one hand, as specific agreements, on the other hand - as a set of rules, actions and procedures aimed at attracting business for a particular project.

Under the British model, the public side allows the private side to determine on a competitive basis how, where, what and when to build facilities. In other words, the design, construction, financing, and operation (maintenance) of the facility are given at the mercy of business by order of the state. As a general rule, the owner of the created property is the public partner, but sometimes it can also be a concessionaire (Isaev, 2020).

When implementing a classic PFI contract creates a private company – Special Purpose Vehicle (SPV), which attracts funding from investors through debt and equity financing. After the commissioning of the facility – payment to the SPV company is made by the end-users for the remaining term of the «operational phase» of the contract (usually 25 to 30 years).

PFI contracts are characterized by:

- unequal distribution of risks between the public and private partners, whereby the latter factor an excess risk premium into the cost of the project, resulting in a substantial increase in project costs;
- the long payback period of the project, due to the high cost of the implemented measures;
- lack of transparency of the financial indicators, costs and revenues of private companies associated with the refinancing of debt obligations and the resale of assets to third parties and interests
- a long period of preparatory work due to the need to calculate a financial model that takes into account cash flows for the implementation of the contract and the return on investment, taking into account discounts, calculation of the possibility and probability of risks, as well as the development of bidding documents and the PFI contract itself (Jin et al., 2021).

PFI contracts are actively used in many countries around the world, such as Australia, Israel, Spain, Canada, the Netherlands, Norway, USA and others (Mirchandani & Jacobo, 2020).

The global economic crisis and the subsequent economic downturn have called into question the need for mass application of PFI contracts, due to the lack of economic balance of value for money. The adopted course on budgetary savings made new demands on the alignment of the relationship «state - business». There was a need to create a model that would be less expensive and more financially transparent, provide access to a wider range of funding sources, such as pension funds, would be more flexible and rapid procurement.

These were PF2 contracts, which in essence-built relationships between the public and private partner, although not significantly different, were more stringent conditions for both parties, including the possibility of budget financing equity, risk-sharing between partners, clearly fixed in the contract, expanding the range of institutional investors, the promotion of additional sources of funding, providing credit and guarantee support from the state and others.

It is important to note that despite the fact that PFI (PF2) contracts in the overall structure are standardized by Her Majesty's Treasury in terms of recommended and mandatory provisions, in termination of the project there is no standard approach or correct contract structures, and the choice of a particular PPP model to use in each project is left to the private partner.

3. Research Questions

One of the features used since 2006 for the conclusion of PFI contracts is the competitive dialogue procedure, which allows for negotiations with several bidders before they submit final bids. After the amendment of the Concession Contracts Directive in 2014 (Cui et al., 2020) there was an additional possibility to conduct some negotiations with the preferred supplier already after the final bidding (and the essential terms of the contract were not subject to negotiation). However, in order to build a more flexible and competitive dialogue, it was decided to abandon this procedure, reverting to exclusively «pre-tender» negotiations.

At present, close attention is also paid to reducing the bidding period: to do this, state agencies, first, limit the areas for which they are willing to negotiate and not infrequently discuss only technical solutions, and second, whenever possible, any negotiations are conducted electronically using web-based applications (Parakhina et al., 2021).

In the Spanish market, the term PPP is not a legal concept but is understood as a type of public policy or management method that involves cooperation between the state and a private partner for the efficient creation, financing and management of public infrastructure. According to the Spanish Public Procurement Law, in force until March 09, 2018, there were three main types of PPP contracts:

- Public works concession contracts;
- Public service management contracts;
- Public-private partnership agreements.

Spain's new public procurement law (Law 9/2017), in force since March 2018, has changed this classification. But despite this, many types of PPP contracts that were entered into under the previous legislation are still in force.

In February 2020, the European Commission urged Spain to comply with the requirements of European legislation on urban wastewater treatment, which indicates that despite the adopted legal innovations, they are not sufficient to actively attract private business to the public infrastructure in Spain and require further refinement.

In Japan, unlike the U.S. and the UK, there is a single Law on Private Finance Initiative (PFI) since 1999. The national government seeks to promote PFI contracts to reduce the public financial burden associated with the maintenance and operation of infrastructure and increase private investment.

The French model of building the relationship between the public and private partners differs significantly from the British model. Here the emphasis is placed on the constitutional and legal foundations of PPP, the responsibility of the state to perform public tasks is emphasized, PPP is analyzed from the perspective of budgetary and financial law. Despite the concluded contract the equality of the public and private partner is not observed: the public partner dominates through the ability to make decisions that can influence the tariffs, taxation, conditions of pricing and other.

The choice of the investor is also made, as under the British model, according to the results of competitive procedures, and not only the implementation of the measures necessary to create and reconstruct facilities and their operation, but also the development of the concession itself is dissolved (Richards et al., 2020).

A special feature of the French model is the inadmissibility of alienation to the concessionaire of property belonging to the public party.

The formation of the French legal framework was significantly influenced by the ratification of European directives relating to public procurement and concession agreements.

Until recently, the legal provisions relating to public procurement agreements (including partnership agreements) and concession agreements were governed by about 30 different legal acts. In order to facilitate the access of companies, including small and medium-sized businesses, to the State's legal framework, in 2018 the French Government set a goal to adopt a Code on Public Procurement and Concession Agreements (the «PPP Code») to consolidate and streamline in a single document, without substantive changes, the provisions of existing legislation, rules and regulations governing public procurement and concession agreements (Maloletko et al., 2017).

With the French model of interaction between private and public partners, two types of inherently administrative contracts are used:

- concession agreements, which serve to implement large infrastructure projects such as canals, highways, water distribution systems and toll bridges;
- partnership contracts, which can be compared to private finance initiative contracts.

Their distinguishing features are payment terms: the partnership contract assumes receipt of budget funds by the private partner in exchange for the performance of certain works (services), while under the concession agreement the return on investment is made by the end-user.

It should be noted that in France there is a PPP Support Service (FIN INFRA), which is a special unit in the Ministry of Economy, which assists grantors in the implementation of partnership agreements, as well as advises state bodies in preparation and approval of partnership agreements, as well as any other complex public contracts or state contracts, implying an innovative financing scheme. The PPP Support Service is an important player, as it must also prepare an opinion on the financial sustainability of each partnership contract.

The maintenance of the housing and utilities sector in France requires a substantial financial investment, so its market in densely populated cities is dominated by large operators, with private ones in the water and district heating and public ones in energy supply.

Management of municipal facilities is transferred to companies by a partnership contract or concession. It should be noted that to the end consumer, regardless of the used method of transfer of rights is not the responsibility of the operating organization, but of the municipalities.

The French experience in the use of concession agreements in the field of housing and communal services, accumulated over the past two decades, allowed to increase the financial obligations of the state, so that the mechanisms of public-private partnerships, increasingly began to be used precisely in large-scale projects.

An example of this is a comprehensive project in the sphere of energy supply of 14 lycées in the region of Alsace, which provides for replacement, maintenance, overhaul, operation of heating sources and networks, supply of fuel and energy resources, use of energy-efficient technologies, use of alternative energy sources and other types of works. Investment of COFELY GDF SUEZ is estimated at 64.6 million euros, payback period – 20 years.

Another good example is the sphere of water supply and drainage: the French corporation Veolia Water is recognized as one of the largest in the world, over 110 million consumers in different countries use its services, there are 8 thousand municipalities in France with a population of 43 million people.

In Germany, unlike France, there is no special law on PPP projects or contracts, except for the constitutional provision on the management of highways. Civil law and regulatory requirements (e.g., laws on taxes, social security, minimum wage, trade unions and labour protection) apply to PPP projects. More specific requirements may derive from budgetary provisions, public procurement law, and sector-specific provisions such as energy. Before using a specific procurement structure such as PPPs, the government must conduct a cost-benefit analysis for various procurement opportunities in accordance with budgetary requirements.

In Germany, the utility market is diverse, ranging from large corporations to small businesses. Water utilities are managed by joint-stock companies, the controlling shareholding of which is in municipal ownership. Municipal authorities have all the levers to manage not only the enterprise but also the industry as a whole while preserving the management of property through the market institution.

To finance investment projects are attracted:

- borrowed funds from banks, which are provided under municipal guarantees;
- municipal bonds, secured by funds of the Federal Bank and loans secured by the municipal property.

Germany's energy supply is significantly affected by the need to import energy resources (in particular oil and gas), due to the lack of its own, and the development of alternative energy sources, due to the increased sense of responsibility of public authorities for environmental safety. In this context, waste incineration plants that generate electricity and heat have developed rapidly. In Germany, therefore, energy law is closely related to environmental law. The construction and maintenance of waste incineration plants are costly, so large private companies are involved in their construction and operation.

For example, in Nuremberg, the construction of the plant cost 243 million euros. The largest incinerator AVG high-cost, which has enough resources to provide 250 thousand inhabitants of Cologne with electricity, as well as to light the Cologne Cathedral, is a private company, namely, a limited liability company, operating within the framework of public-private partnership. The payback period for the investment is 20 years.

Like for Germany, green economy projects are also important for Canada. However, here the incineration of waste is considered less environmentally friendly than its utilization. In this regard, in the province of British Columbia, heat and electricity are obtained from the gas emitted by industrial waste.

To build a complex worth about 10 million dollars, capable of turning garbage into light and heat, an agreement was concluded between British Columbia and a large private company BC Hydro, under the terms of which the private partner builds and designs the facility, and the return on investment - during

the operation of the thermal power plant by selling electricity and heat, the public partner provides the land for the construction of the facility and guarantees the volume of waste supply.

4. Purpose of the Study

At the current stage of the development of concession agreements, the question of the possibility of using consensual agreements deserves special attention.

At present, the mechanism of interaction between the state and private business in various spheres is realized in the form of state contracts (Vertakova et al., 2016). At the same time, in Russia there is already more or less clear knowledge of the state order, it is usually either the supply of equipment and technology for 1-3 years, during which the private enterprise only makes the supply, but does not maintain it. In this case, the state must transfer ownership to the private sector enterprise and receive only the result (Kaletnik & Lutkovska, 2021).

Nevertheless, the described forms seem insufficient to attract private entrepreneurship to the creation of innovative productions in various spheres. The only way out of this situation is the creation of concessions and risk-sharing between the state and business, only this is the tool that can radically change the situation, and increase the percentage of partnerships to 45-50%. This conclusion follows from the fact that the share of private enterprises in foreign countries reaches 60%. The mechanism of public-private partnership based on cooperation is a tool that can radically change the situation by providing an effective combination of public and private, commercial interests in the organization of innovative activities (Pukhova et al., 2021).

Due to current trends, the most promising directions in this regard are:

- Creation of technologies to develop new models of interaction between the state and private business;
- development of joint production for the purpose of re-equipment of enterprises;
- creation of joint ventures in the defence industry by the state and private
- attraction of private companies to service the life cycle of enterprises and institutions.

It is worth noting that the rapid development of concession agreements may lead to the fact that the state will have to increase the provision of state guarantees, budget subsidies, budgetary loans and budgetary investments, which in turn may again have a negative impact on the development of concession agreements (Melnikova, 2019)

5. Research Methods

The research methods of the work are:

- historical;
- method of complex analysis;
- comparative legal method.

The empirical basis was the current legislation of both the Russian Federation and other foreign countries.

6. Findings

Based on the above, we can conclude that in foreign countries concession agreements are implemented mainly in expensive projects with a long payback period. The presence as well as the absence of a special unified law to regulate legal relations between the state and business does not affect the successful construction of these relationships. As a result of the analysis of common forms in Russia, concession agreements have become a part of our life. Concession agreements can, if used correctly, have a positive effect on the development of the economy.

A concession or concession agreement is usually understood as a system of public-private relations in which the private sector participates in managing state or municipal property in order to increase management efficiency and improve the quality of goods and services provided on mutually beneficial terms. A concession agreement is an agreement to transfer a set of exclusive rights that are the property of the right holder for a certain term (or without specifying a term). Concession is temporary in nature, usually created to solve a specific problem for a certain period of time. Concessionaire undertakes to create and reconstruct at its own expense the property granted to it for temporary use for a certain period of time, owned by the confessors, and to use the object (Smirnova & Shuvalova, 2020).

7. Conclusion

The implementation of concession agreements is becoming quite common today, thus emphasizing the effectiveness of interaction between the state and business in various economic sectors (Smirnova & Shuvalova, 2020). Although the number of concession agreements is mainly in the sphere of housing and social services. In conditions of budgetary constraints, it is the projects of concession agreements that allow the full realization of tasks of national scale in various fields, including the development of the state's innovation potential. In order to increase the attractiveness of concession agreements, it is necessary to establish a mechanism for the proper distribution of risks in the implementation of concession agreements and to develop a set of measures to prevent them. The results show that the public-private partnership market is currently experiencing a period of rapid expansion, with a large number of well-funded and highly professional public-private partnership providers emerging in recent decades (Cui et al., 2020).

References

- Akhmetshina, E. R., Ignatjeva, O. A., & Ablaev, I. M. (2017). Tendencies and prospects of public-private partnership development in the field of physical culture and sport. *European Research Studies Journal*, 20(2), 422-430.
- Chizhikova, V. V., Ilin, V. A., Erpelev, A. V., & Zatsepina, D. Y. (2022). Trends in the development of public-private partnerships on the example of the social sector of Moscow. *Cooperation and Sustainable Development*, 245, 789-796.
- Concession contracts: *European Union Directive 2014/23/EU*: not in force for the Russian Federation (2014). <http://www.sigmaweb.org/publications/EU-Directives-Concessions-2014.pdf>
- Cui, C., Liu, Y., Xia, B., Jiang, X., & Skitmore, M. (2020). Overview of public-private partnerships in the waste-to-energy incineration industry in China: Status, opportunities, and challenges. *Energy Strategy Reviews*, 32, 100584. <https://doi.org/10.1016/j.esr.2020.100584>

- Isaev, N. V. (2020). Problemy pravovogo regulirovaniya soglasheniy o gosudarstvenno-chastnom partnerstve [Problems of legal regulation of public-private partnership agreements]. *Bull VN Tatishchev Volga Univ*, 1(3), 81-89.
- Ismagulova, D. M., & Aydaraliev, A. A. (2011). *The concept of investment and its role in the economy* (Moscow: Young scientist). <http://prostoinvesticii.com>
- Jin, H., Liu, S., Sun, J., & Liu, C. (2021). Determining concession periods and minimum revenue guarantees in public-private-partnership agreements. *European Journal of Operational Research*, 291(2), 512-524. <https://doi.org/10.1016/j.ejor.2019.12.013>
- Kaletnik, G., & Lutkovska, S. (2021). Implementation of public-private partnership models in the field of ecological modernization of the environmental safety system. *European Journal of Sustainable Development*, 10(1), 81-89. <https://doi.org/10.14207/ejsd.2021.v10n1p81>
- Maloletko, A. N., Kaurova, O. V., Erokhin, S. G., & Matraeva, L. V. (2017). Prospects and problems of adaptation of foreign experience of participation of pension funds in infrastructure and social investment projects in the Russian economy. *Man in India*, 97(21), 15-28.
- Melnikova, M. P. (2019). *Heat supply in Russia: state and prospects of development Problems of district heating in economies in transition Data from the Federal State Statistics service (Rosstat)*. <http://www.gks.ru>
- Mirchandani, D., & Jacobo, A. R. (2020). *The Public-Private Partnership Law Review – 6th Edition. USA*. <https://thelawreviews.co.uk/edition/the-public-private-partnership-law-review-edition-6/1225150/united-states>
- Nguyen, T. A., & Sun, Y. (2021). Variation negotiation in PPP toll-road projects: Option approach. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 13(4), 04521025
- Parakhina, V. N., Boris, O. A., Vorontsova, G. V., Momotova, O. N., & Ustaev, R. M. (2021). *Priority of public-private partnership models in the conditions of digital transformation of the Russian economic system*. Springer.
- Pukhova, M. M., Merkulina, I. A., & Bashkov, D. Y. (2021). Developing public-private partnership projects to enhance innovation capability in the defence industry. *Economies*, 9(4), 147. <https://doi.org/10.3390/economies9040147>
- Richards, M., Calder, K., & Hadrill, A. (2020). *Public-Private Partnership Law Review – 6th Edition. United Kingdom*. <https://thelawreviews.co.uk/edition/the-public-private-partnership-law-review-edition-6/1225149/united-kingdom>
- Smirnova, D. A., & Shuvalova, D. G. (2020). Concession as a tool for improving energy efficiency in case of tariff regulation. *Paper presented at the Journal of Physics: Conference Series*, 1683(5), 166435. <https://doi.org/10.1088/1742-6596/1683/5/052041>
- Vertakova, Y., Polozhentseva, Y., Klevtsova, M., & Leontyev, E. (2016). Government support tools for small business: Russian and foreign experience. *Proceedings of the 27th International Business Information Management Association Conference - Innovation Management and Education Excellence Vision 2020: From Regional Development Sustainability to Global Economic Growth*, 1134-1144.