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ON THE LEGAL CHARACTER OF PUBLIC-PRIVATE PARTNERSHIPS

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Abstract. *The authors of this article analyze the evolution of contract law in the context of public-private partnerships, focusing on the development of public-private partnership agreements in Russian law. The study also reviews the transition from private law principles to public law principles; it discusses the unique problems arising from the dual interests of the state and private parties. The study reveals the key statements of the Federal Law on public-private partnership and its compliance with the principles of civil law; questions are raised about the need to duplicate legal norms and principles. The complexity of harmonization of civil law norms with the norms characteristic of public-private partnership is emphasized.*

Keywords: *contract, public-private partnership, public-private partnership law, legal norm competition, public good.*

The contract as a legal construct was originally founded and developed within the framework of private law. Modern development of law led to the fact that the institution of contract was borrowed by public law and acquired the form of both international and administrative contracts. The next stage was the institute of public-private partnership (PPP), which implies uniting the efforts of the state and private persons for effective interaction between private and public agents in economic activities.

At the same time, it seems that the parties to such an agreement pursue different aims and interests. The state pursues public interest, ensuring the satisfaction of public needs, and the non-state counteragent, first, enters into contractual relations with the state, proceeding from its subjective interest.

According to Paragraph 3 of Article 3 of the Federal Law dated 13.07.2015 No. 224-FZ "On public-private partnership, municipal-private partnership in the Russian Federation and amendments to certain legislative acts of the Russian Federation" (hereinafter — the PPP Law), a PPP agreement, a municipal-private partnership agreement is a civil law contract between a public partner and a private partner, concluded for a period of not less than three years, in accordance with the procedure and on the terms and conditions established by federal legislation. Meanwhile, a PPP agreement is not a civil law agreement in its pure form, in the sense that it is impossible to define its nature as a private law one.

First, it is necessary to note the purpose of the PPP Law abstracted from private interests, specifically, to create legal conditions for attracting investments into the Russian economy and improving the quality of goods, works, services, the organization of provision of which falls under the jurisdiction of public authorities and local self-government bodies.

The PPP Law defines a system of PPP principles, including openness and accessibility of information, ensuring competition, non-discrimination, equality of the parties to the agreement and their equality before the law, good faith fulfillment by the parties to the agreement of their obligations under the agreement, fair distribution of risks and obligations between the parties to the agreement, and freedom of conclusion of the agreement. It is impossible not to notice the similarity of the above principles with the basics of civil legislation enshrined in the Civil Code of the Russian Federation[1].

Therefore, the question arises about the validity of duplication of the main provisions, provided that the agreement is a civil law contract. It seems that the legislator thus determines that the basic principles of civil legislation should have a specific content when regulating relations in the PPP sphere. In this position, it becomes even more difficult to solve the problem of competition of norms and principles of civil law.

In the construction of the agreement, the rights of the parties are different, the state has greater powers, which is evident from the literal interpretation of the norms of Article 5 and 6 of the PPP Law. In this way of regulation formation, it is noticeable that the public interest pursued by the state is valued by it more than

[1] Osnovnye polozheniya grazhdanskogo prava: postateynyy kommentariy k statyam 1–16.1 Grazhdanskogo kodeksa Rossiyskoy Federatsii [Elektronnoe izdanie. Redaktsiya 1.0] [The basic rules of civil law: article-by-article commentary to Articles 1-16.1 of the Civil Code of the Russian Federation [Electronic edition. Revision 1.0]] / Otv. red. A. G. Karapetov. M.: M-Logos, 2020. — 1471 p.

the benefit of an individual, which is the private interest of the PPP party. Thus, a mandatory element of the agreement is a condition on the transfer of the object of the agreement by the private partner to the ownership of the public partner in case the amount of financing of the creation of the object of the agreement by the public partner and the market value of the property (rights to property) transferred by the public partner to the private partner under the agreement, in the aggregate, exceed the amount of financing of the creation of such objects by the private partner.

Thus, a PPP agreement has a mixed character. The practical significance of this issue is whether it is possible to apply the norms of civil legislation to these legal relations of subsidiarity. The next logical step in the reasoning is whether specific methods of protection of rights, liability measures, positions on invalidity of transactions, obligations, limitation period, contract can be applied to legal relations in the sphere of PPP agreement realization.

A marked obstacle to the successful resolution of this issue is the lack of consistency of the state in the issues of subsidiary application of civil law norms in inter-sectoral relations. Meanwhile, in the absence of a separate branch of public economic law in the Russian system of law, civil law regulation of PPP relations requires compliance with the principle of equality of parties regardless of their social or material position, coordination character of relations. Famous domestic civilists emphasize that the state, through its bodies, acts in turnover as a subject of civil law, which is endowed with equal rights with other participants. Unfortunately, in the framework of the Russian legal order, this postulate is often ignored, which leads to giving relations involving the state a special status. The inaccuracy of such an approach has been confirmed in practice many times: specially created for the state regulation had obvious unfairness and disturbed the economic balance in turnover[1]. In particular, such a trend is observed in relations in the field of insolvency (bankruptcy) procedures, where the scope of privileges of tax authorities is gradually increasing. Thus, the Law on Bankruptcy establishes a two-month period for filing applications for inclusion in the register in the procedure of bankruptcy proceedings. However, for the tax authority it is increased to 8 months, if at the time of closing the register has not been issued or has not entered into force a decision with the identified arrears (Paragraph 4 of Article 142 of the Federal Law "On insolvency (bankruptcy)" of 26.10.2002 No. 127-FZ). This creates uncertainty in the amount of claims, the possibility of their satisfaction, and, in addition, delays the bankruptcy procedure. Also in 2016, an amendment was made to Paragraph 4 of Article 61.4 of the Bankruptcy Law, according to which the possibility of challenging a taxpayer's payments to the budget was excluded, if they were ordinary

[1] Osnovy tsivilistiki: uchebnoe posobie [Fundamentals of civilistics: textbook] / R. Kh. Abdrashitov, V. V. Aleynikova, E. A. Evstigneev [i dr.]; pod red. A. V. Egorova i E. A. Evstigneeva. — Moskva: Assotsiatsiya vypusknikov RShChP, 2020. P. 22.

and the tax authority did not have information about outstanding obligations to other creditors. The inability to challenge budget payments has the obvious effect of jeopardizing the interests of other creditors[1].

Therefore, the solution of the issue of the legal character of public-private partnership is of significant practical importance. The imbalance in the scope of rights and obligations of the parties to the agreement leads to a decrease in the economic interest, first, of private parties involved in the creation of conditions for the satisfaction of public needs, pursuing most often subjective benefit.

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[1] Pervyy sredi ravnykh. Prava nalogovogo organa v protsedurakh bankrotstva — ochevidnye i skrytye privilegii [The first among equals. Rights of the tax authority in bankruptcy proceedings — obvious and hidden privileges] // Zakon.ru — pervaya sotsialnaya set dlya yuristov [Zakon.ru — the first social network for lawyers]: [Electronic resource]. — URL: https://zakon.ru/ (date of address: 15.12.2023).