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Legal Collisions Concerning Public-and-Private Partnership in the Field of Transport Infrastructure

Irina Polyakova¹ and Elena Vasilyeva¹

¹Moscow State University of Civil Engineering, Yaroslavskoye Shosse, 26, Moscow, 129337, Russia
E-mail: irazusina@mail.ru

Abstract. The authors consider that, though the infrastructure projects are rather expensive this problem can be solved by the means of concession agreements. The article presents the current situation review as well as the niceties of the legal regulation in the field of state contract and concession of public-and-private partnership. Both positive and negative tendencies are revealed. Attention is paid on the tension, which arose in the relationship between the Federal Antimonopoly Service and the participants of the projects, concerning the possibility of the further conclusion of such concession agreements. The authors analyze the validity of the contradicting parties’ positions. They prove, that is quite possible to make some legislation amendments which will allow to avoid claims of Federal Antimonopoly Service in the future, but the matter is that the development of the concession form of projects implementation might be slowed down sufficiently.

1. Introduction
Implementation of infrastructure projects is the task which any state is not allowed to refuse, no matter what is the current condition of its economy. Sustainable development of the transport infrastructure is necessary for the development of the economy of any country. That increases the investment appeal of the municipal territory, the region and the whole country, their competitiveness in the international markets. The developed infrastructure is also the reason of the improvement of the ecological environment, achievement of energy efficiency in transport, implementation of modern energy saving materials and structures for transportation facilities. However all the infrastructure projects are rather expensive, and the matters of their financing will be the sharpest.

The year 2016 was rich in events, concerning the transport projects of public-and-private partnership. The final start-up complex of the Central Ring of the Highway is complete as well as the Western High-Speed Diameter in St. Petersburg. The concession agreement on the construction of the road round Khabarovsk is concluded (that is the first transport project of public-and-private partnership in the Far East), two projects in the sphere of railway infrastructure are started at once: they are the construction of the Yamal branch line of Bovanenkovo-Sabetta (the Russia's first project of public-and-private partnership in the sphere of the railways) and the construction of railway infrastructure in the direction of Taman port.

This year the market of transport infrastructure will face some not less significant events [1]. Several large road projects in regions are being prepared for start at once (the construction of the bridge through the Chusovaya river in Perm and the fourth bridge through Ob river in Novosibirsk; the transfer to concession of the airports of the Moscow aviation complex.
The total amount of investments into 19 transport projects, developed on the principles of public-and-private partnership makes up 630 billion rubles, that it is more, than the amount, invested into all the rest of the spheres (social, municipal, IT technologies, energy).

However, it is important to consider not only the perspective projects of public-and-private partnership in the transport complex, but also to think about those problems, which the participants of the market could face during the projects implementation [2].

One of such problems is the emergency of legal collisions between the participants of the investment sphere, who are interested in public-and-private partnership and the federal antimonopoly agency (FAA), which is ready to treat some types of it as illegal activities. Consequences of this collision can be considerable. The purpose of article is to give the review of current situation in the sphere of infrastructure projects, to analyze the validity of the contradicting parties’ positions and also to predict some consequences of possible solutions of the collision.

2. State-of-the-Art Review

The projects in the transport complex, developed on the principles of public-and-private partnership, expand their geography (to the Urals and to the Far East), they are also diversified into some new branches of transport complex, such as railway infrastructure.

First of all we can mention the construction of the route "Round of Khabarovsk" which will begin in 2017 [3, 4]. The capacity of the designed project will make up 4 thousand cars an hour that will allow to cover the current and future (possible) deficiency of transport demand in the remote prospect. The facility will be used not only for the transit automobile transportations, excluding journey through the center of Khabarovsk, but also for the intra-city and region-wide movements, therefore the transport load of the city street road network will decrease [5]. The implementation of this project will allow to solve some chronic road problems in Khabarovsk Region as whole, such as:

- providing the direct access of cargo transport to the industrial and warehouse enterprises, located mainly in east part of the city along the Trans-Siberian railway line (excluding the city);
- providing the transport infrastructure for the territories of so-called advancing social-and-economic development, such as: "Airport", "Avanguard", Rakitnoye, and also the island of Big Ussuriysky;
- providing the capacity of the road network in the meridional direction, sufficient for the intensive development of the regional economy;
- derivation of the main streams of motor transport, among the remote districts of the city of Khabarovsk through the center to the newly-built highway.

The implementation of the project assumes the organization of collecting a fare from the users of the facility in favor of the concensor on the paid road site. Collecting the fare is planned for the decrease in financial load for the regional, and also for the improvement of the road maintenance, especially in winter. The access to the highway will be provided only through traffic intersections.

The construction of the facility is planned to be carried out without any division into stages. All the facility will be put into operation at once [6, 7].

The highway "Round of Khabarovsk, 13-42 Km" will connect three federal highways (A-370 "Ussuri", R-297 "Amur" and A-375 "East") among themselves. The highway will be able to sustain a stream up to 96 thousand cars daily. It will include five traffic intersections, 24 bridge and the overpass. The total cost of the facility is estimated to be more than at 40 billion rubles.

The creation of the boundary-and-customs check point on border with China (the exit to the island Big Ussuriysky) will act as the prerequisite for the continuation of the highway "Round of Khabarovsk" round the settlement Red River and round the village Kazakevichevo.

The agreement on the project on the principles of public-and-private partnership is concluded on the creation and maintenance of a new railway line of uncommon use "Bovanenkovo-Sabetta" in in the Yamal-Nenets Autonomous Area. The implementation of the project will promote the development of mineral resources of the Yamal-Nenets Autonomous Area, Polar Ural Mountains, Western Siberia and the Arctic, and the development of the transport infrastructure of Yamal as well.
According to the terms of the agreement, the company, which becomes the winner of the competition, undertakes to carry out works on design, development of the working project documents and construction of a railway line at the expense of its own and borrowed funds within 36 months (until the end of 2019). The amount of investment exceeds 113 billion rubles. After the completion of the construction the private partner undertakes to carry out technical and commercial maintenance of the created transport infrastructure [8, 9]. Agreement is supposed for 21 year. After this period, in the end of 2036 the railway line will be gratuitously transferred to the possession of the Yamal-Nenets Autonomous Area. The capacity of the new railway line will make 7 million tons for 5 year of operation and 14 million tons for the next 10 year. The perspective development, when the capacity can be increased up to 35 million tons of the transported freights per a year is provided. The railway line will be constructed in as single-way, however dumping of the road bed under the second way (for the prospect) is provided. The track width is standard (1520 mm), the movement will be carried out on diesel draft. Estimated maximum speed of the movement of cargo and passenger trains will make up 50 km/h.

The project includes the construction not only the railway itself, but also the accompanying infrastructure: logistic and car yards, a junction station, a locomotive depot, rotational complexes, passenger platforms and the railway station Sabetta. A big complex of nature protection actions and special requirements for the safety of the transport infrastructure are also provided, as it is important for the Yamal Peninsula.

The Moscow region should be considered separately. In spite of the fact that it has one of the highest investment ratings and considerable financial opportunities, the further development of its transport infrastructure will be hardly possible without private investors [10]. Such projects, requiring considerable private investments, include:

- the development of the Moscow aviation centre within the concession model (preparation of the concession agreements, coordination of financial-and-economic parameters, preparation of administrative acts);
- the development of high-speed extra street transport in the Moscow region (the development of the concept of the project, preparation of the tender documents on the first start-up complex);
- the development of the railway infrastructure of the airports of the Moscow aviation centre (the assessment of financial-and-economic parameters and the development of options of the off-budget financing together with JSC "Russian Railways");
- construction of paid pipe-lines over the railway tracks in the Moscow region (coordination of the distribution of investments on paid and free facilities, preliminary structuring projects);
- the development of bus stations with the possibility of construction of transport hubs in the territory of the Moscow region with the attraction of off-budget financing.

Two options of return of investments into the construction of overpasses over railway tracks are considered [11, 12]. During paid journey the Moscow region carries out only control functions within the period of validity of the agreement on public-and-private partnership. The partner's expenses, both capital and operating, will be compensated at the expense of collecting a fare. The region at the same time guarantees the obtaining the minimum guaranteed income by the to the concessionaire, necessary for regular compensation of operational expenses and cost of debt obligations. At the same time the partner carries out collecting a fare, and the Moscow region guaranties the surcharge of a difference between the total revenue and the level of minimum guaranteed income established for the same period. In case of free pass the partner's expenses are compensated with the help of payments from the regional budget during period of validity of the agreement.

As for the regional paid highways, the project of construction of the route Lytkarino – Tomilino – Kraskovo – Railway can be considered as the example, having investment appeal. General characteristics of the project: the extent is 23.8 km (1.9 km after reconstruction and 21.9 km after new construction); the category is a primary road of the high-speed movement; the quantity of lanes of the main course on the site of reconstruction is 4, and on the site of new construction is 6. The project consists of 7 road interchanges in different levels, 20 bridges and overpasses. The total cost of the
installation-and-construction works is estimated as 33.4 billion rubles. The date of passing of state examination is 2017.

In the long term of paid maintenance is also possible for the highways Podolsk – Domodedovo – Ramenskoye – the Central Ring Road (the site Podolsk – Domodedovo); the Moscow Central Ring Road – Dzerzhinsk – Lytkarino; Pyatnitskoye Highway on the site of Mitino–the Central Ring Road in the Krasnogorsk, Solnechnogorsk, Istra municipal districts of the Moscow region.

Nevertheless there are some tendencies, which are not so positive.

The transport community discusses some tension, which arose in the relations between the Federal Antimonopoly Service (FAS) and the participants of the investment sphere, concerning the possibility of the further inference of concession agreements. We should remind, that canceling of the results of the competition on construction of the road in Bashkiria on the principles of concession was the cause for the trials. Thus FAS reacted to the arrived complaint. But FAS is not restricted separately to the taken project in its claims, but requires some essential changes in the concession legislation [13, 14, 15].

FAS explains the line item on the particular example, which is the construction of the road. On the one hand, we have the Law on contract system. Within this Law the state exposes definite requirements, selects the contractor, accepts the ready facility and pays money. On the other hand, there is the Law on concessions, where in certain cases there is the same: the authority defines, what to construct, when and with what requirements, and also allocates funds from the budget. But the difference is that the requirements of the state procurements are more transparent and administered to participants. Therefore the competition is stronger. The requirements of the concessions are less administered and less transparent. The competition is low. That is the same situation, but in fact, the regulation is different. According to FAS, this difference is to be minimized, the administration if the field of concessions must be strict. It is necessary to study two more examples: the construction of the partially paid road Sterlitamak – Magnitogorsk 171 km long and the project of reconstruction of the cancer hospital in Bashkiria. According to FAS, if all the expenses are incurred by the state, such agreements just cover a state order. The concession on construction of the paid road in Bashkiria was won by Bashkirdorstroy Ltd. The project cost is about 14 billion rubles, at the same time 25% of this sum are put by the investor. Financing was provided by Gazprombank. But after the end of construction the state had to compensate costs for the maintenance of the road that according to FAS breaks the Federal Law No 115-FZ. The arbitration court of the city of Moscow has agreed with arguments of FAS and recognized, that such a contract had to be made out as the state order and the contractor had to get out at an electronic auction.

It has been declared that FAS will monitor aforesaid concessions and liquidate them through the courts. Moreover, Federal Antimonopoly Service is preparing suggestions on changes for the Federal Law No 115-FZ "On concession agreements" in connection with the arisen problems in the market of concessions.

Meanwhile, among 2446 existing projects of PPP 2200 are concessions, according to the Center of development of PPP. Projects with the payment of the concession usually the largest. In Russia there are such concessions 25, 16 (less than 1%) are being implemented, but their share is 40% of such investments (310 billion from total 765 billion rubles). Risks have arisen not only for the concessions. The court has gone further, having specified that the budget should not compensate all the expenses of the investor not only in concessions, but also in the investment contract and the agreement on the public-private partnership. The market of public-private partnership projects is not already developed; any agreement is not concluded according the new law, and the additional hindrance has appeared now. Due to the arisen situation banks refuse to finance concessions in which expenses of investors are covered from the budget until their legality is proved by the court. The positive judgment or changes in the law on concessions can become a condition of financing of projects with the payment of the concession by the main financing organizations.

Banks have begun to be reinsured since the beginning of 2017 as soon as FAS has cancelled a competition in Bashkiria. In concessions circumstances, which the concessionaire expects, but cannot prevent (including changes of the legislation), as a rule, if it happens, the concessionaire demands reimbursement from the state if because of the FAS decision banks refuse to finance projects,
concessionaires will be able to demand reimbursement from the state. This decision of banks is not surprising, they warned that they are very excited with claims of FAS.

3. Results

In order to estimate, how the claims of FAS are reasonable and to develop any suggestion, we should start with the consideration of the essence of public-and-private partnership (and concession as its type), and also to study the legal regulation of the field. The term "public-and-private partnership" is used in this research in the most extended sense and means any contractual or legal relations between the government and private institutions for the purpose of the improvement and/or expansion of the city infrastructure. That is excepting the contracts concerned the state order (public procurements). The term "state" is used for the designation of a certain level of the public power, responsible for the reforming processes, whether it is the national, regional or municipal level of governing. For the convenience of designation the two parties of the basic project contract is called "concessor" (it is the public sector which includes the central and regional executive bodies, local government bodies and so called "public" bodies and organizations authorized by them) and the project company (it is the private sector). The public-and-private partnership as the approach to the provision of infrastructure services, is connected with the realities of time and significantly differs from the traditional public procurements (state contract). Concession is the type of public-and-private partnership, when the private investor at own expense creates or modernizes infrastructure facilities, and in exchange acquires the right of their maintenance and receiving a part of profit (Figure 1).

![Diagram of public-and-private partnership (concession)](image)

**Figure 1.** Scheme of public-and-private partnership (concession)

The cause of the problem is that, according to FAS (and specifically its Head Igor Artemyev) concessions in which the concessionaire does not bear investment loading, but at the same time receives any compensation from the budget in the form of a so-called payment of the concessor, are illegal ("imitations of a concession"). In this case imitation is understood as compensation of all the expenses of the investor by the state within concession realization. Federal Law No 115-FZ does not allow to carry out a full recovery of expenses of the concessionaire, the state can finance only a part. The judgment, concerning a competition of Bashkiria (Case No. A40-31275/2017), has been based on that item. The competition assumed, that the budget will refund a part of expenses on the construction (a capital grant), and the other expenses will be in the form of investment payment, at such option the contract had to be made out as the state order. In such a case the state money is spent according strict rules, and that has been stated in the judgment: the contractor gets out at an electronic auction which unlike a competition does not provide subjective criteria and prevents corruption, and the state proves the initial price that it has not been overestimated. According to the authors, in case of the project of reconstruction of the
hospital in Bashkiria the court could not understand the difference between financing of the creation of a facility and the compensation of expenses of the concessionaire. In first case there are expenses on construction, while in the second case there are the subsequent payments to the concessionaire who has invested money, that distinguishes concession from the state order. The court did not almost paid any attention to the payment of the concessionaire, though it was the key matter in the dispute.

We suppose, that in order to overcome the conflict between the existing practice and the FAS claims it is possible to undertake the following (Figure 2).

**Figure 2. The Essence of the expected innovations**

If the requirements to the participants and the transparency of bidding procedure are administrated more strictly, the matter of introduction of any other (not budgetary) sources of financing will not be so acute. The mechanisms of selection of the performers in case with concessions with absolute budgetary financing should not differ from the state purchasing if the essence of the legal relationship are the same.

But in fact we can also predict some troubles. If the position of FAS is supported, it will make almost impossible to apply the model of public-and-private partnership, created on the return of investments of the private party due to the payments which are dragged out in time of the budget, in Russia. It will significantly increase the risk of contest for already realized concession projects, providing the return of investments of the private partner at the expense of the concessioner payments [20]. Nowadays more than 40 such projects, providing about 270 billion rubles from private investors (one third of all volume of private investments in projects of public-and-private partnership in the Russian Federation) are concluded. More than a half of the aforesaid investments have been already carried out by investors, the rest of the investments have to be used for the development of public infrastructure of Russia within two or three years. Consequences of the contest of such agreements will be catastrophic not only from the point of view of investment climate in Russia, but also for the budget itself, as according to such transactions, the concessionaire in the agreement usually shifts judicial risk and risks of actions of control supervisory authorities to the state and establishes the essential amount of single compensation from the state in case of approach of such risks.
4. Discussion

Some experts recognize that though the quantity of the projects on the principles of public-and-private partnership grows, and the market develops, this development is not absolutely in the way, that would be desirable. Some system adjustment is required.

For example, long-term planning of the development of the infrastructure both on federal, and on regional level is necessary, and it is necessary to define accurately for what projects it is necessary to attract private investors through public-and-private partnership, and what projects should be implemented by the traditional state order. To make such a decision the corresponding assessment of the budgetary efficiency and comparative advantage is to be completed. Federal support of really significant and important regional infrastructure projects is also necessary. Today it is applied only in the road construction branch. So it is worth scaling this practice, first of all in the social sphere.

It is also necessary to control the stage of predesign preparation. The matter is that the attempts to reduce the project cost at the expense of the initial, predesign stage result in a poor quality of the project in general. For example, that is the reason, why only every sixth project passes from the idea stage to the implementation stage. To solve this problem, the Center of development of public-and-private partnership along with Sberbank of Russia and other participants of the market starts the All-Russian programme of support of project initiatives, aimed on collecting the most worthy regional and municipal public-and-private partnership initiatives and their further completion to the stage of the completed concept and also on the assistance in attracting investors and performers.

Some experts expect that those concessions, which have already started, will be implemented in the usual mode. But in fact the market has stood after the judgment since the considerable reputation loss is already caused to the tool of public-and-private partnership. Until the rules in the market of concessions are defined, its participants will not risk to take responsibility for any new concessions with the payment of the concessor. If the decision on concessions is not revised, then already rather poor market of projects will be rejected on five years ago. That is unclear, how to work without any payment of the concessor in many projects (for example, of the free road or construction of hospital). Either the market will be rolled away back, or the state will cover not total, but 99% of the investor’s expenses. Experts afraid, that will inflate expenses according to documents but save them in practice. If all similar concessions become the state order, as FAS wants, the investors will be probably satisfied, since for them the state order is much simpler than concession. The problem is that there will be no projects, as the state has no money to pay for the construction, while concession would give the state a chance to pay for the facility by installments, as a rule, within 15–20 years [21].

In fact, there is no choice "concession or the state order", there is a choice "concession or nothing”.

5. Conclusions

Considering public-and-private partnership in the context of the Russian economy development as well as the current macroeconomic tendencies it is possible to summarize the following. This process happens against the background of general decrease in the public investments in infrastructure field of at least 10% and in the conditions of the reducing access to investments because of the imposition of sanctions concerning the leading Russian financial institutions. In this regard, in the conditions of limited budget resources the public-and-private partnership becomes one of the tools which allows to find the balance of interests of private and public partners in the sake of the implementation of investments in the field of infrastructure of the urbanized territories at the expense of some internal allowances. That provides some growth of the Russian economy in the current conditions.

We believe, that is necessary to find any points of the use of the mechanism of public-and-private partnership in the Russian market, so that after the stabilization of the domestic economy it will allow to provide the essential increase in the number of projects, the increase in the foreign investors' interest in the Russian infrastructure and the infrastructure companies. That in turn will allow to provide the following favorable consequences: the increase in productivity on labour at the created infrastructure facilities, the development of the competition in the infrastructure market, the expansion of the access to labour force (the creation of new workplaces), the growth of the share of investments in national and
of such risks. To the state and establishes the essential volume of single compensation of the state in case of approach to the state and establishes the essential volume of single compensation of the state in case of approach of the concessionaire in the agreement shifts judicial risk and risks of actions of control supervisory authorities to the country, but also directly for the budget as according to such transactions contest of such agreements can be catastrophic not only from the point of view of investment climate in Russia of the model of public-private partnership is created. Over one thousand projects are implemented. Changes in the legislation on concessions will be made, then it will make almost impossible application of separate competitions, is in the competence of court.

The authors suppose, that if the position of FAS is supported by court if on the basis of this position changes in the legislation on concessions will be made, then it will make almost impossible application in Russia of the model of public-and-private partnership, based on the return of investments of the private party at the expense of the payments which are dragged out in time of the budget. It will significantly increase the risk of contest for already realized concession projects providing return of investments of the private partner at the expense of a payment of the concessor. Consequences of mass contest of such agreements can be catastrophic not only from the point of view of investment climate in the country, but also directly for the budget as according to such transactions, as a rule, the concessionaire in the agreement shifts judicial risk and risks of actions of control supervisory authorities to the state and establishes the essential volume of single compensation of the state in case of approach of such risks. Therefore such measure is considered to be inexpedient.

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