

Summary

Discussing the issue of competition for the market and different forms of collaboration between governmental and business structures, it is worthy of note that the legislation of the Russian Federation recognizes a number of forms of public-private partnership.

The current regulation provides the possibility of partnership between the state or municipal body, on the one side, and the private partner, on the other side, (hereinafter – PPP) based on an agreement of public-private partnership, concession agreement, special investment contracts, production sharing contracts.

Currently, one of the most common forms of PPP is a concession agreement.

The FAS Russia takes part in the preparation of draft regulatory legal acts of federal importance on concession agreements and PPP agreements, as well as monitors compliance with antimonopoly legislation when concluding and implementing concession agreements. In particular, the FAS Russia considers complaints about tendering process under such agreements and requests indicating signs of restriction or elimination of competition.

The FAS Russia advocates concessions, competitive tendering of concession and lowering the government presence in the competitive markets. In addition, the FAS Russia is continuously seeking to improve legislation on PPP in order to unify the rules for competitive selection of private partner, and introduce electronic tenders that will reduce barriers and anticompetitive behavior in the field of concession's awarding, on the one hand, and encourage risk-taking, investment and innovation, on the other hand.

Competition for the market

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¹ The document was prepared jointly with the Association of Antimonopoly Experts

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Currently, one of the most common forms of PPP is a concession agreement.

Concession agreements are regulated by the Federal Law No 115-FZ of July 21, 2005 «On concession agreements». It is important to note that the law on concession agreements (unlike the law on PPP) does not imply accrual of the ownership of an infrastructure by a private investor - ownership right remains with the state.

Under a concession agreement one party (the concessionaire) shall undertake on its own account to construct and/or reconstruct property defined under said agreement (hereinafter - the object of the concession agreement) the right of ownership to which either belongs or shall belong to another party (the conceder) and to conduct its activity by using the object of the concession agreement while the conceder shall undertake to grant to the concessionaire for a period fixed under the agreement the rights of possession and use of the object of the concession agreement for the purpose of conducting said activity².

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In order to maintain competition in the market and to develop competition for the market Russian legislation contains the following provisions.

1. First, the legislation defines spheres and markets in which PPP is allowed. For instance, the Law on PPP and the Law on concession stipulate the eligible objects of public-private agreements, among which are: private motor roads, road service facilities, pipeline transport objects, sea and river ports, aircrafts, airports etc. The existing legal framework is being constantly reviewed and amended in order to face current challenges and changes in markets.

² Federal Law No 115-FZ of July 21, 2005 «On concession agreements»

³ Article 18.1 of the Federal Law No 135-FZ of July 26, 2006 «On Protection of Competition»

⁴ Chapter 9 of the Federal Law No 135-FZ of July 26, 2006 «On Protection of Competition»

So, in the context of global digitalization, the amendments to the Law on concession (dated July 2018) have allowed the conclusion of the concession agreements in the information technology facilities market. Given change is expected not only to cut the expenses on informatization of state and municipal governance, but also to significantly accelerate the pace of digitalization of the country, which will improve the quality of competition in these markets.

Thus, federal Russian laws define markets where the lack of market competition must be compensated by competition for the market.

2. In most cases the conclusion of PPP agreements includes the stage of competitive selection of a private partner. As a general rule, the agreements between public and private partners shall be concluded following the results of the tender for the right to conclude such agreement. Arranging an agreement without competitive bidding is permitted only in cases strictly limited by law.

As for the responsibility, the contract awarded in violation of competitive tendering regulation is void. Particularly, the current jurisprudence emphasizes that the lack of public competitive tendering of concession leads to restriction or distortion of competition, therefore directly concluded contracts shall be deemed null and void.

3. The set of criteria for tendering is another significant tool enabling Russian authorities to maintain competition while tendering of concessions.

As a general rule, the law on concession states an exhaustive list of the criteria:

- 1) the time limits for construction and/or reconstruction of object of a concession agreement;
- 2) period from the date of signing a concession agreement to the date of final completion of work (when the constructed and/or reconstructed object would be consistent with the technical-economic indices specified under the concession agreement);
- 3) technical-economic indices of the object of the concession agreement;
- 4) the volume of output of goods, execution of work, provision of services while conducting activities stipulated by the concession agreement;
- 5) the lead time from the signing of a concession agreement until the date of production of goods/execution of work/provision of services in the scope stipulated by the concession agreement;
- 6) the amount of the concessionary payment;

7) the maximum prices (tariffs) for goods to be produced, work to be executed and services to be rendered and surcharges to those prices (tariffs) in conducting the activity under the concession agreement and/or long-term parameters of regulation of the concessionaire's activities;

8) the obligations assumed by the concessionaire in case of not receiving in full the income planned to be derived from using (operating) the facility which is the object of the concession agreement; making additional outlays while constructing and/or renovating and/ or using (operating) the facility which is the object of the concession agreement.

Criteria not complying with the laws may be found to be illegal by decision of the Federal antimonopoly service of Russia (hereinafter - the FAS Russia). Thus, the FAS Russia is an authority entitled to verify the compliance of tendering procedures with the laws, including the Law on concession and the Law on protection of competition. In particular, the FAS Russia deals with complaints regarding the tendering of concessions.

Recent case law of the FAS Russia shows that occasionally, in order to award concession contracts, tendering authorities set criteria, which lead to the restriction of market competition. The example is the requirement for bidders to have previous experience in concessions.

In order to provide rationale for such requirements, bidding authorities argue that lack of experience at the required level and of financial capability may lead to failure to fulfil the contractual obligations. However, the FAS Russia has stated that the presence or absence of previous experience in concessions is not able to prove with the reasonable certainty the ability to fulfil obligations under an awarded through the tender procedure concession agreement.

Opposite, experience requirements as well as the requirements for financial capability cause unjustified restrictions of access to the tender, and, as a result, harm competition by making entrance to the market more complex.

This decision of the FAS Russia was also supported by the Supreme Court of the Russian Federation. In *Sova Electronics case*, the Court examined the legitimacy of actions of the Municipal Public Institution regarding tendering of road and paid parking concession in Vladivostok. The Court agreed with the competition authority that the tender includes requirements which may lead to the restriction of competition. The FAS Russia ruled to terminate the violation of law and cancel the tender, to amend the tender requirements to correspond with the provisions of law, and, once this is done, to re-establish the competitive tendering of concession.

4. Also, in order to support the market competition, the Law on concession allows joint bidding. According to the Article 5, for the purposes of the public-private concessions the concessionaire is either an individual entrepreneur, or Russian, or foreign legal entity, or two or more such legal entities operating under the agreement on cooperation.

5. As for the use of lots, the concession agreement may be applied to several facilities, unless the application of one concession agreement to the multiple objects leads to restriction, distortion or prevention of competition.

6. There are some other restrictions in concession's legislation aimed to protect the competition. For example, the ownership rights over the concession's object belong to the public partner only. Therefore, the private partner is not awarded an exclusive property title by a concession agreement.

With regard to the state or municipal heat supply, water supply and wastewater disposal facilities (hereinafter - housing and utilities facilities) under concession's regulation, it should be noted that such facilities can be transferred to a private operator on the basis of a lease agreement, concession agreement or assigned to a unitary enterprise for economic or operational management.

At the same time, the transfer of facility to a unitary enterprise impedes the development of competition, since it creates for such enterprises preferential conditions in terms of obtaining state or municipal facilities for temporary possession and (or) usage and deprives others who are engaged in similar economic activities of the opportunity to obtain rights for these facilities and enter the relevant market.

In this regard, the FAS Russia concluded that transfer of communal infrastructure facilities under the terms and conditions of concession agreements is one of the effective solutions for attracting investment in the housing and utilities sector, as well as improving the quality of goods, works and services provided to consumers.

7. Although the FAS Russia does not assess the concession agreements (similar to the merger regulation) at the stage of tendering, FAS Russia exercises control over the execution of concession agreements in compliance with competition regulation.

8. Also, the FAS Russia participates in drafting of legal acts which regulate concession agreements and PPP agreements in order to assess the conformity of its provisions with antimonopoly requirements.

The FAS Russia is continuously seeking to improve legislation on PPP in order to encourage risk-taking, investment and innovation.

In addition to the regulation of PPP, FAS Russia has unique experience in providing and supporting competition in the markets where the key player is a state-run or municipal unitary enterprise. Being the legacy of the Soviet system, the unitary enterprises are commercial organizations which are not endowed with the right of ownership over the property, allotted to it by the property owner (state or municipality). The Laws of the unitary enterprise shall describe the subject and the goals of the enterprise's activity.

According to the opinion of the FAS Russia, participation of unitary enterprises in economic activity has the most negative impact on competition in markets and slows down development of the industry. The reason for such conclusion is that unitary enterprises actually have unlimited access to budgetary funds through their owners, on the one hand, and "secured demand" for the company's products, which are guaranteed by its owners, on the other hand. Since that, unitary entities may be easily involved in predation, margin squeeze or other discriminatory practices which harm market competition. The presence of unitary enterprise usually creates high barriers for entry to a market.

Aiming to protect the competition and reduce the share of state participation in the competitive markets, the FAS Russia suggests to restrict the creation of new unitary enterprises and amend the legal status of existing in the competitive markets ones. In order to limit the creation of the new unitary enterprises and acquisition of the private companies within the competitive markets by the state, such transactions shall be notified to the antimonopoly service prior to their implementation and following the conclusion of an agreement. While making its appraisal, the FAS Russia will take into consideration the market concentration, structure of the demand and supply, the possibility of effective competition for the market or in the market.

To sum up, the FAS Russia does not support the presence of the state in the competitive or hypothetically competitive markets. In respect thereof, the FAS Russia advocates concessions, competitive tendering of concession and lowering the government presence in the competitive markets. In addition, the FAS Russia is continuously seeking to improve legislation on PPP in order to unify the rules for competitive selection of private partner, and introduce electronic tenders that will reduce barriers and anticompetitive behavior in the field of concession's awarding, on the one hand, and encourage risk-taking, investment and innovation, on the other hand.