



Changes in the law on concession agreements

July 13, 2010

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On July 6, 2010 Russian Federal Law No.152-FZ “On introducing amendments to the Federal Law ‘On concession agreements’ and certain legislative acts of the Russian Federation” (hereinafter the “**Law**”) came into effect; the Law is [published in the Rossiyskaya Gazeta on July 06, 2010](#), with the exception of certain provisions.

The Law introduces significant changes to the Federal Law No.115-FZ “On concession agreements” dated July 21, 2005 (hereinafter the “**Law on Concession Agreements**”), Federal Law No.161-FZ “On state and municipal unitary enterprises” dated November 14, 2002 (hereinafter the “**Law on Unitary Enterprises**”) and Federal Law No.210-FZ “On the bases of regulating tariffs of utility organizations” dated December 30, 2004 (hereinafter the “**Law on Tariffs**”).

Concession agreements are an instrument for attracting long-term private investments for the creation and reconstruction of facilities owned by the state or a municipality. Such facilities include, in particular, water supply and drainage systems, heating networks and other utility infrastructure systems. The main goal of the Law is to simplify the procedure for entering into concession agreements related to activity of organizations engaged in the utilities complex.

Prior to the Law taking effect, the absence of clear regulation on the issue of concession for a complicated property complex was a serious obstacle for concluding concession agreements, in particular in the utilities area. In the utilities sphere it is inexpedient to conclude concession agreements for separate facilities, since this leads to a breach in the continuity of the utility system infrastructure and complicates contractual relations and the procedure for regulating prices or tariffs. The Law established that not just real estate can be the subject matter of a concession agreement, but also complex things such as those combined of real estate and movable property, that are technologically connected and are intended for carrying out activity as provided by the concession agreement.

The Law also resolves another problem that has existed. The majority of utilities companies are state (‘unitary’) enterprises. Current legislation prohibits transferring their property under a concession agreement if this property is in their possession under economic or operational control terms. The Law has made amendments under which it is possible to enter into concession agreements in respect to property in the possession of state enterprises. Now state and municipal enterprises can act as the conceding party who possesses the property under economic or operational control terms, which is the subject of a concession agreement. The state enterprise exercises certain powers of the conceding party along with other parties who can exercise same under the Law on Concessions, in particular it may participate in transferring property that is the subject of a concession agreement and can sign transfer and acceptance certificates.

The amendments establish the possibility to substitute the party under the concession agreement if the concessionaire does not perform its obligations under the agreement. The party is substituted based on results of a tender, where a mandatory condition is that the winner takes on the concessionaire's obligations toward the creditor on the terms and conditions approved by the creditor and provided in the tender documentation for the tender on substituting the party under the concession agreement.

The Law introduces new criteria for deeming a breach by the concessionaire under a concession agreement to be significant, in particular:

- ❖ Breach of the obligation on timely transfer of the agreement subject to the concessionaire;
- ❖ Transferring the agreement subject to the concessionaire in a state not corresponding to the terms of the concession agreement, if such non-correspondence is revealed within a year from the time the transfer and acceptance certificate for the subject is signed, provided it could not be revealed in the course of it being transferred to the concessionaire and occurred due to fault of the conceding party;
- ❖ Conceding party not performing its obligations on financing part of the costs for the creation and/or reconstruction of the agreement subject matter and expenditures on the use/operation of the agreement subject matter.

A concession agreement may be terminated based on a court decision on a claim by the concessionaire in the event the conceding party is culpable of any of the above violations. In such event, if the concession agreement is terminated early, the concessionaire is entitled to request that the conceding party compensate the expenses on creating and/or reconstructing the subject of the agreement.

The amendments establish new circumstances where concession agreements could be entered into without holding a tender. In particular, a concession agreement may be signed without a tender with an entity who holds the rights to the potential concession agreement subject matter based on a lease agreement, and provided the following are all observed:

- ❖ The subject matter of the concession agreement being signed is property which was transferred to the lessee under a lease agreement and was created and/or reconstructed by the lessee under such agreement;
- ❖ The lease agreement under which the lessee gained the right to possess and use the property that is the subject matter of the concession agreement was signed prior to July 1, 2010.

These changes allow for the possibility to transform long-term lease agreement into concession agreements, making a transfer over to a more transparent system of relations in areas where private operators are currently working based on lease agreements.

The Law makes amendments to the Law on Unitary Enterprises under which a unitary enterprise that leases a land parcel owned by the state or a municipality, subject to approval of the property owner, can lease out the parcel or a part of it or transfer its rights and obligations under the lease agreement to the concessionaire for the purposes of creating and/or reconstructing the subject matter of the concession agreement or for the concessionaire to perform activity envisioned by the concession agreement.

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The Law introduced amendments to the Law on Tariffs which provide for a consistency between the provisions of legislation on concession agreement and legislation on regulation of tariffs.

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This review covers only a portion of issues related to the topic. The purpose of this review is to provide our clients and other interested parties with information on changes in the legislation which may, to a certain extent, affect their business or interests. This review is not a legal opinion and does not substitute required legal consultations or opinions on certain issues.

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