

# Newly adopted federal law deems information technologies subject of concession agreements and PPP

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A federal law was adopted on June 29, 2018 (the “Law”) designating information technology assets as subjects of concession agreements and public-private (municipal-private) partnership agreements.

The amendments were made to Federal Law No. 115-FZ on Concession Agreements of July 21, 2005 and Federal Law No. 224-FZ on Public-Private Partnership... of July 13, 2015 (hereinafter respectively the “Concession Law” and the “PPP Law”).

The Law was adopted due to the need to resolve the problem of it being impossible to enter into PPP and concession agreements for movable property **without the subject of the agreement having to include immovable property**. This is particularly important for implementing, for example, a large number of projects in public transportation and information technologies, as well as all other projects aimed at producing and operating high-value movable properties.

Dentons law firm was active in discussing and finalizing the draft law. The Law incorporates the important recommendations of Dentons’ lawyers. These recommendations should favorably affect the development of the market for infrastructure projects and the information technologies market in general.

Below we describe the basic measures and changes proposed by the Law.

## PPP and concession facilities

The following assets are new subjects of concession agreements and PPP agreements (“CA” and “PPPA,” respectively):

1. Information technology assets (hereinafter “IT assets”), which include:

- Computer programs
- Software
- Information systems (including state information systems) and/or sites on the Internet or other information and telecommunication networks that include the abovementioned items

2. IT assets together with the hardware supporting their operation (property technologically connected to such items and intended to support their operation or engage in other activities contemplated by the CA or PPPA).

3. Data processing centers (all of the buildings, parts of buildings or premises that have the same designated purpose as the movable property technologically connected to the IT assets).

## Participation of foreign investors

The PPP Law does not allow for a foreign investor to be considered a private partner. However, the PPP Law currently does not prohibit a foreign investor from having control over a private partner. The Law does note that if a PPPA is concluded for IT assets and the hardware supporting their operation, Russian legal entities whose decisions may be determined directly or indirectly by foreign individuals and/or foreign legal entities, foreign states or their bodies (“controlled legal entities”) cannot be a private partner, other than in the cases defined by an international treaty to which the Russian Federation is a party, a federal law or a decision of Russia’s president.

The Concession Law, on the contrary, allowed a foreign investor to participate in a project as the concession operator. Now the Law establishes that if a CA is concluded for IT assets and the hardware supporting their operation, in addition to controlled legal entities, foreign investors (foreign individuals and/or foreign legal entities) also cannot act as concession operators.

## Creating an agreement facility

Under the CA/PPPA concluded for the facilities considered here, the private party will be obligated to create the facility and engage in activity using (operating) the agreement facility. At the same time, the creation of information technology assets will include **actions to develop new and/or rework (modify) existing IT assets**, and the creation of hardware to support IT asset operation will include actions to develop new and/or **upgrade** this hardware, including completing construction, acquiring and installing equipment, replacing components and reconstruction.

However, translating a computer program or database or their combination from one language to another cannot be the separate subject of an agreement.

## Exclusive rights

We note that the public party’s obligation to grant the rights to use IP needed to create an agreement facility, which should be included on the list of essential terms of the CA/PPPA will be performed based on a **license (sublicense) agreement**. There is a separate opportunity to include in a PPPA the essential term of the public partner’s obligation to ensure the latter acquires ownership and/or the exclusive right to the hardware supporting the operation of the IT assets.

The Law also provides that a CA/PPPA facility can be a compiled work including, in addition to computer programs and/or databases created by the private party, also computer programs and/or databases used under an open license.

In addition, the Law states that if the private partner will hold the exclusive right to the IT asset upon termination of the agreement the public partner will be entitled to use the asset for the purposes the agreement was concluded to achieve, on the terms **of a free-of-charge simple (non-exclusive) license** for as long as the exclusive right to the IT asset is valid.

We would be happy to answer any questions and provide more detailed comments on the Law and the measures envisioned by it, as well as the possible consequences of their implementation for the market and specific infrastructure projects

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