IMPLEMENTATION OF INFRASTRUCTURE PROJECTS USING THE CORPORATE PUBLIC-PRIVATE PARTNERSHIP MODEL

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Abstract: *The development of the mechanism of relations between private and public entities in the implementation of major infrastructure projects in the world and, in particular, in Russia is currently developing according to the model of corporate public-private partnership (PPP), which involves the creation of joint specialized companies that take into account the interests of both parties and combine the unique competencies of business and the state.*

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I. INTRODUCTION

Conclusion of a concession or long-term investment contract for the design, construction, financing, management and operation of public property is standard practice for the implementation of public-private partnership projects, public entities often prefer the way of creating joint ventures with the private sector - they are sometimes called JV (joint venture) or SPV (special purpose vehicle). This way of realization of the project implies a two- or three-level contractual system:

1) existence of a shareholders' agreement between a state body or quasi-state entity (state company, state corporation) (which, according to global practice, usually holds a minority stake in the SPV) and a business representative (usually the owner of the controlling stake); and

2) availability of a concession agreement/contract for performance of works (purchase of goods/services) between the public entity and the SPV.

Joint ventures are an alternative to full-fledged privatization and an organizational structure in which infrastructure is jointly owned and operated by the public partner and private operators. By joining together to conduct joint activities, public and private sector organizations can either create a new project company or acquire interests in an existing one.

By entering together into a corporate agreement on the creation and management arrangements in a SPV, the public and private partners proceed from the concept of sharing in the risks and benefits of such a venture, and both must make a substantial investment of effort, resources and time in the preparation and implementation phase of the project.

Accordingly, unlike contractual PPP, in a corporate PPP, the state (public) party, in one way or another, assumes the risks associated with the creation and management of the project company, as well as it's more deeply immersed in project management (by assuming the specific risks associated with the status of the founder/participant in the SPV). The public party, through the use of corporate mechanisms, usually provides itself primarily with strategic control over the project, while most routine business operations (issues) are still left to the private party (both by distributing stakes, obligations and competencies between the participants and, for example, by engaging contractors/subcontractors affiliated with or otherwise related to the private investor for these functions).

Joint ventures are a highly effective way to capitalize on and complement the strengths and unique competencies of business and government, allowing public services to be provided more cheaply without compromising quality.

The key factor for the viability and success of this form of PPP is a carefully developed corporate governance structure that would provide a certain degree of independence of the created joint project company from the government authorities. This is important because the state acts in such formations simultaneously as a co-owner of the business and as a regulator, which sometimes makes the public partner tempted to interfere in the activities of the SPV and use it for political purposes. From the position of the participant, however, the state is interested in the profitability and long-term existence of the company and can use its resources to mitigate or overcome some political complications in the implementation of the project.

The goals of the public and private operators do not have to be the same in order for a corporate PPP to be successful; they must be compatible and lead to a common or mutually beneficial and shareable result. For example, one of the partners may be interested in maximizing the financial return on their investment, while the other may be interested in providing users - citizens and organizations - with the final public service; nevertheless, both benefit from creating a viable and sustainable commercial enterprise.

Accordingly, one of the key features of project implementation through the creation of a joint company with private and public participation is the dual status of the public partner: it simultaneously acts as a regulator, which guards and protects public interests and needs, and actively participates in the management of the company as its shareholder.

In the corporate PPP scenario, the amount of involvement of the private sector may vary, but under no circumstances can it replace the public authority with its social obligations. Businesses are motivated by profit maximization, and if their activities are not restrained and regulated in any way, they can start saving on the human and social resources that must be invested in the infrastructure so that it can serve basic public needs. The public partner has a duty of control to ensure that infrastructure services are provided in an appropriate quality and on a basis, affordable to all citizens.

In practice, corporate PPPs can be reduced to two basic types:

I. Equity transfer to the public partner, where the transfer of an equity interest (stake) in a special project company to a public party is a condition for the implementation of the Project.

II. Transfer of shares to a private partner, where a state-owned company transfers/sells a portion of the equity stake(s) in its subsidiaries to the private investor(s). The transfer of shares in a state-owned enterprise may also be done using corporate mechanisms - for example, through a holding company.

Corporate PPP allows, through the use of various legal mechanisms (ownership of shares/interests, corporate/shareholder agreements, options to buy out the shares/interests) to flexibly take into account all the features of a particular project and to optimize the management structure and risk distribution of the project throughout its life cycle (also taking into account the results / financial success of the project).

II. ADVANTAGES OF PUBLIC-PRIVATE PARTNERSHIP

Joint ventures as a form of public-private partnership allow to combine the advantages usually associated with entrepreneurship and market economy - dynamism, access to private sources of financing, managerial efficiency, knowledge of modern technologies, nonetheless not letting down such factors as social responsibility, environmental safety, local knowledge and concern for job creation, which usually are the key concern of the authorities.

Considering the advantages of corporate PPP in the most general way, they can be reduced to the following:

- Control over the project: the public party (the state) receives a certain level of strategic control over the activities of the project company, and also gets access to control / management of the project at the level of routine business operations / tasks through the use of corporate mechanisms (participation in the management bodies of the legal entity, decision-making within the authority granted to participants / founders, approval of major transactions, etc.). Such control may be necessary, for example, in terms of financial activities of SPV;

- Project implementation timeframe: for the state company in relation to the Project and other projects implemented under the PPP scheme, the main advantage will be a significant saving of implementation time, as the state company may choose the strategic partner and the financier in accordance with the direct procurement provided by the Law № 223-FZ "On procurement of goods, works and services by individual types of legal entities" (hereinafter - the Procurement Law).

- Transparency (all accounting and financial documents must be submitted to the board of directors or the meeting of the SPV participants and are subject to regular auditing by the audit commission, which will include representatives from each party)

- Participation in project revenues: by participating in the capital of the project company and assuming the additional risks associated with the management of the SPV, the public partner is entitled to the profits of the project. At the same time, corporate PPP allows sufficient flexibility both to "extract" profit from the project, i.e. to capitalize its investment in the project (for example, by selling its share), and to direct it towards the project development (including through the property contribution of the founder, increasing the size and share in the authorized capital, the corporate decision to reinvest the profit in the project development - for example, by purchasing additional equipment, building new facilities, which will increase the value of the company's assets, and so on);

- Project sustainability: The use of legal entities to organize public and private party cooperation in the project creates a sufficiently sustainable structure, the functioning of which (I) allows the use of the SPV beyond its original functionality (e.g., to implement other projects related to the original project, or to expand the functional load on the SPV - for example, the transfer of new functions in the project), (II) when the project reaches a critical path, for example, in case of a threatened default of the project and the need to replace the private partner, the corporate form of the project will allow to resolve this issue through the assignment of a share to a new partner with the consent of the state (unlike the contract PPP, where a default on the project leads to the need to conduct new competitive procedures to select a contractor and enter into a new contract).

In addition to the aforementioned financial, strategic, economic reasons, the public authorities may also be interested in the implementation of the PPP scheme for the following reasons, less obvious at first glance:

- Perception on the part of society - there is an understanding that the socially useful service provided as a result of the project is not provided by private merchants, but indirectly by the state;

- To reduce the political vulnerability to which a socially significant infrastructure project would be exposed if it was implemented solely privately, and to meet the social obligations of the state;

- To ensure the commercial viability of the project;

- In order to give lenders additional confidence in the repayment of loans issued for the implementation of the project.

III. DISADVANTAGES OF PUBLIC-PRIVATE PARTNERSHIP

The disadvantages of using corporate public-private partnerships, as well as the advantages, are largely due to the peculiarities of the legal structure of the legal entity and corporate mechanisms, and can be reduced to the following points:

- Conflict of interest: The participation of a public party in the share capital (ownership of shares) of the project company usually generates a conflict of interest between the public and private partner, since initially the goals of these parties do not coincide. As the private partner is interested in maximizing profits within the project implementation period, the public partner is primarily focused on solving social and economic problems of the project. This conflict can potentially be reflected - through corporate governance - in the activities of the project company, which can reduce its efficiency and even lead to a default on operating contracts;

When implementing infrastructure projects in the form of corporate PPPs, conflicts of interest may also arise due to the dual nature of the state participant in such projects, who is simultaneously the party that, on behalf of the state, enters into an agreement with a specially created joint venture to build and operate a facility, and who also acts as a corporate participant in such an enterprise. The public party of concession or other executive agreements, on the basis of which the creation and operation of the infrastructure in traditional PPP models takes place, usually exercises its rights under such contracts by applying all kinds of sanctions, penalties and enforcement measures to pursue the best interests of the Treasury and the end users of the infrastructure. In a PPP scenario, it would also be a shareholder in a joint venture controlled by a private investor who sets profit maximization as its key objective. Thus, the public participant will be both the regulator and the regulated in this relationship.

- Transferring the risks of running the JVP to a public party: the SPV will be seen in the public eye as a joint venture between a public body and the private sector. Any mistakes and lapses of such a company would put the public party at risk of being subjected to reasonable criticism, even if the corporate rights of control and management in the SPV do not belong to it.

In addition, due to the fact that the public party is involved in the management of the project company, it (partially) bears the risks associated with management, such as the risk of fraudulent actions of administrative staff (in a corporate PPP, the state does not fully control the SPV and does not have a developed system of security to ensure proper implementation of the contract), the risk of reduced income due to the involvement of controlled contractors/subcontractors and overstatement of operating costs by the private party. This group also includes typical risks associated with the activities of a legal entity (e.g., administrative risks, risks associated with claims from tax authorities, and so on).

- Contract multiplicity: In infrastructure projects that are implemented through concession or other similar contracts between a public party and the private sector, the full range of rights, duties, procedures, ancillary conditions and circumstances must be adequately described in the contract itself. However, since the rights and obligations of the participants in a project company are also defined by a shareholders' agreement, the authority of the public partner under its direct contract with the private partner, in particular under the concession agreement, can be significantly diluted in case if business representatives would want to counter public partner’s interests with their shareholder rights from the shareholders' agreement.

The disadvantages of corporate PPPs can be solved not only at the level of the relationship between the public partner and the investor through corporate and contractual procedures, but also through more detailed special legal regulation of this area, which is usually characteristic for countries with significant experience in public-private partnerships.

According to the World Bank's PPP project database, 735 infrastructure PPP projects structured under the corporate form are or have been implemented to date.

The greatest number of projects was launched in the 1990s - during this period usually at least 50 projects were launched annually. The rate of launching new projects then dropped significantly.

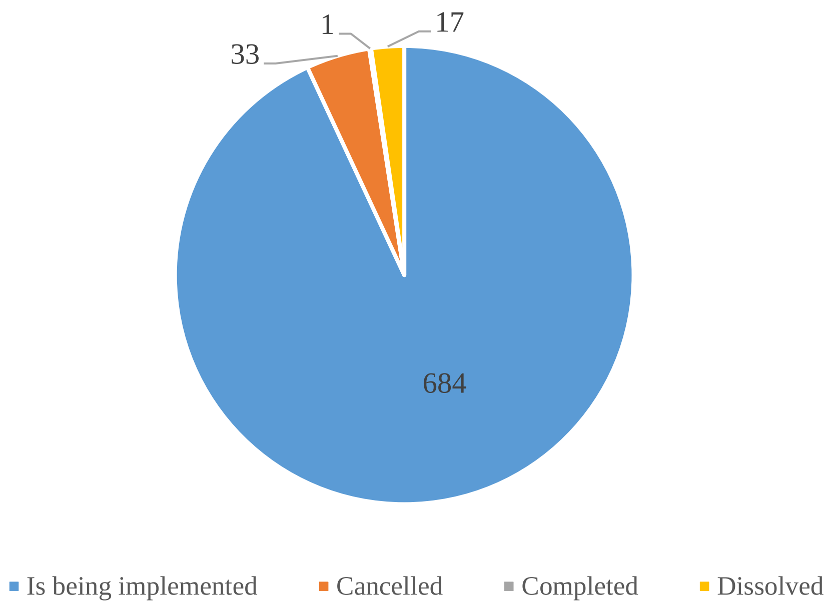

Figure 1. *Distribution of PPP projects in corporate form by the status of implementation*

At the moment the majority of projects (93%) are active, infrastructure facilities created within their framework are either being created or already put into operation and functioning. Projects are usually implemented for a period of 20-35 years.

IV. APPLICATION OF THE CORPORATE PPP MODEL FOR THE IMPLEMENTATION OF THE INFRASTRUCTURE PROJECT "DEVELOPMENT OF THE AIRPORT "BOLSHOE SAVINO»

The project implies construction of a new airport terminal and has been implemented since 2015, when a private investor OOO Novaya Kolkhida joined the project. Perm Krai and quasi-state OJSC Corporation of Development of Perm Krai (fully controlled by Perm Krai) have created a joint venture company, Perm International Airport JSC. The shares of the participants in the JSC were distributed as follows: 25% is controlled by Perm Krai, 75% by OJSC "Perm Krai Development Corporation". (hereinafter referred to as the KRPK). JSC "Perm Krai Corporation of Development" held a tender to select a private investor for the sale of 75% of shares of the JVK - JSC "International Airport "Perm". LLC Novaya Kolchida (owned by LLC Novaport Holding) was declared the winner of the tender.

Under the agreement, KRPK sells its 75% stake in SPK to the private partner. At the same time, the transfer of this stake in the charter capital is carried out in three stages: 25% plus 1 share within 10 days after the signing of the investment agreement, 25% - after the contract with the general contractor, and the remaining 25% minus 1 share - after the commissioning of the facility. As a result, by the beginning of operation and generation of cash flow, the private partner receives 75% of the SPV shares at its disposal.

Figure 2. *Scheme of the project "Development of Perm Airport "Bolshoe Savino" on the model of corporate PPP*

Perm Krai – Пермский Край

Asset company: Arport – Компания-актив: Аэропорт

JCS “KRPK” – АО «КРПК»

Investor – Инвестор

The project implementation period is 49 years. Total amount of investments for the project amounts to 5.3 billion rubles. Investor's investments from its own and borrowed funds amount to 4.9 billion rubles, another 480 million rubles is federal support aimed at equipping the air checkpoint. The project is structured on the basis of estimated passenger traffic in the amount of 2.5-3.0 million passengers per year.

Currently, the project has entered the operational phase.

V. CONCLUSION

Thus, the corporate PPP is a particularly relevant legal scheme in the Russian market of infrastructure capital (with its few big institutional investors leading in financing PPPs) , where there is a need to attract capital and competence of a wider range of financial and lending institutions, as well as real sector companies in the conditions of growth in qualitative and quantitative offer of extra-budgetary investments in infrastructure, an increasing number of projects, as well as the gradual accumulation of competences and expertise by various market actors.

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