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Middle East Legal Insight: The Draft Saudi Arabian Private Sector Participation Law

Jurisdiction

Saudi Arabia

Related Content

Saudi Arabia Cabinet Decision No. 213/1418, Saudi Arabia Cabinet Decision No. 169/1419, through Saudi Arabia Cabinet Decision No. 308/1437, Saudi Arabia Cabinet Decision No. 355/1438, Saudi Arabia Cabinet Decision No. 665/1438.

Abstract

Privatisation in Saudi Arabia has taken more of a front seat over the past few years. As part of Vision 2030, the Kingdom recently launched a Privatisation Program. A key element of the program is “The National Center for Privatization & PPP” (NCP) which was set up to take the role and be responsible for enabling the privatisation program by providing assistance in formulating regulations, creating privatisation frameworks, and preparing government assets and services identified for privatisation.

Most recently the NCP prepared the draft of the Private Sector Participation Law (the draft PSP law) which was put out for public consultation in July 2018. The draft PSP law aims to establish the legal basis in order to further enable the implementation of the privatisation programs and projects, whether it is by way of a sale of assets or Public Private Partnership (PPP).

Analysis

Traditionally, privatisation within the Kingdom may have been limited to corporatizing state assets with such corporate then undergoing an initial public offering whilst the government retaining certain ownership in the corporate. Examples include the Saudi Telecommunication Company and the Saudi Electricity Company.

However, Vision 2030 put in motion the introduction of the Kingdom’s Privatisation Program, which has an overarching objective to strengthen the role of the private sector by unlocking state-owned assets for investment. The main drivers behind this being the need, within selected government services, to improve quality of services and reduce government’s spending while taking into account citizens’ interest; freeing the government’s resources to refocus its efforts on its legislative and organisational roles.

Privatisations in the Kingdom before the launch of Vision 2030

The Kingdom of Saudi Arabia (the Kingdom) has traditionally provided (and, in most cases, continues to provide) the social and infrastructure services for its citizens and residents itself. Previous privatisations within the Kingdom had been approached as corporatizations, where the government assets, together with the related employees and business functions, were transferred into a newly

formed government owned corporate entity. Examples of such approach include privatisations in the electricity and the telecommunication sectors, which took place in 1998.

In April 1998, the Council of Ministers (COM) issued Saudi Arabia Cabinet Decision No. 213/1418 dated 23/12/1418 H (corresponding to 20/04/1998 G) to corporatize the telecommunications sector, which was then a department inside the Ministry of Telegraph, Mail and Telephone (the MTMT) (now the Ministry of Communication and Information Technology). Saudi Arabia Cabinet Decision No. 213/1418 transferred the business of providing telecommunication services that are provided to the public to the Saudi Telecom Company (STC), a joint stock company wholly owned by the government at the time. The relevant employees of MTMT were also transferred to become employees of STC. Later in 2001, the telecommunications sector was also opened to other service providers following the Telecommunication Regulations issued pursuant to Saudi Arabia Royal Decree No. M12/1422 dated 12/03/1422 H (corresponding to 04/06/2001 G). STC later underwent an initial public offering, whilst the Kingdom retained a major shareholding in the company.

The Kingdom took a similar approach in the privatisation of the electricity generation and transmission services. In November 1998, the COM issued Saudi Arabia Cabinet Decision No. 169/1419 dated 11/08/1419 H (corresponding to 20/11/1998 G) in order to liquidate the General Electricity Authority and transfer all its assets and employees to the Saudi Electricity Company (SEC) as an in-kind contribution from the government. SEC also underwent an initial public offering, with the Kingdom also retaining a major shareholding in the company. However, to date, SEC is still the sole operator and provider of electricity in the Kingdom.

Due to a lack of any clear framework or guidelines, other approaches towards privatisation within the Kingdom tended to be developed on a case by case basis and often approached as specific concessions or under outsourcing arrangements.

Privatisations in the Kingdom after the launch of Vision 2030

In April 2016, the COM approved the Vision 2030 strategic plan (Vision 2030) through Saudi Arabia Cabinet Decision No. 308/1437 dated 22/07/1437 H (corresponding to 29/04/2016G). One of the objectives of Vision 2030 in relation to privatisations is to refocus the government's attention or role from being a service provider to that of a regulator and supervisor, and to increase the private sector's participation in the overall economy of the country. An important aspect of this, as emphasised within Vision 2030, is to provide a strong regulatory infrastructure for privatisations.

In March 2017, The National Center for Privatization & PPP (NCP) was established through Saudi Arabia Cabinet Decision No. 355/1438 dated 07/06/1438 H (corresponding to 06/03/2017G) to enable the private sector by easing the transfer of businesses, services and assets from the government to the private sector. Subsequently, the COM approved the Rules of Conduct of the Supervisory Committee of Private Sector Participation with the issuance of Saudi Arabia Cabinet Decision No. 665/1438 dated 18/11/1438 H (corresponding to 10/08/2017G). This was followed by NCP's board Resolution No. 2/5/2018 dated 03/08/1439 H (corresponding to 19/04/2018G) approving the "Privatization Projects Manual" (the Manual <http://www.ncp.gov.sa/en/MediaCenter/News/Pages/The-Privatization-Projects-Manual.aspx>).

Most recently, on July 2018, NCP published Resolution No. 1/5/2018, the draft of the Private Sector Participation Law (the draft PSP law) for public consultation. The public consultation period ended on 29 July 2018, and we await any updates as to when, and in what form, the final law would be issued.

The need for a new law

The main purpose behind the draft PSP law is to establish the legal basis, which will further enable the implementation of the Privatization Program (whether such is by way of a sale of assets or as a Public Private Partnership (PPP)).

The draft PSP law includes provisions addressing the obstacles and legislative gaps that exist within the Kingdom's current regulatory environment, to seek to overcome barriers which may have previously hindered the privatisation or public participation in the contemplated projects, such provisions include certain exemptions from current laws and regulations, such as the current government procurement regulations and sets out scope for financial support that may be provided by the government in respect of the projects.

The draft PSP law, if implemented as per the draft, would greatly modify the regulatory landscape – imposing new regulations and ideas in the approach towards the role of the government and the delivery of social and infrastructure services within the Kingdom.

The draft PSP law is a proposed framework, which would sit alongside the Manual, the earlier issued Rules of Conduct of the Supervisory Committees of PSP Targeted Sectors and the Rules Governing the Work of the Supervisory Committees. The draft PSP law will also be subject to implementation in accordance with more detailed regulations, rules, instructions and procedures which are to be issued by NCP's board of directors (the Regulations).

In addition to the above, article 2 of the draft PSP law states, among others, that the purpose of the law is to raise the transparency, fairness and integrity of the process associated with contracts related to the projects it governs, improve the quality of service and efficiency of the applicable assets and stimulate the local or foreign private sector to invest and participate actively in the national economy in order to achieve growth in the national economy and increase participation of citizens in the ownership of government assets.

Main features of the draft PSP law

The draft PSP law envisages regulating any infrastructure related contractual arrangement which results in a sale of assets (any transfer of ownership of assets, shares, or rights from a governmental entity through a contract or grant) (a SOA) or a public private partnership (any contractual arrangement related to infrastructure which results in a relationship between a governmental entity and a private party that contains any of the following elements: (a) a contractual arrangement for five or more years; (b) the private party providing a public service which includes construction, management, operation or maintenance of assets; (c) there is a qualitative distribution of risks between the governmental entity and the private party; and (d) the payments due to the private party shall be principally calculated on the basis of its performance) (a PPP) (a PSP project).

The duration of a PPP contract (together with any extension thereto) may not exceed 30 years without the approval of the Council of Economic and Development Affairs (CEDA), which may be granted subject to satisfaction of certain requirements. CEDA's main objective is to establish the governance and mechanisms necessary for achieving the Kingdom's Vision 2030: <http://vision2030.gov.sa/en/node/259>

Noting that the draft PSP law proposes that no project or contract may be initiated unless the service or asset is within the scope of a targeted sector, the remit of the draft PSP law is envisaged to capture PSP projects within the ten key sectors identified under Vision 2030, namely:

- a. education;

- b. energy, industry and mineral resources;
- c. environment, water and agriculture;
- d. Hajj and Umra;
- e. health;
- f. housing;
- g. labour and social development;
- h. municipalities;
- i. communication and information technology; and
- j. transportation.

The draft PSP law contemplates that a Joint Committee for PSP Projects will be formed, which shall have the right to designate a project or contractual arrangement, a PPP or a SAO subject to the draft PSP Law notwithstanding it does not fall within the definitions of PPP or SOA. The committee shall be constituted by the membership of NCP and two governmental bodies to be determined by the COM. Inversely, the draft law also contemplates that NCP's board of directors shall have the power to consider that any project or arrangement that would otherwise fall within the definition of a SOA or PPP not to be subject to the Draft PSP Law. In addition, NCP's board of directors have the power to set a minimum value for projects that may be considered PSP projects.

The draft PSP law indicates the powers and functions granted to the Supervisory Committee and specifies that the Supervisory Committee shall prepare and implement the PSP projects in accordance with the provisions of the draft PSP law, the Regulations and the Supervisory Committee's regulations. For instance, NCP's board of directors issued the Manual, aimed at facilitating the comprehension of applied rules and procedures to undertake PSP projects. The Manual provides great detail on how a PSP project is to be approved through a four-stage filing process, as well as the list of requirements to be satisfied at each stage.

A key element to the viability of a PPP project is addressed within article 12 which envisages that the Regulations will specify the type of financial and economic type of support that the government may provide to support a PPP project, with examples provided such as financial guarantees, tariff subsidies, tax benefits, custom duty preferences, foreign exchange and/or interest rate protections, assistance in obtaining licenses, permits and approvals, among others.

Related to the last point mentioned above, the draft law grants CEDA the ability (on the recommendation of the relevant Supervisory Committee and for the purpose of implementing the PSP projects) to grant any licenses, permits or approvals, which would normally be granted by any other governmental body.

In its approach to seek transparency, fairness and integrity, the draft PSP law details both the key rights and the obligations of the private party. With regard to the rights of the private party, the draft law lists as examples (subject to any provisions of the contract that is entered into and any applicable law) the right to non-interference by the governmental entity with the businesses of the private party; protection of the property of the private party from nationalisation, the right to freedom of ownership, use and disposal of the investment made to in the PPP project and the right to recover losses incurred as a result of any change in the draft PSP law, unlawful action or the failure of public authorities to take stipulated action which causes loss to the private party. The obligations of the private party (subject to any provisions of the contract that is entered into and any applicable law) include:

- a. not dissolving, liquidating, changing the legal form, reducing the capital or assigning the project company to a third party unless it obtains prior approval from CEDA and the relevant Supervisory Committee;

- b. obligation to preserve, retain and use the project assets for the purposes for which they were prepared;
- c. not selling or disposing of the movable and non-movable facilities and assets of the project which are the subject of the PPP contract unless it obtains prior approval from CEDA and the relevant Supervisory Committee;
- d. obligation to provide all documents, information and data requested by CEDA, the relevant Supervisory Committee, NCP and any other relevant government agency (and grant access to its site); and
- e. obligation to transfer knowledge and experience to the applicable governmental entity related to the project and train and qualify that entity's employees in accordance with the contract.

The draft PSP law stipulates that a contract in relation to a PSP project shall be formed in accordance with best practice and in accordance with the Regulations (and lists certain elements, by way of note to the applicable provision, that would typically be contained in contracts for such transactions). Interestingly, to accommodate what would typically be of concern to foreign investors and cannot be easily accommodated by governmental entities without specific approvals, the draft law provides that CEDA may approve permitting the contracting parties to agree to arbitration for the purpose of dispute settlement. In addition, the draft law specifically envisages permitting contracts governing a PSP project to be concluded in a language other than Arabic, and for such language to prevail, whereas current practice is for contracts entered into with governmental entities to be concluded in Arabic (or for the Arabic language version of the contract to prevail). It will be interesting to see how this is applied within the Saudi judicial system where currently Arabic documents (or Arabic translations provided by certified translators) would be required to be submitted in evidence in court, where Arabic would be the prevailing language.

An important feature of the draft PSP law is the envisaged interaction with existing laws and regulations, and the disapplication of a number of such laws and regulations with a view to providing a new and transformative legal framework to ease the burden on investors (whether local or foreign) in executing the transactions and related documents governing a PSP contract. Such provisions include:

- a. that the Government Tender and Procurement Law does not apply to such contracts;
- b. subject to approval from the Council of Ministers, non-Saudis may own real estate in whole or in part, except for properties located within the boundaries of the cities of Makkah and Madinah, whilst within Makkah and Madinah private parties may lease property for a period equal to the term of any PPP contract for the purpose of implementing the PPP contract;
- c. NCP may coordinate with the Ministry of Labour to establish any exemptions from the labour law and any applicable Saudization requirements;
- d. the disapplication of the competition law where directly related to the contract; and
- e. the disapplication of the restrictions in the law on private healthcare institutions and the private schools regulations restricting non-Saudis from owning healthcare institutions and private schools, respectively, for the period equal to the duration of the applicable PPP contract.

The draft PSP law sets out detailed provisions in relation to raising complaints and objections to the bid selection process in relation to PSP projects and the appeals process. Special committees are envisaged to be setup to undertake such processes and the Regulations will provide more detail in relation to such procedures.

The draft PSP law also envisages that a registry for PSP projects would be established by NCP in order to maintain a record of PSP projects and related information.

Next Steps

The draft PSP law, if implemented in accordance with its envisaged provisions, would overhaul the legal framework that would otherwise govern PSP projects and should, together with the other enabling tools put in place by the government as well as NCP, open the path to more certainty for private investors (whether local or international). This draft law together with the recently enacted bankruptcy law and the new commercial pledge law, are great strides by the Kingdom to create an environment which is more-friendly to investment, and should encourage international investors who may have previously been reluctant to invest due to a less clear or cumbersome legal framework.

In terms of next steps for the draft PSP law, we await to see whether NCP is able to finalise the draft in its current form and obtain approval by the COM. Following approval, the law would be issued by a Royal Decree, after completing the required regulatory steps, and would be expected to come into force once the related Regulations are subsequently issued and published.

There is currently no indication as to timing and what the final form of the law would look like. We would also need to wait and see how much of an opportunity the disapplication of current regulations envisaged by the draft law will provide – that will depend on whether the dis-applications are exercised at all, what conditions are imposed (if any) and the scope of any alternative conditions or arrangements that are imposed in place of the otherwise applicable regulations.

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Karim specialises in project finance and related areas. He has extensive experience acting for lenders and borrowers on finance transactions including on an Islamic basis. Karim is admitted as a Solicitor in England & Wales, having been qualified within the London office of Allen & Overy LLP. Karim graduated with a Bachelor of Laws (LLB) from The London School of Economics & Political Science.

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