

DRAFT PRIVATE SECTOR PARTICIPATION LAW PUBLISHED FOR PUBLIC CONSULTATION

Hot on the heels of the [Privatization Projects Manual](#), the National Centre for Privatization (NCP) has published a draft of the Private Sector Participation Law (the Draft PSP Law). The Draft PSP Law will form a key pillar of the legislative framework for Public Private Partnership (PPP) and Sale of Assets (SOA) projects in the Kingdom, alongside the Privatization Projects Manual and the Rules of Conduct of the Supervisory Committees of PSP Targeted Sectors (approved by Council of Ministers Resolution No. 665 dated 8/11/1438H (corresponding to 31 July 2018)).

The Draft PSP Law defines a PSP as any infrastructure-related contractual arrangement that results in SOA or a PPP. A PPP is further defined as a contractual arrangement related to infrastructure between a governmental entity (which includes government-owned companies) and a private party that contains the following elements:

- the arrangement is for five years or more
- the private party provides a public service which includes the construction, management, operation or maintenance of assets
- there is a qualitative distribution of risk between the governmental entity and the private party
- the private party is paid principally on the basis of performance.

The Draft PSP Law confirms the roles of the Council of Economic and Development Affairs (CEDA), the Supervisory Committees and the NCP in the PSP process. Four new bodies contemplated by the Draft PSP Law are:

- a “PSP Projects Registry” to be established by NCP to maintain a complete, up-to-date and accurate record of all information relating to PSP projects in the Kingdom
- a “Joint Committee of PSP Projects” which has the right to designate a contract, a PPP or a SOA contract even if it does not meet the definition set out above. Such Joint Committee also has the right to monitor the performance of the private parties in PSP projects
- a “PSP Appeals Committee” that is authorized to hear complaints and objections to the PSP selection process
- a “Final PSP Appeals Committee” that is authorized to hear challenges against decisions of the PSP Appeal Committee. The decisions of this committee shall be final.

Summary:

- Draft Private Sector Participation Law published by the NCP for public consultation
- Contains important definitions on what constitutes a Public Private Partnership or Sale of Asset project
- Contains a number of exemptions from existing laws, including in relation to foreign ownership, procurement, and dispute resolution
- Consultation period closes on 29 July 2018.

The Draft PSP Law contemplates that the implementing regulations will provide helpful guidance on the content of PPP contracts and the range of the government's financial, economic or other types of support (eg financial guarantees, tax breaks easement rights or the right to collect revenue) that can be provided. PPP contracts may not have term greater than 30 years without CEDA approval. The Draft PSP Law also gives CEDA the powers to grant any licenses, permits or approvals required for implementation of the PSP projects, including those that are normally granted by other governmental bodies.

The Draft PSP Law sets out some key obligations of the private party in a PPP contract, namely that it:

- may not dissolve, liquidate, change the legal form, reduce the capital or assign the project company to a third party unless it obtains prior approval from CEDA and the relevant Supervisory Committee
- must preserve, retain and use the project assets for the purposes for which they were prepared
- may not sell or dispose 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
- shall provide all documents, information and data requested by CEDA, the relevant Supervisory Committee, NCP and any other relevant Government agency
- shall transfer the knowledge to the relevant government entity and train and qualify that government entity's employees in accordance with the contract.

Lastly, the Draft PSP Law sets out in detail how the law will interact with the existing legislative framework. Notably the Draft PSP Law provides that:

- PSP contracts may be concluded in languages other than the Arabic language
- existing contracts entered into by the public sector may be transferred to the private party undertaking the PSP project by operation of law (i.e. without having to seek the consent of the counterparty)
- the Government Tender and Procurement Law does not apply to PPP or SOA contracts. In this regard, we also note that, pursuant to the recent Royal Decree No. M/101 dated 20/10/1439H (corresponding to 4 July 2018G), the Government Tender and Procurement Law does not apply to contracts necessary to execute privatization transactions
- 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. In 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
- private parties may be exempted (for a specific period) from Articles 150 and 181 of the Companies Law (which impose sanctions on companies where losses reach more than 50% of the share capital)
- PPP contracts may be exempted, subject to CEDA's or Council of Ministers' approval, from the application of the Competition law

- laws restricting non-Saudis from owning healthcare institutions and private schools are exempted for PPP contracts
- the NCP may coordinate with the Ministry of Labour for exemptions from the Labour Law, including Saudization thresholds
- CEDA may approve allowing contracting parties agreeing to arbitration as a means of dispute resolution, except for contracts relating to real estate within the Kingdom.

Overall the Draft PSP Law is an important, and welcome, pillar of the legislative regime for PSPs in the Kingdom. The NCP has published the Draft PSP Law for a public consultation period ending on 29 July 2018. Potential market participants, consultants and other interested parties are encouraged to submit feedback. AS&H in association with Clifford Chance will issue further updates in due course.

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