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Saudi PPPs - Assessing the Impact of the Saudi Privatisation Law

Twelve months have passed since the Private Sector Participation Law (the **Privatisation Law**) was published in Umm Al-Qura, the Official Gazette of the Kingdom of Saudi Arabia (the **Kingdom**), with the objectives of increasing private sector participation in infrastructure projects and the provision of public services, reducing government spending and increasing foreign investment in Saudi projects by implementing a clear and standardized regulatory regime for the tendering and implementation of Public Private Partnerships (**PPPs**) in the Kingdom as a cornerstone of the Kingdom's Vision 2030 Program.

Prior to the introduction of the Privatisation Law, PPPs were not subject to any dedicated regulatory framework and commonly fell within the ambit of the existing Government Tenders and Procurement Law. As a result, a common barrier to private sector entities considering investment in the Kingdom (**Sponsors**) and their financiers (**Lenders**) entering into the Saudi market was the perceived lack of certainty as to the procurement process and risk profile for PPPs. The Privatisation Law, which came into full force and effect in July 2021, sought to overcome this by providing a dedicated, bespoke framework pursuant to which PPPs could be delivered in the Kingdom and through which risks to Sponsors and Lenders could be identified and mitigated.

The purpose of this paper is to summarise key elements of the Privatisation Law and assess its impact in its first twelve months, including the extent to which it has achieved its stated objectives, as well as to highlight key takeaways for industry participants and lessons learned from our experience in procurement processes governed by the Privatisation Law

1. The Privatisation Law: Origins and Objectives

The Council of Economic and Development Affairs (CEDA), the body responsible for implementing and achieving the objectives of the Vision 2030 Program, established the National Centre for Privatization and PPPs



(the NCP) in late 2017 and officially launched the Privatisation Program early the following year. The NCP sought to identify state-owned and delivered assets and services that would be amenable to privatised procurement in sixteen primary sectors, including healthcare, education, utility and municipal services, and to develop a framework for the delivery of such assets and services, targeting a total of \$16.5 billion in privatised investment by the year 2025.

In July 2018, the NCP prepared a draft private sector participation law (the **Draft PSP Law**) with a view to establishing a standardised regulatory framework for PPPs that would:

- increase private sector participation in the procurement of infrastructure and the provision of public services, thereby increasing the quality and availability of such infrastructure and services;
- reduce risks and offer practical solutions for Sponsors and Lenders considering investment in the Kingdom, thereby encouraging new market participants and increasing the depth and competitiveness of the concessionaire market in the Kingdom;
- reduce Government expenditure and encourage foreign direct investment in the Kingdom, thereby increasing the competitiveness and efficiency of major procurement processes;
- increase efficiency in the operations of state-owned assets, enabling key industry sectors to operate more cost effectively and provide greater accessibility to the public; and
- increase employment opportunities for Saudi citizens, optimize utilization of the national workforce and increase female participation in the workforce.

This strategy aligns with the objectives of Vision 2030 and with those of other GCC economies, such as Abu Dhabi, Dubai and Oman, that are also seeking to increase participation in their PPP programmes and which are expected to produce a significant amount of investment opportunities for the private sector for many years to come. The Draft PSP Law formed the basis of the Privatisation Law, which includes the following key mechanisms that seek to achieve the above objectives.

2. Key Concepts under the Privatisation Law

A. Applicability of Privatisation Law

The Privatisation Law clearly defines the scope of its applicability, thereby mitigating the perceived lack of regulatory certainty that was previously faced by Sponsors and Lenders. The Privatisation Law applies to all contracts entered into between Sponsors and a ministry, other governmental body or state-owned company, the purpose of which is the execution of a PPP project or a divestment. PPP projects are then defined to mean any contract related to infrastructure or public service that results in a relationship where:

- the term of the contract is at least five and, subject to approval by the NCP, no longer than thirty, years in duration;
- the Sponsors' obligations includes two or more of asset design, construction, administration, operation, maintenance or financing assets or services;
- there is a quantitative and qualitative distribution of risks between the parties; and
- the financial return to the Sponsors is primarily based on an assessment of its performance against specified criteria.

B. PPP Tender Process



As a further step in removing regulatory and procedural uncertainty for potential Sponsors and Lenders, the Privatisation Law introduces a standardised procurement process for PPPs, comprising four formal stages:

- the pre-feasibility stage, in which the NCP and the relevant government entity assess the viability of private sector delivery for the proposed procurement;
- the expression of interest (**EOI**) phase, in which the relevant government entity releases an EOI to the market, together with a brief on the proposed project in order to assess the market capacity and interest in delivering the proposed project;
- the pre-qualification phase, in which potential Sponsors provide the information and qualifications as requested in the EOI for assessment by the relevant government entity; and
- the request for proposal stage, in which pre-qualified potential Sponsors supply their technical and commercial inputs in relation to the project to be assessed by the relevant government entity.

C. Protection of Foreign Investors

In order to mitigate perceived risk faced by potential foreign investors in the Kingdom, the Privatisation Law provides for equal treatment of foreign and Saudi Sponsors throughout the tendering and award procedures and specifies that foreign investors enjoy the same treatment in respect of any procedure, condition, right or obligation arising out of the Privatisation Law or PPP contract itself.

Further, the Privatisation Law provides that the principle of Saudi law whereby an SPV incorporated as a limited-liability corporation would be deemed dissolved by operation of law where its accumulated losses exceeded fifty percent of its share capital and its shareholders have failed to issue a resolution to support and continue the company within ninety days of becoming aware of the loss does not apply to PPPs.

D. Coordination of Approvals

The Privatisation Law gives CEDA the ability to coordinate and streamline the process of obtaining approvals and consents necessary to implement PPPs, mitigating a key risk for Sponsors and bankability concern for Lenders.

E. Choice of Dispute Resolution

To make in-Kingdom investment more approachable to foreign Sponsor and Lender groups, the Privatisation Law permits the parties to the PPP contract to agree to dispute resolution by arbitration which, subject to NCP approval and specific constraints applying to disputes involving real estate, may be located and governed internationally.

F. Payment Mechanisms

The Privatisation Law reverses the previous position pursuant to which the ability of Sponsors to collect revenues owing to the government was extremely limited. The Privatisation Law enables the Sponsors to collect fees from service users directly and collect public revenues otherwise due to the state treasury directly, therein providing Sponsors and Lenders greater ability to financially model their involvement in PPPs.

G. Government Guarantees and Credit Support

The Privatisation Law enables the Ministry of Finance to approve provision of direct credit support to ensure the bankability of the PPP, reversing the previous position whereby the Ministry of Finance provided letters of



comfort to the procuring entity only. The Privatisation Law therefore enables direct credit support and enforcement by the Sponsors.

H. Saudization and Local Content

Saudi law provisions that mandate quotas of Saudi nationals in specified businesses had previously been seen as a significant barrier to foreign investment in the Kingdom. The Privatisation Law enables the Ministry of Human Resources and Social Development to exclude certain PPP projects from the ambit of some such laws, thereby mitigating these concerns. Further, in June 2021, the Ministry of Finance approved the Rules and Arrangements for Workers in Sectors Targeted for Transformation and Privatization to provide a regulatory framework for the management of employees chosen to work in businesses that are subject of PPPs, including permanent transfer and secondment arrangements.

3. Assessing the Impact of the Privatisation Law

The twelve months following the implementation of the Privatisation Law have seen a notable increase in the number and value of PPP procurements commencing in the Kingdom, led particularly by projects in the health and education sectors as well as relating to the provision of utility and municipal services. Further, the NCP has strongly signalled that the increase in PPPs being released to the market is set to expand across the remainder of the sixteen sectors targeted for privatisation, with social and sporting infrastructure being a particular area of focus.

Our experience with Sponsor groups bidding on these projects indicates that the appetite for foreign investment in the Kingdom has increased as a result of the introduction of the Privatisation Law, with numerous market entrants considering participation in such procurement processes for the first time. These entities are motivated by the perceived removal of major obstacles to investment that existed prior to the implementation of the Privatisation Law and, together with their Lender groups, are seeking specialised legal counsel on the impact of the Privatisation Law on the project and their potential operations in the Kingdom.

This market activity is encouraging and provides early validation for the steps taken by the NCP in furtherance of the Privatisation Program, however our experience in these procurements also reveals that many of the processes made possible by the Privatisation Law are being used and tested for the first time and neither Sponsors, Lenders nor the procuring authorities themselves are fully informed and experience in their implementation. Accordingly and understandably, it will take time and established use for the full potential of, and the efficiencies made possible by, the Privatisation Law to be realised. This expansion phase represents a unique opportunity for well advised and informed early movers and new market entrants to take advantage of the new processes made available by the Privatisation Law and our experience to date indicates that the interest and capacity is there from both the public and private sectors to continue this growth. Keen eyed Sponsors and Lender groups should, as a minimum, continue to watch this space.



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