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Regulation of motorway concessions in Ukraine: legal framework, restraints and priorities

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In many countries the private sector has been involved in financing infrastructure through concessions as one of the instruments of a public-private partnership (PPP). In countries with transition economies, such as Ukraine, where financing problems are significant and growing, there seems to be huge potential for private-sector involvement in the financing, construction and operation of motorways. In Ukraine, which has a rather poor quality of transport infrastructure, the prospect of hosting the 2012 UEFA EURO championship has created an urgent need for improvement in this sector and required the state to attract private expertise and funding. To meet these needs the Cabinet of Ministers of Ukraine (CMU) approved the State Program of Development of Motor Roads for 2007-2011 (the 'Program').

According to the Program, the investment policy of the government should be focused, first of all, on attraction of additional, non-state funding necessary for development of motor roads of national importance, in particular, on conditions of concession. The Program also provides that nine motorways were to be constructed and further operated on concession basis. On 15 January 2008 the Ukrainian Parliament adopted the Law of Ukraine 'On Concessions for Construction and Operation of Motor Roads', which became effective on 31 January 2009 (the '2009 Road Concession Act') and replaced the similar law which was adopted by Ukrainian Parliament back in 1999 (the '1999 Road Concession Act'). Furthermore, the Law of Ukraine 'On the State Budget of Ukraine for the Year 2009' provided that the Ukrainian Government would issue state guarantees to secure obligations of State Motorway Service of Ukraine (Ukrautodor) with regard to borrowings and obligations under concession agreements.

Legislative provisions relating to conclusion of the concession agreement need to be further clarified to avoid some confusion and misinterpretation.

Outline of legislative novelties in motorway concessions

The 2009 Road Concession Act opened new opportunities for the potential investors and provided a more clear and structured legal framework for motorway concessions. The 2009 Road Concession Act significantly expanded the variety of concession models in Ukraine. Unlike the 1999 Road Concession Act, which, in fact, provided for the toll roads concession model only, the 2009 Road Concession Act set forth different models and sources of reimbursement of concessionaire's investments, in particular: (i) a fee for passing through by a user/real toll; (ii) a payment of road operational readiness fee by a concession grantor/availability fee; (iii) fees for using road service facilities paid by road users; (iv) state subsidy and/or compensation payments provided by a concession grantor; and (v) other payments specified by the concession grantor on the basis of feasibility study and/or design and estimate documentation, as specified and relevant tender documentation and concession agreement.

The 2009 Road Concession Act provides that the CMU will determine: (i) the maximum and minimum level for the passage fees/tolls, (ii) a procedure for the calculation and granting of subsidies and compensations; and (iii) a procedure for the calculation of the availability fee. The latter provision seems to be confusing, because calculation of the availability fee much depends on a particular financial model, which is individual in each particular case. So, it is not clear whether the government is going to set some sort of unified model for calculation of the availability fee, or whether each individual model of calculation of the availability fee will require approval of the CMU.

Another benefit brought by the 2009 Road Concession Act is that it allows concessions to be granted for the construction including the design, rehabilitation, overhaul and/or operation of a motorway, while the 1999 Concession Act limited concessions to the construction and maintenance of motorways only. Additionally, a concessionaire is now entitled to build road service facilities on a land adjacent to a motorway.

Additional important novelties brought by the 2009 Road Concession Act may be summarised as follows: (i) the state may partially finance motorway construction under the concession project; (ii) the state undertakes to facilitate obtaining by the concessionaire of the required licences, permits and consents; (iii) the concessionaires are not bound any more by obligations to employ at least 90 percent of the domestic labour and use at least 70 percent of domestic construction materials for the project; and (iv) concessionaires now may obtain ownership over the property, which is created as a result of the project implementation and located outside the land allotted for the motorway construction.

Conclusion of concession agreements: regulations and problems

Legislative provisions relating to conclusion of the concession agreement need to be further clarified to avoid some confusion and misinterpretation. A successful concessionaire shall be selected on the basis of a competitive tender. The tender conditions must be developed and approved by the authorised state agency, Ukrautodor on the basis of technical feasibility study and design documentation, while the procedure for holding a concession tender shall be approved by the CMU.

Pursuant to Article 14(1) of the Concession Act, the responsible sate agency must notify the State Property Fund of Ukraine (SPFU), who holds the Register of Concession Agreements, on conclusion of the concession agreement. According to the CMU Resolution 'On Register of Concession Agreements', the SPFU may refuse registration of the agreement on certain grounds, however, neither the CMU Resolution, nor the Concession Act or the 2009 Road Concession Act provide how such refusal may impact the validity of the concession agreement. On one hand, under general rule, as established by Article 9(2) of the Law 'On Concession' (the 'Concession Act'), the concession agreement "shall be deemed concluded as of the day when all essential conditions are agreed upon and the text of the agreement is signed by the parties'". Thus, registration of the concession agreement is not provided as a fact giving rise to the validity of the agreement. On the other hand, pursuant to Article 210(1) of the Civil Code of Ukraine, a transaction, which is subject to state registration, became effective as of the moment of state registration thereof.

In addition, the 2009 Road Concession Act stipulates that "in part relating to transfer to the concessionaire of the rights to construct a motor road, the concession agreement shall become effective as of the moment of receipt by concessionaire of right to use land plots" allocated for the purpose of construction of the motor way. Normally, the concession agreement is to be executed immediately after completion of a concession tender, i.e., at a rather early stage when there is no readiness for the commencement of construction. In this case, this can affect the financial position of the concessioner, because he has to withhold resources for an indefinite period of time pending obtaining of rights to use land.

Conclusions

Despite several attempts in recent years and positive modification of the legal framework, no single PPP motorway project has been implemented so far in Ukraine. It is often argued that the reason behind this is lack of legislation to protect private investors. However, basic legislation on motorway concessions have been in place for several years and do provide the necessary legal background and more or less standard level of investment protection. Hence, in Ukraine the PPP projects do not simply suffer from the lack of a sufficient legal framework. The more important problem is the lack of PPP-projects experience and relevant knowledge and competence among the public authorities. In addition, the decision-making processes are very bureaucratic and timely.

The need for infrastructure development in Ukraine is significant and investment in infrastructure is needed even more than ever. The financial crunch has seriously affected liquidity and increased the costs of bank lending. Our experience demonstrates that banks are reluctant to finance long-term PPP projects in Ukraine, such as motorway concessions, unless the government guarantees the debt. In most cases such requirement meets resistance by the authorities arguing that bailing out a concessionaire is against the whole idea of PPP, and liability of the state in the case of investment failure will be superfluous. In addition, in those cases where issuance of state guarantee is possible, Ukrainian regulations require that a governmental authority will be the direct recipient of the funds lent under such guarantees that makes the structure of a PPP project unnecessarily complicated. Thus, to meet the needs of infrastructure development, new instruments and forms of financing need to be developed by the market. ■

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