

Framework Adjustment

At its 72nd plenary meeting on December 9th, 2003, the General Assembly of the United Nations recommended that all States give due consideration to the Model Legislative Provisions and the Legislative Guide on Privately Financed Infrastructure Projects (the “PFI Guide”) when revising or adopting legislation related to private participation in the development and operation of public infrastructure.



Legislative Guide on Privately Financed Infrastructure Projects, 2000, and Model Legislative Provisions on Privately Financed Infrastructure Projects. UNCITRAL. 2003

With the exception of those countries like France which, until recently, were relying upon a contractual framework, backed by case law, most of the countries active in PPP infrastructure projects have either adopted a new legal/ statutory framework, when they had none (Russia), or they adapted their existing framework when they were advised that they ought to in order to attract private investors (India).

Framework adjustment road map

Among the countries which have deployed substantial efforts to adjust their legal framework to attract the participation of the private sector in the development of their public infrastructure and services are the so-called transition economy countries of Eastern and Central Europe and of the former Soviet Union.

Some guidance may be gained from their experience which has now spanned over 17 years and points to two main issues to be addressed in conducting the change. The first one is to find the appropriate instrument to adjust the framework; the second is to implement the various measures beyond the establishment of a legislative framework, such as adequate administrative structures and practices, organizational capability, technical, legal and financial expertise, appropriate human and financial resources and economic stability, all measures without which the mere adoption of a set of laws would serve little purpose.

The choice of the appropriate instrument is dependent upon a number of factors and above all upon the particular circumstances of each country, its history and stage of economic and social development, its political and economic organization, and in this latter respect, its market structures.

This choice is evidently wider for countries starting from scratch with a clean slate than for countries with PPP history or tradition.

As indicated in the PFI Guide, many countries have used legislation to establish the general principles for the organization of infrastructure sectors and the basic policy, institutional and regulatory framework. However, the law may not be the best instrument to set detailed technical and financial requirements.

Many countries have preferred to enact regulations setting forth more detailed rules to implement the general provisions of domestic laws on PPP projects. Regulations are found to be easier to adapt to a change in environment, whether the change results from the transition to market-based rules or from external developments, such as new technologies or changing economic or market conditions.

The pitfalls of legal framework adjustment

Whatever the instrument used, clarity and predictability are of the essence. In this respect too, the experience of the former Eastern European countries should serve as a lesson and highlight the pitfalls of addressing the first above mentioned issue without sufficiently addressing the second.

In the space of 4 years almost half of these then 28 countries experienced significant changes in their legal framework either through enacting new concession or PPP laws, or by adapting their public procurement legislation. This huge legislative exercise was prompted by the need for countries acceding the European Union to reach the level of harmonization required and comply with the EU principles applying to public procurement and concession laws (transparency, equality of treatment, proportionality and mutual recognition).

Because of time pressure and insufficient attention given to the specificity of PPP, compared to traditional public procurement, and to the need to improve their legal and institutional PPP framework (very few have created specific tools dedicated units or task force to coordinate and promote PPPs), several countries enacted long and complex legislation, which tried to encompass all possible PPP options and eventualities.

The result in several instances is confusion, which could be detrimental to the stability of the legal framework of such countries, and produce an adverse effect on the PPP promotion policy. Indeed, there are already some signs indicating that Governments as well as investors consider that PPPs are generating deals which are too complex, onerous and time consuming.

This shows the difficulty of finding the appropriate instrument for conducting the change. The EU itself has not legislated on concessions for the provision of public services, nor is it minded at the moment to legislate on the subject of PPPs. It has stated, and the European Court confirmed, that concessions and PPPs were however subject to the four above mentioned principles of transparency, equality of treatment, proportionality and mutual recognition. It is therefore sensitive to the need to keep flexibility in the legal framework, such a flexibility being required to cover the wide diversity of PPP projects, to the extent that the principles were complied with.

At the other end of the spectrum, countries which have had a long PPP tradition without much legislation on the subject, such as France and Portugal, have in the last ten years adopted specific laws and statutes governing PPPs, set out an explicit PPP promotion policy and set up the tools and task force recommended by the PFI Guide. At the extreme end of that spectrum, the United Kingdom has maintained its non written legal tradition, and refrained from adopting any specific PPP legislation, with one notable exception for the case of toll roads infrastructure.

To conclude this section, the choice of the appropriate instrument to adjust a country legal framework is difficult because the options are numerous. As part of the adjustment process, it is beneficial for countries to take the time to engage a public debate with all stakeholders, from the public and the private sector.