

Institutional framework

Countries which are minded to establish an enabling legal framework or would like to review the adequacy of their existing legal framework may wish to start by considering the few guiding principles for a constitutional and legislative framework which are favorable to private sector participation in public infrastructure projects.

They should ensure that such principles are enshrined in their highest legal norm, usually their constitution, so as to guarantee that they will not be flouted by successive governments or legislators.

Having established the principles, governments should then adopt a clear policy in favor of the participation of the private sector to public infrastructure delivery and make it widely known to local and foreign operators. To implement such a policy, the country's public administration, at the central and local levels, would then be expected to provide the support and coordination required.

Constitutional principles

These are the principles of transparency, fairness, sustainability and proportionality.

Transparency

A transparent legal framework is one which has clear and readily accessible rules and efficient procedures for their application. It creates predictability thus enabling investors to measure their risks and costs, and therefore offer their best offer. It also fosters openness by requiring public authorities to give reasons for their decisions and publish them, thereby protecting against arbitrary decisions and promoting confidence in such country, which is particularly important if the country wishes to attract foreign investors, unfamiliar with local rules.

Fairness

A fair legal framework is one which takes into account the conflicting interests of the Government representing the public interest and that of the private sector operators, who ought to be subject to the same rules, and attempt to strike a balance and maintain equilibrium between them.

Sustainability

Equally important for a country infrastructure policy is to ensure the provision of public services in the long-term and with particular attention to environmental sustainability. A country should therefore have the institutional capacity to undertake the tasks entrusted to the public authorities throughout the project phases of planning, implementation and

operation. It should also aim at the most adequate balance between a monopolistic and a competitive supply of public infrastructure services.

Proportionality

Closely linked to sustainability is the principle of proportionality by which any measure taken should be necessary and appropriate in the light of the objectives sought or for the issue to be addressed. A country PPP legislation should for example not impose conditions, financial or technical or otherwise, that are excessive or disproportionate when selecting candidates, or should not revoke a contract for a small offense.

For countries wishing to promote PPP in infrastructure, it is important to ensure that each of the above mentioned principles translate in the constitution by the adoption of rules which guarantee the protection of the said principles including possibly against legislators or governments actions.

By way of examples, transparency requires that public decision makers be held accountable for their actions, which assumes the existence of a number of rights and obligations such as access to information and to an independent justice system. Fairness requires that public authorities do not discriminate among candidates with positive and negative obligations to ensure the effectiveness of the rule. Proportionality requires that property rights and contracts be protected and respected. A PPP friendly constitution would therefore set out clearly the sanctity of contract, the right of ownership and its corollary, the protection of such a right against expropriation without compensation, the right of access to judicial review, the freedom of and public access to information.

One would also find in the constitution specific rules regarding the duty of the State to ensure the provision of public services. In certain constitutions this duty may be reserved exclusively to public authorities, in others the State may be expressly allowed to grant concessions to private entities for the provision of public services. Some constitutions may also restrict the participation of foreigners in certain sectors, or the ownership of land or infrastructure facility.

Governments and legislators should therefore review their existing constitutional rules to identify possible restrictions to the implementation of PPP projects in public infrastructure, as such restrictions have often led to disputes and judicial challenges against concession agreements after they had been awarded.

Several international organizations have developed guidelines which highlight these principles and explain how relevant they are for PPP projects in infrastructure.

The most comprehensive ones are the



Legislative Guide on Privately Financed Infrastructure Projects (2000) and the Model Legislative Provisions on Privately Financed Infrastructure Projects (2003), by the United Nations Commission on International Trade law, which can be found at [www.uncitral.org]



Model Legislative Provisions on Privately Financed Infrastructure Projects. Uncitral, 2003

The European Commission has also published extensively on this subject. The most recent relevant documents are:



The Green Paper on Public-Private Partnerships and Community law on Public Contracts and Concessions, COM (2004) 327.



Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP), 2008/C 91/02 of 12/04/08



The Commission Interpretative Communication on concessions under Community law. OJ C 121 of 29.04.2000

It is worth noting that the European Commission declared in its 2000 Communication that public service concessions, although not specifically regulated, were subject to the principles of transparency, fairness, and proportionality, which are enshrined in the EC Treaty, the European constitution, and enforced by the European Court of justice.

PPP promotion policy and Administration support

While principles embodied in laws and regulations or implemented by contracts are necessary to successfully develop PPP in infrastructure, they are not sufficient. Public Private Partnership projects also require able and willing partners.

A willing public partner is one which has adopted a clear policy promoting private sector participation in infrastructure development that signals to private investors its commitment to seek their participation.

In addition to policy issues presented in Module 3 Policy and Planning, this section shall present specific legal issues relating to policy and refer to one specific case in Russia, which is particularly relevant to the road infrastructure sector.

A clear PPP promotion policy in road infrastructure will (i) set out the reasons for the policy, that is the government goals in its long-term strategic plans – eg, increase transport and trade between regions; introduce market competition in a traditionally monopolistic sector-, (ii) detail the objectives sought – eg, improve the rehabilitation/ maintenance of the existing road network; freeing public funds for other uses- (iii) state with reasonable level of detail the measures that are being taken, the means and resources that are being deployed to carry out the policy – eg. creation of a PPP advisory unit at central government level; the setting up of an road fund to channel financial resources for future funding- .

The higher the authority in government which develops the policy statement is, the stronger the commitment from the potential investor standpoint will be. Indeed because PPP infrastructure projects necessarily involve several public authorities, government

ministries and agencies, central and local government authorities, appropriate administrative coordination will make the difference between success or failure.

Because Administration support and coordination will be needed at all stages of the process: policy planning, project identification, project implementation and project operation, most governments have created a dedicated PPP unit or “task force”, either as part of a government ministry or a separate agency, which sometimes is itself a public private partnership, as in the United Kingdom (refer Module 3 -> PPP Policy Framework -> Institutional Framework and Reform -> PPP Units and the Role of the Highways Agency).

Russia provides a good example of a PPP promotion policy.

RUSSIA PPP in the transport sector promotion policy

One of the most recent examples of an elaborated PPP promotion policy in the transport sector is that adopted by Russia.

Partnerships with the private sector were obviously unknown in the Soviet Union, but have now been rediscovered in Russia, in its transition to a market-based economy. The Russian Government estimated that to reach the level of investment required in transport infrastructure comparable to most other countries, that is 4 per cent of GDP, compared to its two per cent, it needed about 2 to 3 USD billion of private investment per annum by 2010.

It then set itself a series of preconditions about the use of PPPs including:

- Adopting a federal law on concession agreements;
- Changing from one to three-year budget plans;
- Adopt a regulation on investment funds;
- Adopt standard concession agreements;
- Establish special economic zones.

It then listed the various activities eligible to concession agreements in the infrastructure sector, among which motorways and transport ranked in the first place, together with railway, ports, airports, underground and other public transport.

The first challenge of adopting the required legal framework was passed in 2005 with the adoption of the Law on Concession Agreements N° 115-FZ, 21 July 2005, followed by Russian Government Regulation 319 of 27 May 2006 which approved concession agreements for motorways and engineering infrastructure, including bridges, overpasses, tunnels, parking, checkpoints and toll booths for trucks.

On the basis of regulation 319, the Ministry of Transport developed with the Ministry of Economic Development and Trade draft concession agreements for other types of infrastructure. It created an advisory council on PPP development in order to assist with entering into PPPs and signed an agreement with the Vneshekonombank to act as an investment adviser in such projects.

The Government then set about providing the resources required by its new policy, both financial and in human skills.

A special education program was organized by the Transport Engineering institute of Moscow to provide the Ministry of Transport with specialists in the field of transport concessions.

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The Russian Investment Fund was created in 2005 to provide state co-financing for strategically important long-term projects which have a low level of return, and expand the opportunities for the private sector to invest in projects through direct co-financing and the sharing of commercial risks. State support will also be available through equity participation or state guarantees.

A number of projects are already under way on the basis on this new framework.

Documentation for competitive tenders for the construction of a toll road in Saint Petersburg, the Western High Speed Diameter (WHD) has been prepared and the Russian Federal Road Agency, Rosavtodor, has been appointed as the Contracting authority.

Tender documentation for the construction of a high speed motorway between Moscow and Saint Petersburg has also been prepared. Other toll motorways projects at different stages of advancement are being processed, one between Krasnodar-Abinsk and Kabardinka, and another one between Moscow and Novorossisk.

Even though substantial results have been achieved in terms of adopting a PPP friendly legal framework, the Russian government is aware that some important issues remain outstanding. Among these is the concern about the availability of long-term finance, and also on the legal front a number of issues that will need addressing : issues about land legislation and property rights over public assets (inability to pledge project assets or project rights); inadequate protection of the rights of the concessionaire (loopholes in the protection of property rights against expropriation without adequate compensation, lack of protection against early termination of the concession without compensation); inadequate regulations governing permits and licenses; uncertainties in the tax treatment of concession assets; lack of an adequate definition of a concession; duplication of procurement laws for PPP projects, some being procured under the Concession law, others under the Federal law on State and Municipal Tenders.

However, what is most felt is the lack of practical experience of carrying out project in partnership between the public and private sectors.

Also, as indicated in the EBRD Law in Transition 2007 Russian transport sector report, market studies have showed that private investors would not take part in concession tenders if there were not minimum income guarantees for these pilot concession projects.

More importantly the report stresses that “The future of public-private partnerships in Russia depends on the success of large infrastructure projects. Both the public and private sectors need to prove that they are reliable partners that are capable of meaningful dialogue and mutual cooperation”. As experience has shown, this is an even bigger challenge than adopting new laws because mutual trust cannot be obtained by decree. It is the result of years of cooperation.



Public Private Partnerships in the Transport sector: a Russian view, in Law in Transition 2007, European Bank for Reconstruction and Development.