CLIENT ALERTER: ISSUANCE OF PRIVATE SECTOR PARTICIPATION LAW

The long-awaited Private Sector Participation Law (the **PSP Law**) has been issued and will form a key pillar of the legislative framework for Public Private Partnership (**PPP**) projects and for the transfer of assets from the Government to the private sector (**Divestment**) in the Kingdom.

Key issues

- Issuance of Private Sector Participation Law
- Provides framework for PPP projects in the Kingdom
- Allows for a number of exemptions from existing laws
- Governing Rules and Implementing Regulations to be issued in due course

The PSP Law defines a PPP as any contractual arrangement related to infrastructure or public service that contains the following elements:

- the arrangement is for five years or more;
- the private party provides at least two of the following: design, construction, operation, maintenance or finance of the assets (whether the assets are government-owned, or owned by the private sector, or both);
- there is a qualitative and quantitative allocation of risks between the Government and the private sector; and
- the payments owed by or to the private sector under the contractual arrangement are primarily based on the performance of its obligations.

The PSP Law applies to all contracts entered into by ministries and government majority-owned companies if such company was established and/or acquired for the purpose of carrying a privatisation project.

The PSP Law refers to the "approving authority" and the "contracting authority" which will be further defined in the Governing Rules, to be issued by the Council of Ministers. It is expected that the Governing Rules will further regulate the Supervisory Committees Rules issued pursuant to Council of Ministers Resolution No. 665 dated 8/11/1438H (corresponding to 31 July 2018) as amended by Council of Ministers Resolution No. 55 dated 20/01/1442H (corresponding to 08/09/2020G).

The PSP Law also includes a summary of the Ministry of Finance's roles and responsibilities in this regard, namely:

- confirm the PSP project affordability prior to issuing the approval for tendering;
- allocate budget, as determined by the Ministry of Finance, to cover the financial obligations of any Government entity;

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- approve any additional financial obligations on the State's Treasury (and in this regard we note that Article 28 of the PSP Law specifically provides for the payment of compensation on termination); and
- approve and provide the financial and credit support necessary for the PSP.

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

- if the PSP project company incurs losses above the limit specified in the relevant laws (e. g. more than 50% of share capital as specified in Companies Law), the project company is not subject to applicable statutory requirements such as mandatory capital increase/decrease or dissolution, but will be instead subject to further decisions of CEDA (*Article 15*);
- existing contracts entered into by the government 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) (*Article 29*)
- the approving authority may approve (potentially with conditions) that the private sector is not subject to the Competition Law (*Article 30*);
- with the approval of the Ministry of Human Resources and Social Development and on the request of the contracting authority and in coordination with NCP, it is permissible to exclude any PSP project from certain provisions governing labour affairs, including Saudisation requirements, the provisions of termination of employment contract by the employer, and the duration of employment contract in a way that ensures the rights of the transferred employees under the PSP project (*Article 33*).
- the approving authority may approve allowing contracting parties agreeing to arbitration as a mean of dispute resolution, and the parties may agree on the applicable law governing the dispute (*Article 34*);
- PSP contracts may be tendered and concluded in languages other than the Arabic language, with the approval of the approving authority (*Article 35*); and
- 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 (*Article 37*).

The PSP Law specifically provides that the government can take a stake in PSP project companies. In this context, we also note Council of Ministers' Resolution 496 which mandated that PSP projects should be listed on the Saudi Stock Exchange, through a direct or indirect initial public offering (IPO).

The PSP Law also provides a framework for hearing appeals from the private sector against the tendering and award process for PSP projects.

Conclusion

The issuance of the PSP Law (which comes into force 120 days after publication) is an important development in the Kingdom's PPP regulatory framework and a signal of the growing complexity and sophistication of the sector.

Further legal instruments that will be issued pursuant to the PSP Law are:

- the “Governing Rules”, which shall be issued by the Council of Ministers and which will identify the entities that have the authority to approve PSP contract;
- the Implementing Regulations which shall be issued by the NCP, which shall set out the applicable PSP models for PPP or Divestment, and the conditions linked to each of these models, including the criteria (e.g. financial threshold) for considering a project as a PSP project; and
- tender document templates and templates for contractual terms (mandatory and indicative), to be issued by the NCP.

We await these with interest and further updates will appear in due course.

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