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Italy


This article aims to provide a brief update regarding PPPs in Italy, based on recent case-law developments.

Applicability of public procurement rules to pure private entities.

The Italian Constitutional Court (Corte Costituzionale, the “Court”) has ruled on applicability of public procurement rules to pure private entities (judgment No. 269/2007) within the framework of the scrutiny of a law passed by the Autonomous Province of Trento (the “Law”).

According the Law, any entity (including private entities) entrusted with a building permit which is required to set-up primary infrastructures to support the proposed urban development (e.g. sanitary sewer, water, electrical, etc.), is allowed to directly execute or award such works without any public tender procedure, although the relevant procurement thresholds are met.

The main issue pertains to the assessment as to whether the above private entities have to comply with public procurement rules or, rather, are free to choose their contractors lacking any call for competition.

Consistent with the relevant case law of the European Court of Justice (case C-399/98), the Court ruled that the Law is not consistent with the EC public procurement Directives and, therefore, with certain provisions of the Italian Constitution.

First of all, the Court held that the execution of primary infrastructures works in the circumstances provided by the Law amounts to a public work contract.

Therefore, from an objective standpoint, such contract is subject to the public tender procedures laid down in Directive 93/37/EC, and implementing national laws.

As to the applicability of procurement rules to pure private entities, the Court has stated that the holder of a building permit requiring to set-up primary infrastructures to support the proposed urban development is to be considered as the “holder of an express mandate” granted from the municipality for the construction of the work.

Such “mandate” implies the duty for the private entity to act within the framework of the rules and the principles to which the municipality is bound.

In light of the above, the provisions of the Law allowing direct awarding of primary infrastructures works lacking any call for competition are likely to result in a breach of the competition and of the basic principles of the Treaty and of the relevant secondary legislation as regards public tenders.

Alberto Fantini and Livio Esposizione

Portugal

News about the Portuguese road sector: the beginning of the end of the shadow toll model

It is well known that Portuguese Government has developed a Road Programme with toll roads and a significant number (seven) of shadow tolls, the so-called “SCUTs”.

Although the mileage increase in the road sector has been remarkable (the Shadow Toll Programme comprises the construction of 936km of roads), the future of SCUTs is one of the most debated themes of Portuguese economic and political life.

The former government (constituted by the centre-right wing) intended to discontinue the system of shadow toll roads in favour of a real toll model, mostly due to budgetary constraints, as SCUTs are paid for by national budget (approximately €700 million per year for the next 25 years).

Furthermore, it is worthwhile stressing that SCUT’s concessionaires have submitted several requests for the rebalance of its concession contracts, mostly on the basis of delays attributed to the grantor (Portuguese State), or modifications introduced by virtue of environmental decisions taken by Portuguese administration. Considering the fact that these disputes involve significant indemnities.
to be paid to concessionaires, derived mainly from loss of revenues for the concessionaires and increased costs of construction for the contractors, the "price" of the current shadow toll roads system may increase even more.

In this context, a government resolution for the modification of the current system of SCUT motorways to user-paid tolls was published on 5 November, 2004 and several meetings between concessionaires and the former Public Works Ministry took place in November and December 2004.

Although the Portuguese government – elected in February 2005 (formed by Portuguese Socialist Party) – announced its intention to keep the current regime of shadow toll roads in force, considering that this type of motorways (potentially) concur to the economic development of some parts of Portuguese territory, rumours on the possibility of a change have continued by virtue of the fact that Portuguese budget cannot accommodate the referred annual payments to concessionaires (besides these annual payments we should also outline payments related to expropriation costs as well as payments due to the concessionaires as a consequence of financial rebalances of concession agreements – in 2005, for instance, the State paid more than 88 million euros to concessionaires in connection with financial rebalances processes).

These rumours had, after all, some basis. In fact, at the end of 2006, the Portuguese Government announced that three SCUTs motorways (out of a group of seven that currently exist on the Portuguese Continent) would have to be modified to user-paid tolls ("Norte Litoral" Concession, held by the Concessionaire "Euroscut Norte", "Costa da Prata" and "Grande Porto" Concessions, both held by the Portuguese Group "Mota-Engil").

Currently these concessionaires are negotiating with a commission appointed by the Government the terms and conditions necessary to implement the referred modification. Needless to say that the referred negotiations are complex since there are a lot of stumbling blocks related to technical, juridical and financial issues that are difficult to overcome. Anyway these meetings represent the first steppingstone towards the above mention modification of the actual system of shadow toll roads.

As a consequence of this political change of philosophy, future road concessions to be awarded are real toll roads (to note that the Portuguese Road Programme envisages the construction of another 680kms, which shall be awarded until 2011 in connection with ten new concession agreements).

Pedro Melo, Senior Associate of PLMJ-Law Firm


table

United Kingdom

Current Developments in the United Kingdom

It has been a busy summer. In terms of both deal volume and size, 2007 compares with 2006 and surpasses 2005. 21 projects closed with a value of £1732m. This compares with 20 projects with a value of £2733m closing in the same period of 2006 and only 15 projects with a value of £1105, closing in the summer of 2005 (in the aftermath of Labour's third election victory).

Policy

Little has happened from a policy perspective over the summer. The main event was the resignation of Tony Blair as Prime Minister and his replacement by Gordon Brown. Brown initiated a major cabinet reshuffle. Under Brown it seems unlikely, however, that there will be much change to PPP policy.

The competitive dialogue procedure has now been mandatory in the UK since 31 January 2006 and a number of schemes which advertised under the competitive dialogue procedure are now moving towards financial close. It will be interesting to see how these fare. Anecdotal evidence to date is that bidding under the competitive dialogue procedure is more onerous for bidders and authorities than it was under the negotiated procedure.

Defence

The defence market continues to make steady progress. In August, the £111m Future of Marine Services project sponsored by Serco Denham reached financial close. This provides for the long-term replacement of Marine Services vessels for HM Naval Bases. In addition, the Corsham Development project sponsored by Inteq (John Laing/Interserve),