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Briefing note July 2015

The modification of the RPA regime on concessions and the pledge of future credit rights is adjusted and gains momentum

The proposal is currently included in the Bill of the Public Sector Legal Regime Act (processing of which is at an advanced stage and may foreseeably be approved by the end of the legislature), adjusting the proposed amendment of state liability ("**RPA**") in the event of termination of concession agreements.

Ninth Final Disposition of the Bill on the Public Sector Legal Regime Act

Thursday 30 July 2015 saw the publication of the Bill on the Public Sector Legal Regime Act passed by the Congress of Deputies. This represents an acceleration and adjustment of the modification to the RPA regime for concessions.

The new developments contained in this Bill include: a) a pledge of the credit right consisting of payment of RPA will require the prior authorisation of the Administration; b) in the event of termination for reasons attributable to the concessionaire, there will be a mandatory tender process for the contract and the maximum amount of the RPA will be limited so that the concessionaire has no guarantee that the investment will be recovered.

Key aspects of the change

- A pledge of the RPA will require prior authorisation of the Administration
- RPA is limited in the event of termination of the concession for reasons attributable to the concessionaire:
  - The amount of the RPA will not exceed the value of the concession
  - The value of the concession will be that paid by the purchaser in the retender for the contract; or the auction price if the retender is unsuccessful
- More precise rules are established on the calculation of loss of profit to be indemnified by the State
- This change will only apply to contracts that postdate the entry into force of the Act

RPA in the Ninth Final Disposition of the Bill of the Public Sector Legal Regime Act

According to the Bill, in the event of termination of the concession:

- The State's general duty to pay the concessionaire the investment made in the following is maintained:
  - Expropriation of land;
  - Execution of the works and facilities destined to become the property of the State.
- The need to take into account the condition of the

assets and the time remaining to reversion is maintained, applying a linear amortisation criterion.

- The term of 6 months for establishing the resulting amount is maintained.
- Termination due to bankruptcy or insolvency of the concessionaire will always be considered attributable to the concessionaire.
- In the event of termination attributable to the concessionaire:
  - (a) The State is obliged to open a new tender process for the concession with price as the sole criterion;
  - (b) The conditions of the terminated contract, including duration, will be maintained;
  - (c) The starting auction price will be set depending on the future cash flows in the period remaining, brought to present value applying the discount rate of the interest on 10-year Treasury bonds plus 300 basis points. They will be quantified as the arithmetic mean of the cash flows obtained during a period of time equivalent to the years remaining until termination, without including payments and receipt of interest, receipt of dividends and payments or receipt of profit tax. If the first auction is unsuccessful the starting price for the second will be 50%. If construction has not been completed, the price will be 70% of the amount equivalent to the investment carried out.
  - (d) If the second auction is unsuccessful, creditors holding 5% or more of the liabilities of the concessionaire, and the concessionaire, will have a term of three months to present a new purchaser who will pay at least the starting auction price.
  - (e) The State will pay the concessionaire the value of the concession within a term of three months as of the award of the same or as of when the second auction is unsuccessful. Said value will be: i) the amount paid by the purchaser; or ii) if the second auction is unsuccessful, the starting price of said auction.
- In the event of termination attributable to the State, the loss of profit indemnified will be quantified: with the arithmetic mean of the pre-tax profits for a period of time equivalent to the years remaining until termination of the concession, applying the weighted average capital cost of the concessionaire's last annual accounts as the discount rate. This provision is only applicable to public works concession contract and not to management of public services contract, where the loss of profit continues to be calculated by reference to the profits obtained during the last five years.

Applicability of the new RPA: only for new contracts

- This new RPA regime will apply to all public works concessions whose tender procedures initiate following the entry into force of the Act.
- Concessions awarded prior to the entry into force of the Act or whose tender procedures initiated prior to that date, will be governed by the existing legislation, that is, they will not be affected by the new regulation of the RPA.

Insolvency Law is also amended: pledge of future credit rights

- The reform takes advantage of the opportunity to introduce the long-awaited reform of Article 90.1.6º of the Insolvency Act, on pledges of future credits, which had generated much controversy.
- The new wording makes it clear that a pledge of future credits grants the holder special privilege in the case of insolvency when, prior to the declaration, the following circumstances exist:
  - The credits arise from existing contracts or legal relationships.
  - The pledge is in public document form or, in the case of a pledge without transfer of possession, it has been registered.
  - In the case of a pledge of RPA, the requirement added by the Public Sector Legal Regime Act (i.e., authorisation from the State when the pledge is created) has been met.
- By establishing these requirements, the legislator reaffirms what had already been recognised by jurisprudence (neutralising the unfortunate reform that amended this rule in 2011), making it possible to pledge future credits, without the need for the pledge to be recorded in the Registry, provided they arose from legal relations established prior to the declaration of insolvency.

Status

- At the time of writing, this Bill has been approved by the Congress of Deputies.
- As such, it is reasonable to assume that after it goes through the Senate, it may be passed by the Parliament in autumn 2015.

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