



EUROPEAN COMMISSION
EUROSTAT

Directorate D: Government Finance Statistics (GFS) and quality

Luxembourg, 7 July 2014
ESTAT/D-2/EBC/LFO/LPU/mhd/

Mr Jean-Marc Delporte
Chairman
National Accounts Institute
City Atrium C
Rue du Progrès 50
B-1210 Brussels
Belgium

Subject: Concession contract related to the "Oosterweek Link" (OWV)

Ref.: Your letter ICN/2014/003970 of 23 April 2014
Our letter ESTAT/D-2/D(2013)2742351 of 10 July 2013
Your letter ICN/2013/003794 of 11 April 2013 and previous correspondence on the issue

Dear Mr Delporte,

Thank you for your letter dated 23 April 2014. Eurostat has closely examined the arguments put forward in your request and the additional documentation provided and is now in a position to express its view on this matter.

1. THE ACCOUNTING ISSUE FOR WHICH A CLARIFICATION IS REQUESTED

In July 2013, Eurostat provided an advice on a concession type scheme related to an infrastructure project (OWV) which implied the construction and operation of a tunnel in the city of Antwerp (region of Flanders).

The issues to be analysed were the sector classification of the concessionaire (TLH) and the allocation of the infrastructure assets to be built. Eurostat agreed that the concessionaire (TLH) could be maintained in the non-financial corporations sector in the light of ESA1995, but that the classification could be reassessed following ESA2010 provisions. As concerns the assets, Eurostat considered that, because of the explicit government guarantee covering 100% of the debt raised by the concessionaire, government would bear the majority of the risks associated to the asset, which should then be recorded in the books of the Flemish Region.

Subsequently, the Flemish Region decided to modify the project and a new contract with new features has been arranged and transmitted to Eurostat in April 2014. In this context, the NAI has asked Eurostat to provide a new advice on the basis of the updated project.

Description of the case

The case relates to a concession type scheme in the region of Flanders for the construction and operation of an infrastructure project (Oosterweel Link, OWV hereinafter) that will complete the ring motorway around the city of Antwerp by providing a crossing via a tunnel of the Schiedt River.

The Flemish government has planned the construction of the OWV by the use of a concession type scheme in which the regional government would be represented by BAM and the concessionaire would be TLH.

BAM (Beheersmaatschappij Antwerpen Mobiel) is a public unit owned by the Flemish regional government and is in charge of developing (implementing and financing) infrastructure projects in Flanders, the OWV being the main project. BAM is classified inside government and is acting as grantor in the concession contract.

TLH (Tunnel Liefkenshoek NV) is a public corporation owned entirely by BAM (i.e., the Flemish government) already operating an existing infrastructure (the Liefkenshoek Tunnel) on a concession scheme basis, with the Flemish Region as grantor. It is foreseen that TLH will also act as the concessionaire, in the concession contract being analysed in this letter, for the construction and operation of the OWV.

The construction phase is foreseen to last 8 years and the exploitation phase up to a maximum of 50 years from the contract date.

TLH will charge tolls to the users of the infrastructure built and will be able to set such tolls within a bandwidth of 15% above or below an amount which will be decided by the Flemish Region.

The total project cost is assumed to be EUR 4.91 bn and the funding is expected to be provided as follows:

- EUR 1.15 bn will be provided by the Flemish Government in the form of equity;
- EUR 1.16 bn will be index linked bonds with the guarantee of the Flemish Government;
- EUR 1 bn will be project bond financing by the EIB;
- EUR 1.45 bn will be private bond placement (OTC bonds).

As concerns the ranking of these funding sources, the EIB project bonds will have a senior subordinated status.

Documentation provided

Together with the letter of 23 April 2014, the NAI provided the following documents:

- A draft of the new concession agreement, in Dutch;
- The new financial model, in Dutch;
- The memorandum prepared by the Flemish government in 2014 explaining the new contract foreseen between BAM and TLH and a request of Eurostat's advice;
- The BAM Decree of 13 July 2012;
- A letter from DG Internal Market of the European Commission confirming the compliance of the project with European public procurement law.

It should be noted that most of the annexes to the memorandums and to the contract, which are intended to clarify the model and to provide information on the figures, have not been provided or do not yet exist.

2. METHODOLOGICAL ANALYSIS

Eurostat has carried out its analysis on the light of ESA2010 and the MGDD version of 2013 “implementation of ESA2010”. Concession schemes are covered by sections VI.3.1.5-VI.3.4. Some parts from the section for PPPs in the MGDD (VI.4) might also be relevant for the case.

Sector classification of the concessionaire

The concessionaire (TLH) is a public corporation 100% owned by government (therefore controlled by government) and the already existing concession granted by government is its only activity. Therefore, following ESA2010 and in particular MGDD VI.3.2.20 “implementation of ESA2010”, the concessionaire TLH should be classified in the general government sector.

Notwithstanding the above, as far as the concession contract is concerned, Eurostat has taken note of the following issues:

Concession fees linked to profit

The concession fees to be paid by the concessionaire (TLH) to the Flemish Government are determined on the basis of the profit of TLH. “Fees” are simply defined as 85% of the yearly profit of the unit (if any), which is the same formula used in the already existing concession of the Liefkenshoek Tunnel. TLH being a public corporation 100% owned by government, these amounts have in fact the nature of dividends rather than real fees, which should normally be fixed and unconditional (although they could vary due to renegotiations of the term of the contract or indexation). Being this the case, it would seem that further investigation would be needed to understand whether this concession could be really qualified as such.

Moreover, it is doubtful whether THL is indeed incurring risks and benefitting from the rewards of the concession in a situation in which no fixed concession fee is paid to government and the overwhelming majority of its profit are to be transferred to government as well.

Government financing

If considered jointly, the direct financing to be provided by the Flemish Government (EUR 1.15 bn in the form of equity) plus the part of the debt benefiting from a government guarantee (EUR 1.16 bn of index linked bonds) although close to 50% of the total capital cost of the project, are intended to remain below the 50% of the total financing of the project. However, one must consider that the financing directly provided by the EIB is considered as senior debt. Being this the case, it is clear that the risk incurred by the EIB is lower than the one incurred by the other investors, including government as guarantor of a junior tranche of the project. Therefore, due to the above, the risk borne by government would appear to be higher than the risk borne in total by all the other investors (due to the fact that the EIB clearly incurs a very limited risk). Therefore, this would indicate that government would still be bearing the majority of the risk related to financing, through its equity and its guarantee, even if at first sight they represent less than 50% of the total financing. This 50% rule is in fact intended to be a proxy for determining which party bears the majority of the risk.

In addition, it should be noted that the BAM Decree of 2012 is still in force and allows the Flemish Government to guarantee 100% of the liabilities of TLH if needed. Although this is not explicitly foreseen in the current concession contract or in the financial model, it is established in a Decree law that could be exercised in the future in case of necessity..

It should also be noted that the equity of TLH amounted to EUR 28 mn at the end of 2013. A capital injection by the Flemish Government of EUR 1,150 mn would increase very considerably the existing equity as compared to the current balance sheet with the potential of modifying the nature of the unit.

Penalties and list of force majeure external events

Other elements in the concession contract which would need further discussions concern penalties and the concept of force majeure. Penalties for non-performance are dealt with in clause 21.2.7 of the concession contract. According to this clause, the grantor is not obliged to impose a financial penalty in case the commitments by the concessionaire are not fulfilled and are not corrected within a reasonable period and might simply decide to do so if it wishes. The grantor (the Flemish government) can in fact decide whether to impose, or not to impose such a penalty. This means that penalties are neither automatic, nor the amounts fixed, in the concession contract.

In addition, no exhaustive list of contingent events considered as resulting from "force majeure", thus excluding any responsibility of the partner in the deterioration of its financial situation, is foreseen in the contract.

3. CONCLUSION

Eurostat considers that being the concessionaire a 100% owned public corporation with a concession granted by government as its only activity, it must be classified in the general government sector in the light of ESA2010 rules. Therefore, the transactions, assets and liabilities of the concessionaire (THL) would consolidate in government accounts.

In addition, the existence of direct financing through equity and junior subordinated debt guaranteed by government would determine the fact that most of the risks related to the financing of the contract would be incurred by the Flemish Government. This would point in any case to a classification of the assets in the books of government. This conclusion could be further reinforced by the other points raised in the previous section (very limited risks and rewards incurred by the concessionaire, no automatic penalties and no exhaustive list of force majeure events).

4. PROCEDURE

This view of Eurostat is based on the information provided by the Belgian authorities. If this information turns out to be incomplete, or the implementation of the operation differs in some way from the information presented, Eurostat reserves the right to reconsider its view.

In this context, we would like to remind you that Eurostat is committed to adopt a fully transparent framework for its decisions on debt and deficit matters in line with Council Regulation 479/2009, as amended, and the note on ex-ante advice, which has been presented to the CMFB and cleared by the Commission and the EFC.

Eurostat is therefore publishing all official methodological advice (ex-ante and ex-post) given to Member States on its website. In case you have objections concerning the publication of this specific case, we would appreciate if you could let us know before *23 July 2014*.

Yours sincerely,

(eSigned)
Eduardo Barredo Capelot
Director