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pan of the PPP project. Especially in low-revenue projects of social infrastructure (such as roads) the grant should be applied on the basis of the availability payment installments rather than on the basis of the costs of the project. The annual appropriation process of the German development aid budget, however, hinders payment in installments over a long period of time. Upfront payments, however, can destroy the risk distribution of the PPP project, namely the "no service no payment" principle.

A solution which is also discussed in a recent report issued by the European PPP Expertise Centre[5] is the payment of the German aid into an investment fund: under this model German development aid would be contributed to an investment fund in the receiving country together with contributions by commercial lenders and the receiving state. This fund would then invest into a range of PPP projects. Such an investment fund would also provide some protection in case of a failure of the PPP.

V. Conclusion

To sum up: The new development aid provided by South Korea to the Philippines serves as a timely reminder to Germany that PPP schemes in developing countries need support if they are to work. Bilateral development aid may be a possible way to further incentivize private investors and lenders to participate in PPP projects in developing countries. Given that the current Minister of the German Federal Ministry for Economic Cooperation and Development, Mr Niebel, actively supports the use of business solutions in development aid, a dialogue on this issue between PPP Centres and his ministry could soon begin.

It appears that any new programme would need to be implemented at the level of the German development bank KfW which already today regularly provides loans and loan guarantees to PPP projects in Germany and at times also in developing countries alongside the World Bank Group. Such a new programme should also draw on the expertise of the German Federal Ministry of Transport, Building and Urban Environment – the ministry in charge of PPP projects in Germany's transport sector.

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RöverBrönner

5 See *supra* note 3.

Portugal

Banks' Step-In Rights under the Portuguese Public Contract Code: Exercise by Means of Transfer of Shares

I. Introduction

The recent Portuguese Public Contract Code (the "PCC") approved by Decree-Law no. 18/2008, of 29 January, besides establishing the legal framework applicable to public procurement[1] as a result of the transposition of Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council of 31 March, also stipulates the arrangements to be applied to the performance of administrative contracts[2].

As outlined in the Preamble of the PCC, the Portuguese legislator also strived to align both the regime applicable to the public procurement and the regime applicable to arrangements to be applied to the performance of administrative contracts with the most relevant current financing techniques – especially in the area of concession contracts – such as project finance, acquisition finance and asset finance.

In the context of project finance, surely the most relevant financing structure applied in Public Private Partnerships[3] ("PPPs"), one of the new mechanisms introduced by the PCC, was banks' step-in rights. In fact, this new provision corresponds to the introduction of a legal framework for a mechanism that had already been used, but only on a contractual basis.

In general, this is a prerogative attributed to the banks[4] which entitles them to control – or to

1 Generally, the PCC sets out a range of rules regarding public procurement procedures engaged by a contracting authority for the award of (namely) the following contracts: public works; public works concessions; public services concessions; lease or acquisition of movable property; acquisition of services; and company incorporation (see Part II of the PCC).

2 This matter is divided into two sections: a set of common provisions applicable to the performance of all administrative contracts and another part in which the legal framework that will apply to the performance of each of the main administrative contracts referred to in note 1 is previewed (see Part III of the PCC).

3 See E.R. Yescombe, *Public Private Partnerships – Principles of Policy and Finance* (London: Elsevier Ltd., 2007), pp. 113 *et sqq.*

4 The authority step-in is *mutatis mutandis* the equivalent right of the contracting authority to temporarily take over some or all of the obligations of the concessionaire in cases in which the concessionaire is breaching (or is likely to breach) its obligations (see Art. 421 of the PCC).

appoint a third party to control – the concession[5] in certain circumstances and typically for a certain period, as it will be explained below.

Although step-in rights apparently seem to be a very powerful tool for the banks, these clauses have not been much more than *a conditio sine qua non* included in what are known as direct agreements. In other words, they are a defensive tool since it is assumed that they are not going to be exercised in practice[6].

As a preliminary comment, it should be noted that the exercise of step-in rights by the banks faces several difficulties namely related to the following situations: (i.) lack of technical experience to proceed with concession activities; (ii.) lack of companies in the market interested in carrying out the concession activities; or (iii.) legal restrictions of the banks in becoming shareholders or substitutes of the concessionaire for more than a short period.

In addition to this, we believe that another ground that existed and still exists for looking at step-in rights as a mechanism that only aims to provide comfort to the banks, is the weak interest it has received from academic writers. This has indeed contributed to mystifying the concept, standardising its insufficient contractual regulation and avoiding its exercise.

Therefore, the purpose of this article is to carry out a brief analysis of some aspects of step-in rights – in particular regarding its exercise by means of transfer of shares – that need to be rethought in order to enhance their practical importance.

II. Step-in rights: Concept

According to Article 322 of the PCC, the step-in right is defined as being the right of the banks or of a third party appointed by them to take over the concession under the following main conditions:

(i) banks' intervention shall be contractually agreed[7];
(ii) it shall be exercised under a serious breach of the concession agreement or of other project agreements[8] by the concessionaire;
(iii) it shall be exercised in cases in which the concessionaire is likely to breach its obligations on a serious basis or upon the event of default that once occurred gives the contracting authority or the other contracting parties the right of termination of the concession agreement or other project agreements;
(iv) it shall be authorised by the contracting authority[9];
(v) it shall be exercised in compliance with the applicable legislation on the concession activity.

In addition to this, it must be separately emphasised another legal requirement set out by the provision referred to above, that relies on the fact that the exercise of step-in right aims only to ensure that the concessionaire's obligations will continue to be performed[10].

In fact, the main purpose of the banks when stepping into a concession is not only to receive the payments in arrears but also to rescue the concession, since the maintenance of the finance agreement depends on the health of the concession[11].

Therefore, although a step-out right in favour of the banks is expressly established in Article 322 of the PCC – which means in other words that after stepping in, it is up to them to decide whether or not they want to step out of the concession – we

5 Please note that our analysis is only made with reference to the concession contracts. However, in theory, this mechanism may be stipulated in administrative contracts in general.

6 *"The existence on paper of Step-In and Substitution rights means that they seldom have to be used."* See E.R. Yescombe, *Public Private Partnerships – Principles of Policy and Finance* (London: Elsevier Ltd., 2007), p. 278.

7 For its contractual regulation see below point III.

8 In general, PPPs can exist under the following contractual frameworks: i. concession agreement; ii. construction agreement; iii. operation and maintenance agreement; iv. offtake agreement; v. supply agreement; vi. finance agreement; vii. collateral agreement; viii. shareholders' agreement (see Gabriela Figueiredo Dias, "Project Finance (Primeiras Notas)" in *Série Miscelâneas do IDET*, n.º 3, Almedina, Coimbra, 2004, pp. 143 *et sqq.*).

9 As general rule, the authority step-in may also be exercised under the same conditions as step-in by the banks, but typically the contracting authority will let the banks go first and only intervene if they do not succeed. See Gonçalo Guerra Tavares and Nuno Monteiro Dente, *Código dos Contratos Públicos – Comentado*, Volume II, Almedina, Coimbra, 2011, p. 277.

10 See Art. 322, number 1 of the PCC.

11 *"(...) lenders in a PPP project-financing can only rely on the cash flow of a successful Project Company for their repayment."* See Yescombe, *Public Private Partnerships – Principles of Policy and Finance*, *supra* note 6, p. 208.

believe that the step-in right tends to be exercised only on a temporary basis[12, 13].

To back up our point of view, it shall be added that, in general, banks want to avoid the exercise of the step-in right on a permanent basis. According to the Legal Framework of Credit Institutions and Financial Companies[14] (the "LFCFC"), banks are not allowed to step into the concession for more than a limited period by way of transfer of the shares – due to restrictions imposed in acquisition of shares in other companies[15] or by means of assignment[16] – owing to its limited scope of activity and to a possible breach of public procurement rules.

Regarding third parties that can be appointed by banks, the assignment on a permanent basis also risks a possible breach of public procurement rules. As to the transfer of shares, although there is no strong legal restriction, this mandatory transfer could lead to conflicts of interest arising between new shareholders (third party) and managers (concessionaire).

All in all, the best case scenario for the banks is the following: if necessary, they will step into the concession in order to help sort out the problems of the concessionaire, after which they will be willing to step out again.

However, it is worth referring that there is one situation in which the step-out should be considered a step-out duty instead of a step-out right. In fact, if step-in right can only be exercised under certain conditions (i.e. in general terms, in cases in which the concessionaire is in default), then if these conditions cease to exist, it makes sense that banks should step-out of the concession. Although this has not been addressed in the legislation, under these circumstances, the step out decision is also motivated by the financial interest of the banks.

Finally, it should also be borne in mind that in Portugal the exercise of step-in rights by the banks allows them to take control of the concession in two possible ways[17]:

(i) transfer of shares of the project company[18] or

(ii) assignment of the contractual position of the concessionaire.

In this context, it may be said in advance that the exercise of step-in rights is traditionally strongly linked to the security package taken by the banks in this type of project[19].

To sum up, the key issues surrounding step-in rights are their legal and contractual regulation, connection to security demanded by the banks and temporary basis. From this point on, we will analyse their contractual regulation in direct agreements as well as their exercise by means of transfer of shares[20].

III. Step-in rights: Contractual regulation

As already mentioned above, according to Article 322 of the PCC, step-in rights are subject to contractual regulation in direct agreements. These direct agreements are one or more agreements entered into between the contracting authority, the banks, the concessionaire and the other contracting parties in PPP Contracts, in which the bank's right to intervene if the concessionaire has breached or is likely to breach its obligations is regulated.

12 There is at least one Portuguese author that argues that the step-in right may only be exercised on a temporary basis. See Jorge Andrade da Silva, *Código dos Contratos Públicos – Comentado e Anotado*, Almedina, Coimbra, 3.ª Edição, 2010, p. 790.

13 *"Step-in is supposed to be a temporary remedy to allow time to find a longer-term solution to the Project Company's problems."* See Yescombe, *Public Private Partnerships – Principles of Policy and Finance, supra* note 6, p. 278.

14 Approved by Decree-Law no. 298/92 of 31 December, republished by Decree-Law no. 1/2008 of 3 January and last amended by Decree-Law no. 88/2011 of 20 July.

15 See Arts. 100, 101 and 114 of the LFCFC.

16 See Art. 4 of the LFCFC.

17 In UK law under Section 72C and Schedule 2A, para. 6, both of Insolvency Act 1986 (as amended by Enterprise Act 2002), one can say that *"the way that banks will typically step into a company is to appoint an administrative receiver over it."* See Graham D. Vinter, *Project Finance – A Legal Guide*, 3rd Edition (London: Sweet & Maxwell, 2006), p. 264. This results from the enforcement of a floating charge, which broadly speaking is a form of security over all assets of the company. Alternatively, the banks can also take control by acquiring the shares of the company under the enforcement of a financial pledge of shares. See *ibid.*, p. 294.

18 See below point IV.

19 See Michele Lubuono, "Le Garanzie nel Project Finance", in *Rivista di Diritto Civile* (Marzo-Aprile 2005), Parte Seconda, p. 134.

20 Please note that we have chosen to analyse the exercise of step-in right only by means of transfer of shares, since it tends to be more effective than by way of assignment. *"Lenders normally take security over the investors' shares in the Project Company. This is to enable the Lenders to take over the management of the Project Company more quickly than may be achieved by taking action under contract assignments."* See Yescombe, *Public Private Partnerships – Principles of Policy and Finance, supra* note 6, p. 209.

In general terms, banks are interested in having the power to exercise step-in rights ever since they become aware of a default and in widening the range of default events that can give rise to the exercise of step-in right. At the same point, they will try to negotiate the maximum step-in period and will seek to limit their liability[21] during the step-in period. By contrast, the concessionaire naturally wants the opposite[22, 23].

In reality, these agreements typically preview the factual circumstances that, once they occur, will enable the banks (or another entity appointed by them) to play an active role in the concession. Given the fact that the range of default events is fairly extensive – including not only breaches of the finance agreements, but also of the concession or other project contracts – another issue that is commonly established in this type of contract are the notifications given by contracting authorities or the other contracting parties to the banks upon the occurrence of a default event.

As default events usually give the contracting authority or even the other contracting parties the right to terminate PPPs contracts[24], direct agreements are also an instrument to protect banks against the exercise of this right, since they undertake not to do it (or at least they agree not do it without first giving prior written notice to the banks) in case the banks decide to get involved with the project for a certain period.

At this point it is worth mentioning that, before stepping in, banks will have to notify both the contracting authority and the other contracting parties in order to communicate its intention to do so. This is because as already referred to above, under the terms of the PCC, the exercise of this right requires a prior authorisation[25] from the contracting authority and also to avoid the exercise of the termination rights by the other contracting parties.

At the same time, direct agreements are supposed to be the right place for regulating the way that the banks or a third party will step in and out of the concession. However, we cannot find much more than a mere reproduction in them of what is already legally established in Article 322 of the PCC.

This means that direct agreements typically contain a clause stating that in the event of the concessionaire's default, the banks will be given the right to step-in by way of the assignment of the concession or, alternatively, by acquiring the shares of the concessionaire. As regards the second option, it is often established (or assumed) that the exercise of the step-in right typically results from the enforcement of the financial pledge of shares.

Concerning the termination of the bank's intervention – or the exercise of the step-out right –, direct agreements are typically silent as to the mechanisms – that is the legal or contractual instruments – for stepping out of the concession.

Finally, besides being the contractual regulation of step-in and step-out rights, direct agreements may also include several covenants with respect to the disclosure of information given to the banks and related to supervision of the concession by them, as well as others concerning undertakings not to amend the project contacts or the non-exercise of compensation credit rights against the concessionaire by other contracting parties, among others.

IV. Step-in rights: Exercise by means of transfer of shares

In this section we will analyse the mechanisms – legal and contractual instruments – underlying the exercise of step-in rights by taking possession of the shares in the company set up by concessionaire to run the concession[26].

Before moving forward with this analysis, it is important to point out that takeover by the banks or the entity appointed by them has as its main purposes the acquisition of the following shareholders' rights established in Article 21 of the Portuguese Companies Code[27]: i.) the right to informa-

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21 This issue has particular relevance in cases where step-in is realised by an assignment of the contractual position of the concessionaire. However, even when the banks choose to step-in by way of transfer of shares, they are likely to be considered *shadow directors*.

22 The concessionaire will insist on having pre-emption rights with respect to their original *status*.

23 See Vinter, *Project Finance – A Legal Guide*, *supra* note 17, pp. 276 *et sqq*.

24 As stated earlier, it also gives the contracting authority the right to intervene (see Art. 421 of the PCC).

25 This prior consent of the contracting authority is also legally required in any assignment and often contractually required in any change of control of the concession (see Arts. 319 and 323 both of the PCC).

26 Typically a Special Purpose Vehicle ("SPV") that assumes the form of a company incorporated as a limited liability company (see Art. 411 of the PCC).

27 Approved by Decree-Law no. 262/86 of 2 September, republished by Decree-Law no. 76-A/2006 of 29 March and last amended by Decree-Law no. 53/2011 of 13 April.

tion[28]; ii.) the right to share in profits; iii.) voting rights and iv.) supervision rights under Articles 292 and 450 of the Portuguese Companies Code[29].

In general terms, voting rights entitle the banks, as shareholders, to appoint and dismiss managers by means of a resolution adopted by the general meeting, thus allowing them to appoint additional managers or replace the management of the company now owned by them (see Articles 391 and 403 of the Portuguese Companies Code).

After taking a decision to replace the management, banks should be aware that, if there is a dismissal without just cause[30], managers have the right to financial compensation for any losses suffered. In order to avoid this issue, letters of resignation in which managers agree to resign from office without being compensated by the banks if step-in right is exercised, may be annexed to direct agreements. In other words, they agree in advance that under these circumstances there are grounds for a dismissal for just cause (see Article 404 of the Portuguese Companies Code).

Having identified the main reasons that underlie the exercise of a step-in by way of share transfer, we will now on consider what the best mechanism is – between the call option and the financial pledge of shares – to ensure this transfer of shares from the original shareholders to the banks or to a third party appointed by them.

As mentioned earlier, the answer to this question is not given in direct agreements, which are silent on this matter or merely refer to the financial pledge of shares – a legal instrument that is included in the security agreement and gives the banks the right to appropriate the shares. This (undoubtedly) innovative scheme was introduced to the Portuguese legal system by Decree-Law No. 105/2004 of 8 May, last amended and republished by Decree-Law No. 85/2011 of 29 June ("Decree-Law 105/2004"), as a result of the implementation of the Directive 2002/47/EC of the European Parliament and of the Council, of 6 June 2002, on financial collateral arrangements. Since then, it has generally been assumed that this form of security fits in exactly with the exercise of the step-in right.

On the other hand, there is the call option, the contractual mechanism traditionally chosen by the banks to take control of the concessionaire by taking possession of the shares of the company. Before being possible the financial pledge of shares, the enforcement of a traditional pledge of shares was slow, expensive and difficult because, as a general rule, a court order was required (see Article 23 of Portuguese Companies Code and Article 666 and following of the Portuguese Civil Code[31]).

Although it can be said that banks would rather use the financial pledge of shares than the call option to exercise the step-in right, we continue to see both instruments used in the contractual framework underlying project financed PPPs. Therefore, another question comes to mind: Has the financial pledge of shares really replaced the call option and, if not, does it still make sense to maintain both mechanisms, perhaps with different functions, in this scheme?

Financial pledge vs call option

As to the call option[32] in the context of a project finance concession, it is an agreement entered into between the banks and the shareholders in the project company in which the following is agreed: in the event of the concessionaire's default, banks will be given the right to exercise the call option and if they do so, to purchase all the shares in the project company[33]. From the shareholders' perspective, they agree on a promise of sale under a condition precedent[34], which means that in the event of default and if the call option is exercised, they assume the obligation to sell the shares in the com-

28 *"The immediate priority for lenders faced with a borrower in financial difficulties is information."* See Vinter, *Project Finance – A Legal Guide*, *supra* note 17, p. 291.

29 See Paulo Olavo Cunha, *Direito das Sociedades Comerciais*, 3.ª Edição (Coimbra: Almedina, 2007), p. 290.

30 And even if there is just cause, sometimes it is not easy to prove it.

31 Approved by Decree-Law no. 47 344/66 of 25 November and last amended by Law no. 23/2010 of 3 August.

32 In theory, this is an agreement that gives the holder the right (but not the obligation) to buy an asset at a pre-specified price ("option premium"), for a specified price ("strike price") and within a specified period. For its conceptual definition see Engrácia Antunes, *Os Instrumentos Financeiros* (Coimbra: Almedina, 2009), p. 159.

33 In reality, under these circumstances, banks will have to decide if (i.) they want to exercise the call option in order to become shareholders of the project company; (ii.) they want to exercise the call option, becoming the new shareholders of the project company in order to sell the shares to a third party appointed by them or (iii.) they want to sell the call option to a third party appointed by them instead of exercising it.

34 On the discussion of the legal nature of the call option, see Tiago Soares da Fonseca, *Do Contrato de Opção – Esboço de uma Teoria Geral* (Lisbon: Lex, 2001), pp. 37 *et sqq*.

pany to the banks (see Articles 270 and 830 of the Portuguese Civil Code)[35].

Regarding the strike price, a truly symbolic price is typically agreed which ends up being the same as that of the option premium[36]. This is because the main purpose of the banks when acquiring the shares of the company is to indirectly step into the concession and this scheme enables them to do it quickly and effectively.

The corresponding step-out right can be exercised by establishing a put option in favour of the original shareholders – or when assuming the step-out has a duty by a promise of sale – under the terms of Article 830 of the Portuguese Civil Code.

In short we can say that the call option – contractually agreed under the terms referred to above – has the following pros and cons:

(i) banks can take control of the project company without officially[37] having to declare early termination (*"vencimento antecipado"*) which fits in exactly with purposes of the step-in right identified earlier: the maintenance of the concession (as well as the finance agreement);

(ii) it allows banks to step in in a quick and effective way without having to comply with the legal requirements set out in the legislation applicable to the financial pledge of shares referred to below;

(iii) it must be exercised on a temporary basis otherwise it is likely to be considered as a hidden financial pledge of shares[38];

(iv) it may not be clear whether it is an agreement against payment or free of charges and one can argue that an option agreement free of charges is not acceptable[39].

Turning to the financial pledge of shares it consists in a financial collateral agreement which, on the occurrence of an enforcement event, gives the banks the right to appropriate the shares of the project company[40].

The exercise of the right of appropriation is subject to the fulfilment of certain legal requirements set out in Decree-law 105/2004, the most important of which are that: (i.) it has to be agreed by the parties in the security financial collateral arrangement and (ii.) the parties have also to agree on the valuation of the shares in the security financial collateral arrangement[41].

Compliance with the second condition referred to above leads us to conclude that under a financial pledge of shares it is not possible to pre-specify a symbolic price for the shares, given the fact that it does not ensure an objective valuation of the shares[42]. This is not surprising since the financial pledge of shares is a security under of a finance agreement.

Furthermore, there are other reasons that make us believe that the financial pledge of shares does not fit in properly with the exercise of a step-in right. These reasons can be summarised as follows:

(i) in general, as the financial pledge of shares is a security, its enforcement does not allow banks to intervene on an adequate and temporary basis;

(ii) the legal rules for the financial pledge of shares do not apply to the exercise of the step-out right which must be separately agreed under the same terms referred to above;

(iii) since its enforcement involves the declaration of early termination of the obligation, banks will have to make significant provisions for liabilities in their balance sheets;

35 The only way that the original shareholders have to avoid selling the shares is remedying the default scenario. This is a clause sometimes included in direct agreements.

36 The price settled may be 1 €.

37 We say "officially" because in theory the call option right only exists under an event of default established in direct agreements.

38 For instance the acquisition of shares on a permanent basis for a symbolic price might be seen as a lex comissoria (*"pacto comissório"*) forbidden under the terms of Arts. 678 and 694 of the Portuguese Civil Code.

39 See Fonseca, *Do Contrato de Opção – Esboço de uma Teoria Geral, supra* note 34, p. 31.

40 Please note that it is not clear whether the financial pledge can or cannot be taken over shares which are not negotiable on the capital market, which is the case of the companies set up to run the concession. For a favourable thesis, see Rui Oliveira Neves, *O Penhor Financeiro de Acções – Aspectos particulares de uma Garantia Pignoratícia com Perfil Inovador* (Lisbon: Ano Lectivo 2003/2004), pp. 84–87.

41 See Art. 11 of Decree-law 105/2004.

42 See, on these lines, Alexandre Jardim, "Acordos de Garantia Financeira: o respectivo Regime Jurídico face ao Decreto-Lei n.º 105/2004, de 8 de Maio. Algumas Questões", in *Revista da Banca* (2006), n.º 62, p. 156.

(iv) in the event of both a step-in and a step-out, the bank's position will be less secure, especially if the concessionaire gets into trouble again, given the fact that the financial collateral arrangement is terminated;

(v) by contrast, if at an early stage, banks exercise the call option in order to step into the company, they can later decide whether they want to a) exercise the step-out right, keeping the financial pledge of shares, or alternatively b) enforce the financial pledge of shares in the event of an ongoing default scenario.

To conclude, and in order to answer the earlier question, we believe the best mechanism to put step-in rights into effect is the call option. However, it should be emphasised that, although the enforcement of the financial pledge of shares does not fit in properly with the exercise of step-in right, this innovative security has greatly reinforced the security package typically taken out by banks in project financed concessions.

V. Conclusion

In the light of the above, we would like to draw attention to the following conclusions:

(a) Banks' step-in rights are established in Article 322 of the PCC which, in general terms, establishes that in cases where the concessionaire has committed (or is likely to commit) a serious breach of its obligations, the banks will be then given the right to take over the concession - provided it is contractually agreed in what are known as direct agreements and authorised by the contracting authority.

(b) According to the referred legal provision, the banks are allowed to take control of the concession in two possible ways: transfer of shares of the project company or assignment of the contractual position of the concessionaire.

(c) Regarding the exercise of step-in rights, direct agreements typically contain a clause stating that, in the event of the concessionaire's default, the banks will be given the right to step-in by way of the assignment of the concession or, alternatively, by acquiring the shares of the concessionaire. As regards the second option, it is often established (or assumed) that the exercise of the step-in right typically results from the enforcement of a financial pledge of shares.

(d) Thus, the exercise of step-in rights is typically strongly tied to the security package taken out by the banks in this type of project, especially as to its exercise by means of transfer of shares. However, we believe that securities are not the most suitable instruments to exercise step-in rights.

(e) Indeed, step-in rights and securities are designed to achieve different goals. Although at an early stage they both aim to provide comfort for the banks - which means that they share a defensive function - the only purpose of exercising step-in rights is to ensure that the concessionaire's obligations will continue to be performed – that is why the right tends to be used on a temporary basis.

(f) On the other hand, the enforcement of a security fits in exactly with those circumstances in which the banks' primary purpose is to be repaid. This applies to those cases where banks have already exercised the step-in right and have not succeeded in getting the problems of the concessionaire sorted out or, in the worst case scenario, if at an early stage they see no other solution than to terminate the finance agreement.

(g) Therefore, in our opinion, where there is a serious default on the part of the concessionaire, the step-in right should be seen as an earlier and optional "step" in the enforcement of securities.

(h) This lead us to conclude that in cases where the step-in right is exercised by means of transfer of shares, banks should use a call option rather than a financial pledge of shares, given the fact that the rules for the latter do not fit in properly with this type of intervention.

(i) To sum up, if in a default scenario banks are willing to step into the concessionaire by way of a share transfer, they may firstly exercise the call option and they can decide later whether they want to (i.) exercise the step-out right, keeping the financial pledge of shares, or alternatively (ii.) enforce the financial pledge of shares in the event of an ongoing default scenario.

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