

# GLOBAL PUBLIC - PRIVATE PARTNERSHIP (PPP) GUIDE

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Hungary	Turkey
Ivory Coast	Turkmenistan
Jordan	Ukraine
Kazakhstan	United Kingdom
Kingdom of Morocco	Uruguay
	Uzbekistan



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## FOREWORD

ÇAKMAK PUBLISHING is pleased to publish the 2017 edition of the *Global Public-Private Partnership (PPP) Guide*.

The *Guide* is designed to provide an overview of applicable legislation and available incentives to PPP projects in many jurisdictions around the world. It will aid investors, lenders and government agencies and their counsel in understanding and comparing different facets of PPP regulation in different jurisdictions.

The publication maintains a Q&A format with a common questionnaire set by the editors and answered by leading practitioners from 35 jurisdictions around the world.

The following are notable observations from this 2017 edition of the *Guide* regarding the regulatory regime and available incentives for PPP projects in the 35 jurisdictions explored:

- In most of the countries, 22 out of 35, PPP projects are commonly used, while in the remaining 13 countries PPP projects are not yet commonly used but are starting to be used more and more.
- The sectors where the PPP model is used the most are the transportation sector (30 out of 35 countries), the healthcare sector (19 out of 35 countries) and the energy sector (13 out of 35 countries).
- The PPP model is also used in other sectors, including: education, agriculture, urban and suburban rehabilitation and development, sanitation (water supply/disposal and waste disposal), tourism infrastructure, housing, office developments, and public administration infrastructure.
- 13 out of the 35 countries have a centralized and PPP-specific regulatory authority to supervise and regulate the PPP projects.
- 22 out of the 35 countries have a PPP framework law, while the remaining 13 countries rely on their public procurement and concessions legislation or general legal principles.
- 13 out of the 35 countries provide for some sort of tax advantages for PPP projects.
- 7 out of the 35 countries provide for additional incentives for the domestic manufacturing of equipment and materials used in PPP projects.

We are grateful to all of the authors of this publication, who have been selected for their recognized expertise in the PPP field, and thank them for making this *Guide* a reality.

We also gratefully acknowledge the support of **Gama Holding**, **Rönesans Sağlık Yatırım** and **Türkerler Holding** for their support in the publication of this *Guide*.

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Editors

Ankara, January 2018

# ALBANIA



Besnik Duraj

## DRAKOPOULOS LAW FIRM

### GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The most common PPP models used in Albania are the BOT (build, operate & transfer) and DBFO (design, build, finance and operate) models; however other forms of similar long-term contracts are also used.

Depending on the reward mechanism as well as on the basic ordinary risk sharing, a private public partnership may be set up in one of the following forms: (i) public works concession; (ii) public services concession; (iii) public works contract; or (iv) public services contract.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

Concessions/PPP models are applied for the carrying out of works and/or provision of services in the following sectors and for the following purposes: transport (railway system and rail transport, ports, airports, roads, tunnels, bridges, parking, public transport); production and distribution of electricity and

heating power; production and distribution of fresh water and treatment, collection, distribution and administration of waste water, irrigation, drainage, cleaning of canals and dams; waste management, including the collection, transfer, treatment and disposal; telecommunication; science and education; tourism, leisure and hospitality; culture and sports; health; social services; prison and judicial infrastructure; rehabilitation of land and forests; industrial parks, mines and similar business support infrastructure; housing; public administration facilities, IT and database infrastructure; natural gas distribution; urban and suburban rehabilitation and development; agriculture; and public lighting under municipalities' administration.

Besides the above listed sectors, the law entitles the Council of Ministers to resolve on the execution of concessions/PPPs in other sectors, based on proposals from ministries, municipalities, districts and central bodies involved in concession/PPP policies.

The concession and PPP contracts are not applicable in the following sectors, which is explicitly prohibited by law:

- a. Contracts under the minimum monetary threshold (the minimum monetary threshold for concessions and PPPs is determined by Article 2 of the Decision of

- the Council of Ministers No. 575/2013 “On the approval of rules for the assessment and granting by Concession/Public Private Partnerships” and is set at ALL 5 million (approx. EUR 37.5K));
- b. When a contract’s performance must be accompanied by special security measures in accordance with the applicable laws, regulations or administrative provisions, or if required, for the protection of the state's main interests;
  - c. For the acquisition or lease, by whatever financial means, of real estate or concerning rights thereon;
  - d. Acquisition, development, production of material for media publicity and broadcasting contracts;
  - e. Concessions which are subject to different rules and are awarded pursuant to special procedural rules of international organizations;
  - f. Arbitration and conciliation services;
  - g. Financial services related to the issue, sale, purchase or transfer of securities or other financial instruments, in particular public authority's transactions for the purpose of raising money or capital;
  - h. Services included in the utility contracts as per Public Procurement Law;
  - i. Air transport services;
  - j. Concessions/PPPs, which are subject to different rules and are awarded in accordance with international agreements, which the Republic of Albania concluded with one or several other states, signed in accordance with the Treaty on the Functioning of the European Union, and which include works, supplies or services intended for joint implementation or use of the projects by the signatory countries;
  - k. Concessions/PPPs which are regulated by an international agreement;
    - l. Public service concessions awarded by the public authority to another public authority, or to an association of public authorities, on the basis of an exclusive right which they enjoy pursuant to the legislation in force;
    - m. Construction and exploitation of renewable energy sources, except for hydropower plants with an installed capacity higher than 2 MW; and
    - n. Public works concessions/PPPs for the construction, operation, maintenance and rehabilitation of national roads where they present special importance for the country's road infrastructure.
- 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**
- The Albanian Government is in negotiations with Star Bridge Port Developments Limited for a DBFO project related to Karpen Port. The award procedure has been carried out as per Law no. 55/2015 “On strategic investments in the Republic of Albania”, which is based on a “particular procedure” aiming at attracting foreign investors in specific sectors considered to be strategic for the development of the country. The project requires an investment of USD 5 billion for a period of 5 to 10 years. The project contract is not executed yet, whilst the “particular procedure” requires an approval by the Albanian Parliament.

## LEGISLATION & REGULATION

### 4. What are the principal laws and regulations? Is there a framework PPP Law?

The legal framework on concessions and PPPs in the Republic of Albania is mainly based on the following legislation:

- Law no. 125/2013 “On Concessions and Public Private Partnerships”;
- Law no. 55/2015 “On strategic investments in the Republic of Albania”;
- Decision of the Council of Ministers no. 575, dated 10.07.2013 “On the approval of rules for the assessment and granting by Concession/Public Private Partnerships”;
- Decision of the Council of Ministers no. 130, dated 12.03.2014 “On the electronic conduct of competitive procedures of Concessions/Public Private Partnerships”;
- Decision of the Council of Ministers no. 634, dated 01.10.2014 “On the approval of the rules for the evaluation and granting of Concessions and Public Private Partnerships for the public works and services for the construction, operation and maintenance of national roads”;
- Decision of the Council of Ministers no. 211, dated 16.03.2016 “On the establishment and management of the electronic registry for Concessions and Public Private Partnerships”;
- Decision of the Council of Ministers no. 150, dated 22.03.2007 “On organization and functioning of ATRAKO – Concessions Treatment Agency”;

In addition to the above main legislation, the PPPs’ tender stage procedures are based on the following public procurement legislation:

- Law no. 9643, dated 20.11.2006, “On Public Procurement”;
- Decision of the Council of Ministers no. 914, dated 29.12.2014, “On the approval of the public procurement rules”; and
- Decision of the Council of Ministers no. 918, dated 29.12.2014, “The online public procurement procedures”.

### 5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

The principal regulatory bodies for PPP are: the Council of Ministers; ministries of the central government, i.e. Ministry of Transport and Infrastructure; Ministry of Economic Development, Tourism, Trade and Entrepreneurship; Ministry for Urban Development; Ministry of Education and Sports; Ministry of Justice; Ministry of Innovation and Public Administration; Ministry of Environment; Ministry of Agriculture, Rural Development and Water; Ministry of Health; Ministry of Energy and Industry; Ministry of Culture; Ministry of Finance; units of the local government; the Public Procurement Agency; the Public Procurement Commission; other institutions (e.g. State Advocate Office, administrative courts or arbitration institutions).

The centralized PPP authority is the Concessions Treatment Agency (“**ATRAKO**”). ATRAKO is a special body established by DCM no. 150/2007 for the purpose of assisting the public authorities during the procedures for granting of concessions and PPPs, with a main focus on the assessment of the projects, preparation of tender documents, negotiation of contracts and monitoring their implementation.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

Albanian law does not envisage any explicit or implicit restriction against foreign investors. As per the applicable law, a contracting party may be any natural or legal person or public entity or group of such persons and/or bodies which offer on the market, respectively, the execution of works or services.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The project agreement is concluded for a predetermined term, which also provides for a long-stop date for the completion of the project. The public authority shall determine in the relevant project's feasibility study the term of the contract in such a manner that its duration does not restrict competition more than necessary in order to ensure the amortization of the real value of the concessionaire's/private partner's investment and a reasonable rate of return on the investment, taking into account the costs and risks assumed by the concessionaire/private partner for the duration of the contract. The concession/PPP contract may not initially be concluded for a period longer than 35 years. The time limit, for which the concession is awarded, shall run from the date of entry into force of the contract. The contract duration term may be extended only due to reasons not attributable to the concessionaire/private partner.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

The force majeure events are not explicitly defined by the Albanian legislation. Force majeure definition and legal applicability is given by the legal doctrine and courts'

jurisprudence and it usually means an unexpected event occurred outside the control of the parties to an agreement due to which a part of an agreement cannot be performed. As per the Albanian law the occurrence of a force majeure event is deemed as legal cause for amending the provisions of the project agreement. However, the parties may clearly set out the procedure to be followed upon the occurrence of a force majeure event and its consequences.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Albanian law envisages the possibility of the parties to request the amendment of the concession/PPP contract provisions in case of impossibility to carry out the contract's scope, or in case of change in law, or in other cases which change the factual or legal situation related to the provision of works or services.

The public authority may enter into a binding commitment on behalf of the state, which provides for appropriate assurances in favor of the concessionaire/private partner that will be protected against the financial consequences of legislation which shall become effective after the entry into force of the project agreement. However, such presumed assurances are subject to the following limitations: (i) the financial consequences must be clearly and precisely described; (ii) the commitment shall terminate upon the termination of the agreement; and (iii) the nature of the future legislation must be described. Such binding commitment shall be approved by the Council of Ministers upon the public authority's request.

The risk sharing between parties and the respective risk level undertaken by the private partner shall be set forth on a case-by-case

basis depending on the PPP scheme and taking into consideration the risks related to all contractual aspects, such as risks related to the financing, construction, availability, operation, management, maintenance and technical risks. As a rule of thumb, each partner shall be liable for the risks that fall within their sphere of influence, and the risks are allocated to the party that is objectively more capable of bearing such risks.

Proper risk allocation to the party that can best undertake it is a key factor of private partnerships and Value for Money (“VfM”). Risk transfer is one of the key challenges for a well-functioning system of projects that are based on private sector involvement, and proper risk allocation is an important factor that contributes towards sustainable and successful PPP projects. However, risk allocation is carried out on a case-by-case basis, depending on the project’s nature and the contractual undertakings regarding works and services, maintenance, financial obligations and a number of other elements which must be taken into account with regards to the allocation of risks. Taking into account that whilst risk transfer is the key element for determining the efficiency and the VfM, ensuring the existence of competition and lack of contestation of the tender project procedures are factors that add to the guarantees of ensuring effective risk transfer.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Albanian law does not envisage the reinstatement test; however, the parties may freely agree to include such a test in their PPP agreement.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

Such concept is not usually recognized in the project agreements, however, should the parties agree to it, there are no legal obstacles. It should be also noted that prior to the signing or entry into force of the concession/PPP contract, the public authority should receive the performance guarantee from the private partner. Elements of the guarantee regarding the contract execution, such as the value, the form and the modality, must be in compliance with the requirements provided by the public authority in the tender documents. The performance guarantee serves to the public authority as a compensation tool with regard to the damage that may be caused as a result of the failure of the private partner to fulfill the contractual obligations. The security titles requested by the public authority may be a promise to perform payment, a bank guarantee, corporate guarantee, bills of exchange, or other security titles, but in any case, as previously specified in the tender documents. The performance guarantee is submitted to the public authority, which must keep it for the entire duration of the contract. The public authority should periodically verify the validity of the security titles provided by the private partner. Following receipt of the performance guarantee, the contract security submitted during the competitive tender procedure shall be returned to the private partner.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

In case of the lender’s step-in right, it occurs when as a result of the failure by the private partner to successfully fulfill the PPP project, the third party financial interests are at risk

(parties that have financed or supported financially the private partner in their capacity as lenders). The third-party lenders, that are usually represented by banking or financial institutions, can replace the private partner to achieve the contract objective, intervening by themselves or through a third private partner. The contract shall outline cases and procedures for the implementation of this step-in mechanism, taking into account the protection of the public interest but also the legitimate interests of the project financiers. Step-in rights can be also regulated by separate contracts, which can be attached to the PPP contract or to which the PPP contract shall refer.

The second case, that of the public authority's step-in rights, occurs when the public authority temporarily takes over the control of a PPP project upon identification of issues that put in danger the provision of public services, often in case of environmental and health emergencies, or those related to the public safety. This mechanism is a temporary one and is related to the fact that the public partner can better withstand the extraordinary emergency situations. In both cases, the contract must determine the procedure as well as the rights and obligations of the lender or the public partner, including issuance of the step-in notice, payments on step-in, provisions for step-out, liabilities of the public and private partner, etc.

Upon written prior consent by the public authority, the concession/PPP contract may be transferred to a third person which fulfils the suitability requirements set out in the tender documentation on the basis of which the contract was initially awarded, unless those requirements refer to conditions that are no longer necessary for the fulfillment of the contract, due to the fact that the obligations to which such requirements referred have already been observed or executed by the previous concessionaire/private partner. The transfer of the concession contract shall not undermine the quality and deteriorate continuity of contract

execution and performance. When the concessionaire/private partner is a special purpose vehicle, a change in the SPV's ownership or management rights, as a result of the transfer of stocks or businesses shares, cannot be implemented without the approval of the contacting authority and the Ministry of Finance, unless this is a result of regular stock trade on a regulated capital market. The public authority shall request a prior approval from the Ministry of Finance for all planned transfers of the contract, which in any way or manner affect or create the risk of affecting the state budget or budget of other government or local bodies or, which in any way change the financial support as defined by the relevant law.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The concession/PPP contract shall be governed by the laws of the Republic of Albania. Any disputes between the public authority and the concessionaire/private public partner shall be settled through dispute resolution mechanisms, agreed upon by the parties in the concession/private public partnership, including the procedure of international arbitration. In any case, the applicable law shall be the Albanian law. The concessionaire/private partner, its shareholders and other business partners shall be free to choose the appropriate mechanisms (governing law and courts) for settling disputes among themselves.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Albanian legislation does not provide for regular market testing procedure; however, it

may be included in the PPP agreement should the parties agree so.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Facilities constructed under a concession/PPP contract, including the additions and improvements, shall be owned by the public authority, unless otherwise provided for in the contract. In the tender documentation, the public authority should envisage the conditions under which the ownership rights shall be regulated. Following the termination of the contract, the concessionaire/private partner shall be obliged to return, i.e. to transfer the ownership of the facilities constructed under the contract, regardless of whether they have been entirely or partially constructed, reconstructed, preserved, equipped or improved, under the conditions and in the manner set out in the contract, unless otherwise stipulated by the applicable law. All the issues, including conditions relating to ownership rights, as well as required quality standards, shall be subject to analysis of the concession/PPP feasibility study for that contract and set out in the tender documentation, as well as in the contract itself.

The final stage in the PPP contract management is related to the management of transitory procedures at the conclusion of the contract. This stage includes the hand over by the private partner to the public authority of works, services and assets that are the object of the contract. Moreover, this phase includes the performance of all procedures and necessary actions that must be effectuated by parties, eventual payments, hand-over modalities or other aspects. All transitory procedures and actions for the hand-over of contract assets at the moment of the finalization of the contract must be clearly detailed in the PPP contract.

**16. Are there any expected changes or reform to the existing legislation?**

We are not aware of any changes or reform planned to be implemented in the near future which affect the financing or the incentives in a concession/PPP project. It should be noted that there is a draft bill being debated in the relevant Parliamentary commissions related to the following: (i) alternative evaluations; and (ii) approval by law of all project agreements for which implementation period exceeds 4 years. The new draft bill requires that the feasibility study prepared by ATRAKO include also an evaluation of different alternatives of how the project could be carried out in order for the public authority to be able to select the most favorable option. The second suggested amendment relates to the general risk borne by both parties on project contracts which exceed 4 years of implementation. As such, the Parliament should pass a law approving each long-term contract granting thus additional safeguards to the private partner rights by giving the project contract the status of the law.

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The feasibility study regulates the payment mechanism of the PPP project and the amount the concessionaire will pay as a compensation for the concession which will be further detailed in the concession contract. The only exception to the payment is made for health-related projects. The concession fee shall be paid under the rules as defined by the minister of finance on the collection of state budget revenues. The amount and method of payment of the concession fee shall be determined in respect to the subject of concession, estimated value of the concession contract, contract duration, risks and costs that the

concessionaire assumes and expected profit as well as the level of equipment and value of the property awarded under the concession contract by the public authority. The concession contract may define the variability of the amount and/or method of calculation and payment of the concession fee within a particular time period, throughout the concession contract duration period, in compliance with tender documentation and the contract award decision. The concession fees shall constitute the revenue of the state budget of the Republic of Albania and/or the budgets of local government bodies.

Payment mechanisms must determine the remuneration modality regarding the performance of works and services by the private partner as per the contract. Such mechanisms need to lay out clearly the payment modalities, their resources as well as payment terms. Payment modalities of the concession/PPP, terms, tariff amounts and manners, are determined in advance in the feasibility study proportionately with the object, the value and the contract duration, as well as with the value of properties and assets made available by the public authority. Similarly, payment mechanisms must foresee any eventual changes and adjustment in payments, which can depend on the achievement of performance input, risk factors, inflation, etc.

Based on the legal definition, financial support shall mean any type of monetary or non-monetary support and/or the financing provided by the public sector including but not limited to subventions, financial guarantees, or other ones, capital contributions and transfers of property rights.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return for the project company

or sponsors under Albanian law; however, such rate/cap may be included in the PPP agreement should the parties agree so.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

The public authority may enter into a binding commitment on behalf of the state, which provides appropriate assurances in favor of the concessionaire/private partner that it will be protected against the financial consequences of legislation which becomes effective after the entry into force of the project agreement. However, such presumed assurances are subject to the following limitations: (i) the financial consequences must be clearly and precisely described; (ii) the commitment shall terminate upon the termination of the agreement; and (iii) the nature of the future legislation must be described. Such binding commitment shall be approved by the Council of Ministers upon the public authority's request.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

Albanian law does not provide for separate guarantees to be granted by the treasury to the concessionaire or the lenders. Further, the obligations of the administration are not qualified as treasury obligations, whilst the guarantees issued to the benefit of the private partner are usually issued by financial institutions.

**21. Are deductions from the service and availability payments subject to a cap?**

Albanian law does not limit the deductions from the service and availability payments to a

cap amount. However, the project contract may include variation of the terms of the private partner's payment. Further, the amount of rent to be paid by the public authority may be reduced due to applicable penalties resulting from breach of contract by the private partner. The project contract may also provide that the rent to be paid by the public authority may be reduced depending on the amount of ancillary income gained by the private partner.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Such modality is not explicitly regulated by the Albanian law; however, considering that typically the PPP contracts are long-term agreements, the project contract usually incorporates specific clauses related to the amendment of those provisions which might alter the price of the contract or its implementation term, such as tariff-variation and indexation clauses.

Further, as previously explained, the parties may amend the terms of the contract provided that the overall structure of the contract is not materially altered, however, without explicitly setting out the limitations under which the contract is considered to be materially altered. The private partner has the right to be compensated for the incurred damages.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

There exists the possibility for parties to renegotiate the contract terms. Changes as a result of the renegotiation are different from changes applied pursuant to mechanisms preliminarily provided in the contract. In principle, renegotiation mechanisms must be avoided to the extent possible by public authorities, as it changes the initial terms of the contract already agreed upon, creates the risk of distorting the market and may produce

consequences for the free competition. For this purpose, the public authorities must determine to the extent possible in the contract the above-mentioned mechanisms for the regulation of consequences and the contract amendments. Nonetheless, there are cases where the renegotiation cannot be avoided due to unforeseen situations that occur and when such renegotiation is in accordance with the public interest and that of contracting parties.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Even though not explicitly provided by the Albanian law, the latter does not preclude the public authority from entering into direct agreements with the lenders to cover specific issues (cancellation or nullity of the concession/PPP contract) and provides for specific safeguards in order to preserve the lenders' best interests. However, such practices are not usual in Albania, and to date we are not aware of the existence of a direct agreement between the lenders and a public authority.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default termination?**

Besides the lender's step-in right mechanism provided under the Albanian law as explained in detail under answer 12, there is no other legal debt assumption mechanism in place. We are not aware of any case whereby the public authority undertook to assume the debts of the project company towards the lenders.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The early termination of the contract may be caused by several factors, as a consequence of: default or unilateral decision of the private partner; default or unilateral decision of the public authority; prolonged consequences caused by force majeure; or mutual agreement of both parties.

In case of early termination by the default or unilateral decision of the public authority, the private partner shall be indemnified as per the Albanian law provisions in respect of losses incurred, as well as in respect of the loss of profits. In addition, the early termination for such reasons causes also the return of the performance guarantee in favor of the private partner.

It should be noted that the public authority shall indemnify the private partner except to the extent that any such claim has arisen due to breach by the private partner of any of its obligations under the project contract. Thus, the public authority shall not be held liable to pay in all termination scenarios unless it bears the responsibility for breach of contract.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Albanian law does not provide for such type of incentive.

**28. Are there tax advantages available to PPP projects?**

There are no specific tax advantages available to the PPP projects provided in the applicable law.

**29. What are the other incentives available to PPP projects?**

There are no other incentives available to PPP projects provided in the applicable law, with the exception of particular incentives which may be negotiated and included in the project contract for strategic investment.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

During 2016, different PPPs were implemented in Albania pertaining to many economic sectors (e.g., transport, health, infrastructure, renewable energy, telecommunications and environment), as detailed below:

- Health sector: Service agreement, hemodialysis service – EUR 8,5M;
- Transport: ROT model work agreement, rehabilitation of railway infrastructure Fier – Ballsh, Fier – Vlore, – EUR 18M;
- Transport/infrastructure: BOT model work agreement, construction and operation of Shengjin yacht port – EUR 5.4M;
- Transport/infrastructure: build-improve-operate-maintenance model work agreement, construction and operation of Milot-Morine highway – EUR 15M;
- Energy: BOT model work agreement, Pocem HHT project – EUR 104.5M;
- Energy: BOT model work agreement, Arsti HHT project – EUR 1.7M;
- Energy: BOT model work agreement, Viliq HHT project – EUR 1.5M;

- Energy: BOT model work agreement, Kalivar HHT project – EUR 3.5M;
- Infrastructure: BOT model work agreement, build of underground parking – EUR 14.4M; and
- Environment/waste management/energy: BOT model work agreement, build and operation of waste management facility and energy production of Fier city – EUR 27.3M.

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# AUSTRALIA



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### GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP model is commonly used in Australia to develop infrastructure projects. PPPs can be delivered through various delivery models with the most common being the Design - Build - Finance - Operate & Maintain (“**DBFOM**”).

The key distinction that is drawn in the Australian market is between social infrastructure and economic infrastructure as defined below.

- Social Infrastructure* – this generally refers to core services/accommodation type projects (e.g. hospitals, prisons, etc.) where the government pays the private sector based upon availability.
- Economic Infrastructure* – are projects where the private party bears market (demand)

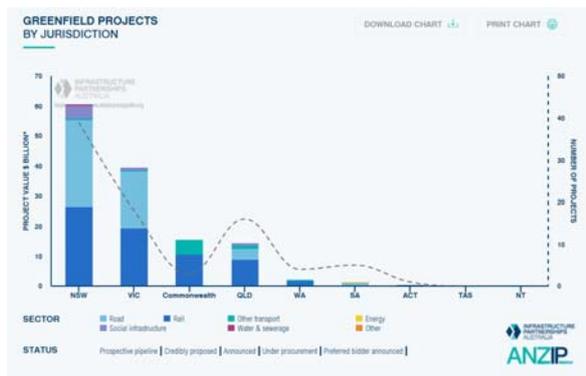
risk and revenues are often derived from users of the facility. This differs from Social Infrastructure projects where the government retains demand risk, traditionally through an availability-based payment mechanism. Examples of economic infrastructure projects include toll-roads.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

In Australia, PPPs are used in various sectors (e.g., transport, health, justice and education) and the PPP market generates billions worth of activity every year.

- 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

There are a number of PPP projects in the pipeline. The diagram below shows the PPP projects in the pipeline, graphed by jurisdiction and sector, as published by IPA’s Australian & New Zealand Infrastructure Pipeline (a resource launched last year by NZ Prime Minister and Australian Treasurer).



**LEGISLATION & REGULATION**

**4. What are the principal laws and regulations? Is there a framework PPP Law?**

Australia does not have a specific legislative framework which regulates PPP procurement. However, in 2008, Infrastructure Australia developed the National PPP Policy and Guidelines, as updated in October 2015 (“**National PPP Guidelines**”). These documents have been prepared and endorsed by Infrastructure Australia and the State, Territory, and Commonwealth governments of Australia, as an agreed framework for the delivery of PPP projects. All Australian, State and Territory Government agencies now apply the National PPP Guidelines to all PPP projects released to the market. The National PPP Guidelines aim to provide a consistent framework that enables public and private sectors to work together to improve public service delivery through private sector provision of public infrastructure and related services. Additionally, most individual State and Territory governments have their own jurisdictional requirements and guidelines for PPPs. These state and territory guidelines are almost identical across each Australian state and territory and are read in conjunction with the National PPP Guidelines.

Each new project will use the National PPP Guidelines as a framework for appropriate risk

allocation between the government and the private sector. However, the government can depart from the National PPP Guidelines where there is a project specific reason to do so.

Note also that some projects (depending on the type of project and the relevant Australian jurisdiction) may require specific enabling legislation. For example, toll road projects in the Australian state of Victoria require specific legislation to enable tolling.

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There are no principal regulatory bodies as such. The different government ministries and agencies act as procuring authorities within the scope of their authority. For example, a highway project in New South Wales would be procured by the Roads & Maritime Services.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

Neither the National PPP Guidelines, nor the state and territory guidelines, place any restrictions on foreign investors, and there are no specific restrictions for foreign investors to develop/operate PPP projects. However, as with all foreign investment into Australia, foreign investors for Australian PPP projects must comply with, and where applicable obtain approval from, the Foreign Investment Review Board (“**FIRB**”) in respect of their investment. The FIRB review framework is a well-established process that seeks to strike a balance between protecting the national interest and ensuring Australia remains an attractive investment destination. FIRB operates in accordance with the *Foreign Acquisition and Takeovers Act 1975* (Cth) and Australia’s Foreign Investment Policy.

The Commonwealth government reviews foreign investment proposals against the national interest on a case by case basis, and if it is determined that a proposal is contrary to the national interest, it will not be approved, or conditions will be applied to safeguard the national interest.

The FIRB notification and approval regime is broad and complex, and applies to many different types of foreign investment. Foreign investors should seek advice with regards to Australia's foreign investment framework and ensure they comply, as a failure to do so may result in the imposition of penalties. As an example, mandatory notification or approval is required for:

- (a) the acquisition of a substantial interest (20% or more) in an Australian corporation with a value of A\$252 million or more. For foreign investors from prescribed countries (e.g. US, New Zealand, Japan and others) investing in non-sensitive sectors a threshold of A\$1.094 billion applies; and
- (b) a direct investment by a foreign government investor.

#### **7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

For Economic Infrastructure, the National PPP Guidelines provide that failure to achieve completion by the date for completion does not necessarily constitute an event of default; however, the government party is entitled to terminate project agreements (subject to cure periods) where the private party fails to achieve completion by a specified sunset date.<sup>1</sup>

<sup>1</sup> Section 10.5.4 of Volume 7 of National PPP Guidelines.

For Social Infrastructure, the National PPP Guidelines provide that the failure to reach completion by the date for completion (or the determination by an independent expert that there are no reasonable prospects of completion being reached by the date for completion) will constitute an event of default (meaning the government can terminate subject to a cure period). Furthermore, the failure to make the infrastructure available by a specified sunset date which will be later than the date for completion (or the determination by an independent expert that there are no reasonable prospects of doing so) will constitute a default termination event (i.e. no cure period will be available to the private party in such circumstances).<sup>2</sup>

#### **8. How are force majeure events defined, and what are the consequences of their occurrence?**

Force majeure events are commonly defined as a limited category of events of exceptional severity which are outside the control of either party and which prevent the private party from performing all or a material part of its obligations under the project agreement. Such events may include: lightning, cyclones, earthquakes or other natural disasters; civil unrest; terrorism; war; fire; flood; explosions; or radioactive, nuclear, chemical or biological contamination (“**Force Majeure Event**”).<sup>3</sup>

To the extent that the impact of a Force Majeure Event could not have been reasonably mitigated by the private party, the private party is using its best endeavors to comply with its obligations under the project agreement and the private party did not cause the Force Majeure Event, the National PPP Guidelines specify that the private party will usually:

<sup>2</sup> Section 10.5.3 of Volume 3 of National PPP Guidelines.

<sup>3</sup> Section 21.1 of Volume 3 of National PPP Guidelines.

- (a) in respect of Social Infrastructure, be granted relief from its obligations (including time relief (during construction) and relief from termination), as determined taking into account the likely effect of the Force Majeure Event; or
- (b) in respect of Economic Infrastructure, the private parties' obligations under the project agreement will be suspended to the extent and for so long as the relevant obligations are affected by the Force Majeure Event.<sup>4</sup>

The government party will not usually be obliged to provide any financial relief (including loss of revenue for economic infrastructure) to the private party during the period of performance relief or period of suspension other than to the extent that the Force Majeure Event is uninsurable.<sup>5</sup> Similarly, the private party will not be liable to compensate the government party for any costs or losses of the government party during the period of performance relief or suspension.<sup>6</sup> However, it is market practice for the government party to cover the private party's debt service costs during the period of uninsurable Force Majeure Event.

When a Force Majeure Event occurs, the government party and the private party must consult with each other to agree appropriate terms to mitigate the effects of the Force Majeure Event, and to facilitate ongoing

performance of the project.<sup>7</sup>

In respect of Social Infrastructure, where the parties cannot agree these terms and the Force Majeure Event is continuing or the affected party is still unable to comply with all or a material part of its obligations under the project agreement, either party may terminate the project agreement on certain conditions. In respect of Economic Infrastructure, usually only the government party will retain this termination right.<sup>8</sup> Although, in recent Economic Infrastructure projects, the private party has been provided the right to terminate the project agreement where the parties are unable to agree an alternative method of redress.

Where a Force Majeure Event results in the termination of the project agreement, the government will usually pay the private party a termination amount.<sup>9</sup>

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Risks in relation to the occurrence of an exhaustive list of political and legal events will be allocated to the government party (known as "**Compensation Events**" for Social Infrastructure projects and "**Key Risk Events**" for Economic Infrastructure projects).

<sup>4</sup> Section 21.2.1 of Volume 3 of National PPP Guidelines; Section 20.2.2 of Volume 7 of National PPP Guidelines.

<sup>5</sup> Section 21.2.5 of Volume 3 of National PPP Guidelines; Section 20.2.6 of Volume 7 of National PPP Guidelines.

<sup>6</sup> Section 21.2.6 of Volume 3 of National PPP Guidelines; Section 20.2.7 of Volume 7 of National PPP Guidelines.

<sup>7</sup> Section 21.3.1 of Volume 3 of National PPP Guidelines; Section 20.3.1 of Volume 7 of National PPP Guidelines.

<sup>8</sup> Section 21.3.1 of Volume 3 of National PPP Guidelines; Section 20.3.1 of Volume 7 of National PPP Guidelines.

<sup>9</sup> Section 21.3.2 of Volume 3 of National PPP Guidelines; Section 20.3.1 of Volume 7 of National PPP Guidelines.

For Social Infrastructure, Compensation Events typically include<sup>10</sup>:

- breach by the government of the project agreement;
- (during the construction phase only) act or omission of the government or a relevant government related entity;
- delays to works being carried out by the government;
- any legal proceedings challenging the validity of a government obtained development approval or the modification, withdrawal, revocation or replacement under environmental and planning legislation of a government obtained development approval;
- project specific change in law which adversely affects only the project;
- industrial action, to the extent that it is a direct result of an act or omission of the government party and occurs only at the site or is specific to the project;
- discovery of an artefact which results in the private party being directed by an authority, court or tribunal to cease carrying out the project; and
- native title claims / heritage claims which result in the private party being directed by a court to cease carrying out the works.

Where the private party can show that there has been a loss and the private party has mitigated its losses, the private party will be entitled to both time and cost relief during the construction phase and both abatement relief

and costs during the operations phase (less any insurance proceeds, damages and costs avoided)<sup>11</sup>.

For Economic Infrastructure, the private party will be entitled to relief for certain events (known as Key Risk Events) that have themselves a material adverse effect on the ability of the private party to either:

- pay the debt financiers the amounts due in accordance with the financing agreements; or
- pay the equity investors their projected equity return.

Possible Key Risk Events may occur in either the construction period or the operating term; however, the majority of possible Key Risk Events are typically events occurring during the operating term given the greater potential to cause a material adverse effect as described above. Typically during the construction period, the parties may rely on a relief event mechanism similar to that described above for Social Infrastructure PPPs.

The specific possible Key Risk Events will be determined on a project specific basis but may include:

- project specific change in law which adversely affects only the Project;
- the occurrence of an uninsurable Force Majeure Event;
- proximate government party works; and
- failure to manage connecting infrastructure (e.g. feeder routes for toll roads)<sup>12</sup>.

<sup>10</sup> Section 17.1 of Volume 3 of National PPP Guidelines.

<sup>11</sup> Section 18 of Volume 3 of National PPP Guidelines.

<sup>12</sup> Section 15 of Volume 3 of National PPP Guidelines.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

If any part of the site, the facility or the works is damaged or destroyed or cannot be used or occupied, the National PPP Guidelines require that, as a starting point, any insurance proceeds received in respect of such damage (including any amounts representing insurance proceeds paid by the government where the relevant event was uninsurable) must be applied towards the cost of reinstatement or repair<sup>13</sup>.

To the extent that the re-instatement is required as a result of an uninsurable Force Majeure Event it would be dealt with as noted in question 11 below.

To the extent that the government party requires the facility to be re-instated to different specifications, this would be treated as a variation entitling the private party to compensation from the government party (and time relief during the construction period).

**11. Is the concept of “uninsurability” recognized in the project agreements?**

Yes, typically an “uninsurable risk” is defined as where:

- (a) insurance is not available in the recognised insurance market with insurers of good standing in respect of that risk and coverage is not available under the *Terrorism Insurance Act 2003* (Cth); or
- (b) the insurance premium payable for insurance of that risk is so high that the

risk is not being insured in the international insurance market with reputable insurers of good standing.<sup>14</sup>

Uninsurable risk provisions included in a project agreement are not intended to provide protection against changes in terms of insurance or levels of deductibles, but are rather intended to offer protection where the cost of insurance is such that there is no reasonable protection available on the market.

The National PPP Guidelines propose the following in relation to the treatment of uninsurable risks:

- (a) if the parties agree, or it is determined, that a risk is uninsurable, and this is not attributable to the actions of the private party or a sub-contractor, the private party will generally not be required to procure insurance against that risk;
- (b) if the uninsurable risk materializes which gives rise to a Force Majeure Event, the parties will negotiate in good faith to come to some arrangement to preserve the project;
- (c) if the uninsurable risk materializes and gives rise to a Force Majeure Event in relation to which the parties are unable to agree a method for preserving the project and ultimately results in the termination of the project agreement, the government party will pay a termination payment to the private party; and
- (d) in certain circumstances, the government party may pay the private party an amount equivalent to the insurance proceeds that

<sup>13</sup> Section 22 of Volume 3 of National PPP Guidelines; Section 21 of Volume 7 of National PPP Guidelines.

<sup>14</sup> Section 23.4.1 of Volume 3 of National PPP Guidelines; Section 22.4.1 of Volume 7 of National PPP Guidelines.

would have been payable had the event had been insurable.<sup>15</sup>

In practice, the government may treat uninsurable risks differently, as it is a matter of negotiation with the private party and will therefore often differ project to project.<sup>16</sup>

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The National PPP Guidelines provide for the government party to step-in and assume all or some of the service delivery obligations of the private party in certain events<sup>17</sup>.

Step-in may occur where there is an emergency, a serious risk to the structure of the facility or the works, the environment, the public or users of the facility, or a serious risk of material damage to public or private property, or where the step-in is necessary to discharge a statutory duty.

For Social Infrastructure in some jurisdictions, the government party may also step in where an event of default remains unremedied or a default termination event or force majeure termination event occurs.

For Economic Infrastructure in some jurisdictions, the government party may also step in where an event of default occurs.

<sup>15</sup> Section 23.4.2 of Volume 3 of National PPP Guidelines; Section 22.4.2 of Volume 7 of National PPP Guidelines.

<sup>16</sup> Section 23.4.2 of Volume 3 of National PPP Guidelines; Section 22.4.2 of Volume 7 of National PPP Guidelines.

<sup>17</sup> Section 26 of Volume 7 of National PPP Guidelines.

Where there are external lenders, it is market practice for lenders to have the right to step-in and cure events of default or default termination events prior to the government party having the right to terminate the project.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The National PPP Guidelines provide for arbitration as a dispute resolution mechanism for both Social and Economic Infrastructure<sup>18</sup>. The National PPP Guidelines provide for arbitration in accordance with the Institute of Arbitrators and Mediators Australia Rules for the Conduct of Commercial Arbitration for Social Infrastructure, and in accordance with the Arbitration Rules of the Australian Centre for International Commercial Arbitration for Economic Infrastructure.

The National PPP Guidelines do not mandate the governing law of project agreements; however, it is generally expected that the law of the State or Territory in which the project takes place will be the governing law for the project agreements.

Accordingly, while it is not prohibited to have an international arbitration process or to have foreign law as the governing law, it is unlikely to be agreed by the government as the government would prefer to have the law of the State or Territory in which the project takes place.

<sup>18</sup> Section 31.4 of Volume 3 of National PPP Guidelines; Section 30.4 of Volume 7 of National PPP Guidelines.

Similarly, in relation to direct agreements with lenders, as these agreements are State project documents, the relevant State governments have a strong preference for the law of the State or Territory in which the project takes place to be the governing law for the project agreements and arbitration to be limited to local arbitration. From a legal perspective, it is also advisable to ensure that the governing law of any direct agreement mirrors that of the underlying project agreement.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

For Social Infrastructure projects, reviewing and market testing of the cost of specified reviewable services during the operations phase are used to keep service costs competitive over the long life of the project and ensure the government achieves value for money<sup>19</sup>.

For Economic Infrastructure projects, there is no mandated market testing process on the basis that the private party is adequately incentivised to ensure the services provided are competitively priced.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

For Economic Infrastructure, if the private party (or the government party) considers that completion has been achieved, they may notify an independent verifier. If the independent verifier considers completion to have been achieved, they must issue a certificate of

<sup>19</sup> Section 15 of Volume 3 of National PPP Guidelines.

completion identifying the date of completion and provide both parties with a list of the residual works to be completed to achieve close-out.<sup>20</sup>

Close-out will have been achieved once the private party has completed the balance of outstanding works and has performed all conditions precedent to close-out under the relevant project agreements. A similar assessment process to that used for completion will be undertaken to assess whether close-out has occurred.<sup>21</sup>

For Social Infrastructure, the certification of completion may be performed by either the government party or an independent certifier. In certain jurisdictions, depending on the nature of the project, a two-stage completion process may be used, consisting of technical completion and commercial acceptance.<sup>22</sup> Where a two-stage process is used, technical completion may be certified by an independent certifier, while commercial acceptance may be certified by the government party (for larger social infrastructure PPPs, it is usual market practice for both technical completion and commercial acceptance to be certified by an independent certifier).<sup>23</sup>

**16. Are there any expected changes or reform to the existing legislation?**

The National PPP Guidelines were last updated in October 2015, and there are no further expected changes or reform to the National PPP Guidelines at the time of writing this chapter.

<sup>20</sup> Section 10.5 of Volume 7 of National PPP Guidelines.

<sup>21</sup> Section 10.5.7 of Volume 7 of National PPP Guidelines.

<sup>22</sup> Section 10.5.1(c) of Volume 3 of National PPP Guidelines.

<sup>23</sup> Section 10.5.4(b) of Volume 3 of National PPP Guidelines.

## FINANCING & INCENTIVES

### 17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?

The payment mechanism for PPP projects in Australia is generally governed by the project agreement, and will substantially differ depending on whether the PPP project is a Social Infrastructure project or an Economic Infrastructure Project, or a hybrid of both.

In relation to Social Infrastructure, the private party generally receives a service fee from the government party for the provision of services on a quarterly basis, with deductions and abatements for non-performance and non-availability<sup>24</sup>. This is commonly known as an availability based payment mechanism. The level of abatement will reflect the severity of the performance failure, effectively allowing the government party to monitor the private party's performance. The service fee may be made up of sub-elements reflecting particular categories of expenses faced by the private party (both fixed and variable).

For Economic Infrastructure, the private party bears market (demand) risk and revenues are often derived from users of the facility<sup>25</sup>. The ability to charge users will often be prescribed and constrained by the project agreement. For example, a project agreement for a toll road will set out the tolls that may be charged, including for different categories of vehicles and sections of the toll road. The private party will generally be restricted in deriving revenue from only those prescribed sources, with alternate sources of revenue to be first

approved by the government party. Depending on the project specific economics, the government party may make a contribution towards the cost of the project. This contribution could be made through a number of mechanisms including a direct payment (i.e. upfront, during or at the end of the construction period)<sup>26</sup>.

The payment mechanism for both social and economic infrastructure will generally include arrangements for indexing either the service fee or the revenues collected (e.g. by indexing the tolls that may be charged)<sup>27</sup>. The project agreement will not usually provide foreign exchange protection (that is, the government party would expect the private party to bear this risk), however in reality this is likely to be built into the private parties' contingency when bidding for the project.

### 18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?

There is no guaranteed rate of return or a cap on the rate of return for the project company or sponsors under Australian law.

The National PPP Guidelines for Economic Infrastructure contemplate a revenue upside sharing regime, whereby the private party shares a percentage of revenue with the government party that exceeds a pre-agreed threshold<sup>28</sup>. Economic Infrastructure projects may also include a regime for compensable enhancements, where the private party shares with the government party any additional revenue received from government party

<sup>24</sup> Section 14 of Volume 3 of the National PPP Guidelines.

<sup>25</sup> Section 14 of Volume 7 of National PPP Guidelines.

<sup>26</sup> Section 14.2 of Volume 7 of National PPP Guidelines.

<sup>27</sup> Section 14.3 of Volume 3 of National PPP Guidelines; Section 14.1 of Volume 7 of National PPP Guidelines.

<sup>28</sup> Section 14.3.1 of Volume 7 of National PPP Guidelines.

actions or policies (e.g. improvements to the transport network which increases the use of the toll road)<sup>29</sup>.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Social Infrastructure projects often contain an availability based payment mechanism, whereby the private party receives a guaranteed service fee from the government party for the provision of services on a quarterly basis, subject to deductions and abatements for non-performance and non-availability. See question 17 above for further information.

However, while there are no government guarantees *per se* issued for PPPs in Australia, the counterparty to each project agreement is usually a government minister on behalf of the relevant State – hence agreed payments are backed by the State’s AAA credit rating. Depending on the project specific economics, the government may make a contribution towards the cost of the project, either by way of payment or by a contribution of works. See question 17 above for further information.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The project agreement is usually executed by the relevant government minister on behalf of the relevant State or, in the case of New South Wales, by the relevant government department but the State of New South Wales executes a PAFA Act (*Public Authorities (Financial Arrangements)*)

<sup>29</sup> Section 14.3.2 of Volume 7 of National PPP Guidelines.

*Act 1987 (NSW)*) Guarantee which guarantees the obligations of the relevant government department under the project agreement.

**21. Are deductions from the service and availability payments subject to a cap?**

Pursuant to the National PPP Guidelines, in relation to Social Infrastructure projects, deductions from the service and availability payments are subject to a cap, being the amount of the service and availability payment for that period. If the deduction is greater than the service and availability payment of the relevant period, the service and availability payment will be deemed zero<sup>30</sup>.

Pursuant to the National PPP Guidelines, in relation to Social Infrastructure projects, where the private party fails to meet the benchmark Key Performance Indicators (“KPIs”) in an economic PPP, it will owe the government KPI credits. There are no caps on the amount of KPI credits the government may receive<sup>31</sup>.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The project agreement provides a process by which the government party may vary the agreement during the construction and operation stages (including variations to the scope of works). These are generally not subject to a cap. However certain types of variations (such as fundamental variations or variations which omit all or almost all the works) may be invalid under common law and result in repudiation of the contract.<sup>32</sup>

<sup>30</sup> Section 14.1.4 of Volume 3 of National PPP Guidelines.

<sup>31</sup> Section 13 of Volume 7 of National PPP Guidelines.

<sup>32</sup> *BAE Systems Australia Ltd v Cubic Defence New Zealand Ltd* (2011) 285 ALR 596; *Chadmax Plastics*

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

The National PPP Guidelines provide for refinancing gain sharing. The government party will usually require that it receives 50 per cent of any refinancing gains during the term of the project, provided that the projected equity return at the time of the refinancing (taking into account any refinancing) is above that reflected in the original base case financial model.<sup>33</sup> There will be certain pre-agreed refinancings to which this gain sharing regime does not apply.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The lenders will sign a direct agreement with the relevant government party which covers specific issues (including termination of the project agreement, subordination of the lender's security if the government party also takes security over the works) and preserves the lenders' interests. The direct agreement will include "step-in" entitlements which enable the lenders to remedy defaults of the private party under the project agreement.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

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*Pty Limited v Hansen and Yuncken (SA) Pty Ltd* (1984) 1 BCL 52.

<sup>33</sup> Section 32 of Volume 3 of National PPP Guidelines; Section 31 of Volume 7 of National PPP Guidelines.

As set out in the National PPP Guidelines, the government party will not typically provide an undertaking to assume the private party's debts in the event of termination.<sup>34</sup> However, the project agreement may entitle the government party (in its absolute discretion) to elect to assume senior debt obligations in lieu of having to pay out senior debt. This may arise, for example, where the private party's interest rate hedges are "out of the money" and the government party would prefer not to bear the break costs of early termination.

If the government party elects to assume some or all of the senior debt, the termination payment payable to the private party will exclude the amounts that would otherwise be payable with respect to the transferred senior debt.

This entitlement to assume senior debt would only arise in the scenario where the government party is required to make a termination payment to the private party (i.e. for a termination arising from government party risk or an uninsurable force majeure event).

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The National PPP Guidelines provide that the government party must pay the private party termination amounts as follows:

- (a) Termination on the grounds of breach by the private party

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<sup>34</sup> Section 26.5 of Volume 3 of National PPP Guidelines; Section 25.4 of Volume 7 of National PPP Guidelines.

In respect of a Social Infrastructure project, a default termination event will occur where the private party, among other things, has not commenced works within the specified time, has abandoned the works, is insolvent, is persistently in breach of its obligations, has not achieved certain levels of KPIs or has not achieved completion by the sunset date. If the government party terminates the project agreement upon a default termination event, the National PPP Guidelines provide that it will pay the private party an amount equal to the fair market value of the project (to be determined by re-tendering the project if a liquid market exists or by an independent person if no liquid market)<sup>35</sup>.

The National PPP Guidelines provide that in respect of an Economic Infrastructure Project, no termination payment is payable by the government party upon termination of the project agreement due to the private party's default<sup>36</sup>.

(b) Termination for voluntary termination by the government party or government party default

Where the government party elects to voluntarily terminate the project agreement or the project agreement is terminated for a government default, for a Social Infrastructure Project, the National PPP Guidelines provide that the government party will pay the private party compensation. Where a project is funded by debt financing, the amount will comprise the following (less any deductions):

- the lower of senior debt owing to financiers and the amount forecast in the financial model to be owing at that time;

<sup>35</sup> Section 26.1 of Volume 3 of National PPP Guidelines.

<sup>36</sup> Section 25.1 of Volume 7 of National PPP Guidelines.

- an amount for equity returns;
- the break costs and all other reasonable costs incurred by the private party as a result of terminating its financing arrangements; and
- employee redundancy payments.<sup>37</sup>

Where the government party elects to voluntarily terminate the project agreement or the project agreement is terminated for a government party default for an Economic Infrastructure PPP, the National PPP Guidelines provide that the government party will pay the private party compensation. Where a project is funded by debt finance, the termination amount will comprise (less any deductions):

- the lower of senior debt owing to financiers and the amount forecast in the financial model to be owing at that time; and
- an amount for equity returns.<sup>38</sup>

(c) Termination for force majeure

If a force majeure termination event occurs in respect of a Social Infrastructure project, the project agreement may be terminated and the National PPP Guidelines provide that the government party will pay the private party compensation. Where a project is funded by debt financing, the force majeure termination amount will comprise the following:

- an amount equal to the senior debt owing to financiers as at termination and any break costs owing to financiers (less any deductions); and

<sup>37</sup> Section 26.3 of Volume 3 of National PPP Guidelines.

<sup>38</sup> Section 25.2.1 of Volume 7 of National PPP Guidelines.

- in certain jurisdictions only, half of equity as shown in the balance sheet of the private party at the time of termination, at par.

In some jurisdictions, where the force majeure termination amount is less than the default termination amount which would have been payable had the PPP agreements been terminated due to the private party's fault, the governing authority may elect to pay the default termination amount instead<sup>39</sup>.

If a force majeure termination event occurs in respect of an Economic Infrastructure Project, the project agreement may be terminated and the National PPP Guidelines provide that the government party will pay the private party compensation (subject to the Project's financing) equivalent to the voluntary termination amount calculated under paragraph (b) of this question.<sup>40</sup> However, current market practice is for the government authority to be required to pay:

- the lower of senior debt owing to financiers and the amount forecast in the financial model to be owing at that time; and
- half of equity as shown in the balance sheet of the private party at the time of termination, at par.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

While the National PPP Guidelines are silent on this issue it is market practice for the government party to require the private party

<sup>39</sup> Section 26.2 of Volume 3 of National PPP Guidelines.

<sup>40</sup> Section 25.2.1 of Volume 7 of National PPP Guidelines.

to create and comply with a local industry participation plan (in accordance with the government policy) as approved by the government party.

**28. Are there tax advantages available to PPP projects?**

There are no specific tax advantages available to the PPP projects provided for in the National PPP Guidelines.

However, where a project is procured by a State or Territory government, often the private party is exempt from paying or reimbursed for paying land based State or Territory tax applied by the procuring State or Territory government<sup>41</sup>.

**29. What are the other incentives available to PPP projects?**

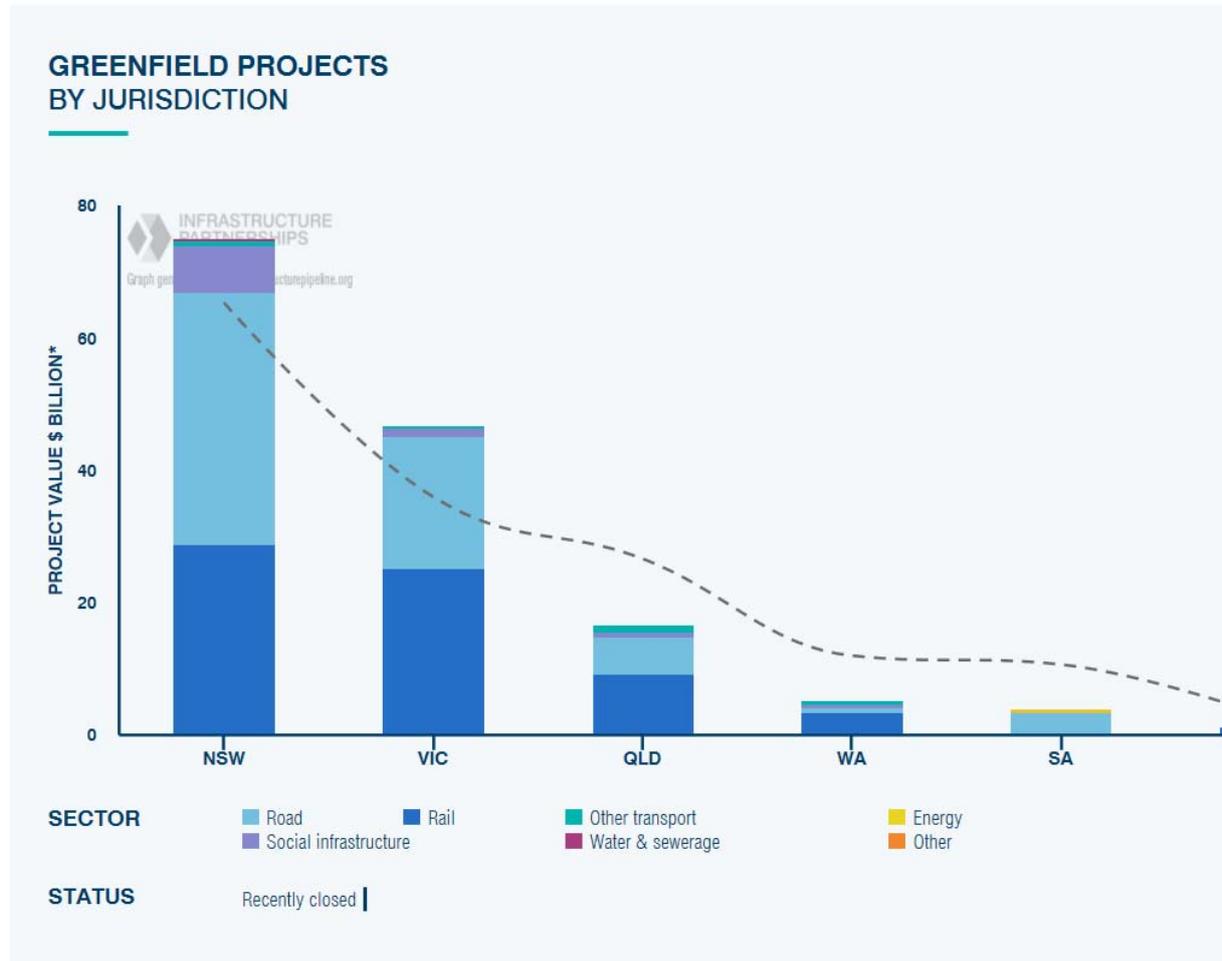
There are no other incentives for the PPP projects provided for in the National PPP Guidelines.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

The diagram below shows the PPP projects recently closed, graphed by jurisdiction and sector as published by IPA's Australian & New Zealand Infrastructure Pipeline. The key highlights for 2017 include:

- New Grafton Correctional Centre in New South Wales;
- High Capacity Metro Trains in Victoria; and
- Gold Coast light rail in Queensland.

<sup>41</sup> Section 14.6 of Volume 3 of National PPP Guidelines; Section 14.5 of Volume 7 of National PPP Guidelines.



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# BANGLADESH



Nasirud Doulah

## DOULAH & DOULAH, Dhaka

### GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

Yes. An earlier PPP model was successfully utilized to develop power and energy projects, and later the model has been further institutionalized in 2010 in the form of a guideline for the development of a diverse range of infrastructure projects in Bangladesh.

The most common form of PPP model adopted in Bangladesh is the Build-Own - Operate-Transfer (BOOT) model with the principal project company (the “Project Company”) sub-contracting the construction, maintenance and service functions.

2. Which sectors apply a PPP model to develop infrastructure projects?

The PPP model has been applied to a wide range of sectors in Bangladesh. At the beginning, it was used only in the power and energy sector, but currently it covers a wide range of sectors, including mass

transit, economic zones, tourism, communication, education, accommodation, waste and healthcare.

3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?

There is a large number of PPP projects in the pipeline that are under development or in the procurement phase, as administered by the Government of Bangladesh (available at <https://www.pppo.gov.bd/projects.php>). Sector wise, the economic zone is the latest addition to the PPP model, as introduced through the Bangladesh Economic Zones Act, 2010.

### LEGISLATION & REGULATION

4. What are the principal laws and regulations? Is there a framework PPP Law?

There was no specific PPP framework in Bangladesh until 2010 when the Government introduced Policy and Strategy for Public-Private Partnership (PPP), 2010. Later in 2015, the PPP Act, 2015 was introduced, which is the current and subsisting principal framework

PPP law. Several other pieces of legislation also address PPP project development as their inherent part, e.g. Bangladesh Economic Zones Act, 2010. In addition, the following regulations have been enacted to support the PPP process and infrastructure development in Bangladesh:

- Procurement Guideline for PPP Projects, 2016
- Guidelines for Unsolicited Proposals, 2016
- Guideline for VGF for PPP Project, 2012
- Guideline for PPPTAF 2012 & Scheme for PPPTAF, 2012
- PPP Screening Manual

Policy and Strategy for Public-Private Partnership (PPP), 2010 (repealed and applicable to attributed projects only); Guidelines for Formulation, Appraisal and Approval of Large Projects, 2010; Guidelines for Formulation, Appraisal and Approval of Medium Projects, 2010; and Guidelines for Formulation, Appraisal and Approval of Small Projects, 2010.

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

For PPP projects, the principal regulatory bodies include:

- Public-Private Partnership Advisory Council (PPPAC)
- Cabinet Committee on Economic Affairs (CCEA)
- PPP Office
- Line Ministry/implementing agency;
- Finance Division; and

- Planning Commission.

The PPP Office acts as the centralized PPP Authority and acts as the central point of promoting the PPP concept. It supports line Ministries in identifying, formulating, selecting, contracting and monitoring the implementation of PPP projects. The PPP Office for PPP will also coordinate among various government and private agencies for fast tracking PPP projects. The PPP Office also monitors PPP projects including the linked components and facilitates risk mitigation measures for private investment.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no such legal restrictions for foreign investors to develop/operate PPP projects; however, the Authority can object to unsuitable shareholders and participants. Furthermore, PPP projects must follow specific procurement processes which can include or preclude foreign investor involvement while floating the invitation to bid. However, foreign investors can always propose unsolicited proposals at any time.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The long-stop date has not been addressed to attributed in the legislations. However, the model PPP documents, which are actually prepared on a project wise basis mostly with the under technical assistance from multilateral investment banks like the Asian Development Bank, ADB, generally includes such a long-stop date provision (commonly 2-6 months following the completion of construction) for the provision to address that the handover or service commencement, which should not generally be allowed to be delayed indefinitely.

and a long stop date is therefore generally included. After the long stop date, which the Authority which the Project Agreement may be terminated by the Authority. In general, the long-stop date is reasonable, taking into account the nature of the project and the length of time the Project Company and its lenders should reasonably be allowed to remedy the situation and should be extended to account for relief events, force majeure, etc.

#### **8. How are force majeure events defined, and what are the consequences of their occurrence?**

There is no PPP specific regulation or guideline which defines force majeure events and their effect. Force majeure events and corresponding measures are addressed in the PPP project documents on a project wise basis. In general, the force majeure events are classified as “Non-Political Event”, “Indirect Political Event” and “Direct Political Event”, if they affect the performance, and such act or event:

- is beyond the reasonable control of the Affected Party;
- the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice; and
- has a Material Adverse Effect on the Affected Party.

Under the model contracts, a “Direct Political Event” includes acts or events by or on account of any Government which are unlawful or unauthorized or without jurisdiction; the revocation of, or refusal to renew or grant without valid cause, any clearance, license, permit, authorization, no objection certificate, consent, approval or exemption required by the Project Company to perform its obligations under the PPP

Contract; and any failure or delay of a Sub-Contractor but only to the extent caused by another Direct Political Event.

An “Indirect Political Event” generally includes an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage; industry-wide or national strikes or industrial action; and any failure or delay of a Sub-Contractor to the extent caused by any Indirect Political Event.

A “Non-Political Event” includes acts of God or events beyond the reasonable control of the Affected Party which could not reasonably have been expected to occur, including: extreme adverse weather or environmental conditions, lightning, earthquakes, heavy rains, cyclones, tempest, whirlwind, landslides, storms, floods, volcanic eruptions, chemical or radioactive contamination or ionising radiation, fire or explosion (to the extent originating from a source external to the Project or not catered for as part of the Works); any judgment or order of any court of competent jurisdiction or statutory authority made against the Project Company in any proceedings, discovery of unforeseen site conditions (including climatic, hydrological, ecological, environmental, geotechnical and archaeological) or Contamination on the Site that would not have been reasonably foreseeable by an experienced construction contractor or service provider and that were not discovered by the Project Company's Site inspections conducted in accordance with the terms of the PPP Contract; and an Uninsurable Risk.

A party to the PPP contract is generally excused from performance of its obligations to the extent it is unable to perform on account of such Force Majeure Event. There are no specific regulations as to the force majeure

costs. However, below is an illustration based on the model PPP contracts:

- Where a Force Majeure Event occurs after the commercial operation date (“COD”) that is an Indirect Political Event and the insurance proceeds recoverable by the Project Company are insufficient to cover the Force Majeure Costs incurred by it, the Project Company shall be entitled to claim a reimbursement from the Contracting Party equal to 50% of such shortfall in insurance proceeds.
- Where a Force Majeure Event occurs after COD that is a Direct Political Event, the Project Company shall be entitled to claim a reimbursement from the Contracting Party in an amount equal to all the Force Majeure Costs properly and reasonably incurred by the Project Company in respect of such Force Majeure Event.

At termination due to a prolonged force majeure, the Authority in general pays to the contractor 100% of the senior debt termination amount plus equity at par minus the amount equal to insurance claims admitted and/or paid by the insurance companies.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

These are also mostly covered under the Force Majeure Events as outlined above. To the extent any political and legal risks are not covered under “Direct Political Event” or “Indirect Political Event”, the only protection available is the protection accorded under the Foreign Private Investment (Promotion and Protection) Act, 1980 and corresponding Bilateral Investment Treaty, if any:

- The terms of any sanction, permission or license granted to a foreign direct investment (FDI) industry shall not be unilaterally changed so as to adversely alter the conditions under which the establishment of such undertaking was sanctioned.
  - In the event of losses of foreign investment due to civil commotion, insurrection, or riot, foreign private investment shall be accorded the same treatment with regard to indemnification, compensation, restitution, or other settlement as is accorded to investments by the citizens of Bangladesh.
  - Foreign private investment shall not be expropriated or nationalized or be subject to any measures having a similar effect except for a public purpose against adequate compensation which shall be paid expeditiously and be freely repatriated.
  - The repatriation of capital and the returns from foreign investment and, in the event of liquidation of industrial undertaking having such investment, of the proceeds from such liquidation is guaranteed.
- 10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

A reinstatement is neither mandated by legislation/regulation nor covered under the model PPP Contract. As per the model PPP Contract, the insurance proceeds would be used to reinstate the facilities subject to the debt facility requirements imposed by the lenders.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

The concept of “uninsurability” is recognized in the model PPP Contract. In the model PPP Contract, “Uninsurable Risk” is defined as a risk against which the Project Company is required to insure under and for which: (a) insurance is not available to the Project Company in respect of the Project in the worldwide insurance market with reputable insurers of good standing in respect of that risk; or (b) the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in Bangladesh.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The legislation does not impose or waive the right of the relevant public authority or the lender to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company. However, such right is generally granted under the Concession Agreement and covered under the model PPP Contract.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Bangladesh courts uphold the choice of foreign law and party autonomy as agreed among the parties while entering into the contract. It was decided in PLD 1964 Dacca 637 that when the intention of the parties to a

contract as to the law governing the contract is expressed in words, this expressed intention determines the proper law of the contract and in general overrides every presumption.

Bangladesh is a member state of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Offshore/international arbitration is permitted to settle disputes under the project agreements and direct agreements with lenders. Parties are free to choose an arbitral tribunal and the underlying rules. Foreign arbitral awards are enforceable in Bangladesh. The court in which recognition or execution of the foreign arbitral award is sought may refuse to enforce such foreign arbitral award:

if the party against whom it is invoked furnishes proof to the Court that

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it;
- the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable causes to present his case;
- the foreign arbitral award contains decisions on matters beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, in absence of such agreement

was not in accordance with the law of the country where the arbitration took place; or

- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or

the court finds that

- the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force in Bangladesh. This includes matters in relation to employment, land and charge, over which Bangladesh courts have exclusive jurisdictions; or

the recognition and execution of the foreign arbitral award would conflict with the public policy of Bangladesh. The public policy issue generally is not invoked in commercial disputes.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

A regular market testing procedure is not envisaged under the legislation or the project agreements to procure the services to be provided by the project company. However, the underlying legislations and regulations provide for a strict evaluation process during the award of the project which is applicable even for unsolicited proposals.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The parties to the PPP Contract generally form

a Joint Coordination Committee for day to day coordination on various issues including acceptance. In addition, the appointment of an Independent Engineer is mandated under the PPP Contract, which is appointed for the project acceptance under due coordination between the Government and the Project Company. In some cases, an Independent Engineer / Technical Adviser also participates as a member of the Testing and Commissioning Committee.

**16. Are there any expected changes or reform to the existing legislation?**

No changes or reform to the existing legislation are envisaged at this moment.

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The payment mechanism envisaged for a PPP project depends on the project type and industry, and the mechanism is included as a schedule to the Project Agreement and operates by way of a unitary charge with non-performance/non-availability deductions as appropriate. The payment mechanism is drafted in a way so as to enable the Authority to monitor the Project Company's performance. It typically does not include a fixed portion. Unless indexation is accounted for in the Project Company's bid, the payment mechanism should include arrangements for indexing the unitary charge so as to allow the Project Company to protect itself against inflation over the course of the Project Agreement. The Bangladesh regime does not specifically contemplate foreign exchange protection, and this is likely to be built into the Project Company's contingency if required.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

The Project Agreement generally does not provide a capped or guaranteed equity investment rate of return (“IRR”) for sponsors except in the termination compensation payable for Authority default or Authority voluntary termination.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Generally, such payment guarantee is not provided by the relevant public authority for PPP projects. However, for PPP projects with a minimum revenue guarantee provision in the PPP Contract, the Government contractually accepts the obligation to compensate the shortfall in such minimum revenue guarantee. In addition, in case the PPP Contract is executed by a Government corporation, the Government guarantees the payment obligations of the public corporation under a separate guarantee agreement.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

In most cases, the PPP Contract is executed by the line ministry or one of its subdivisions as an organ of the Government of Bangladesh as per the Bangladesh Rules of Business 1996, with the obligations of the relevant public authority qualified as State (Treasury) obligations. However, in case the PPP Contract is executed by a Government corporation, e.g. Bangladesh Oil Gas & Mineral Corporation, or Bangladesh Power

Development Board, the Government guarantees the payment obligations of the public corporation under a separate guarantee agreement.

**21. Are deductions from the service and availability payments subject to a cap?**

In most of the payment mechanisms there are typically no caps on deductions except at the level of zero meaning that where deductions exceed the amount of a unitary charge, the excess will be carried forward against future unitary charges, but may not result in a negative unitary charge.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

No. There is generally no cap on the amount or cost of Authority requested variations in general.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Whereas there is no specific provision on such sharing in the legislation or regulations, it is quite typical for the Authority to insist on including a requirement that any refinancing gains are shared with it under the PPP Contract. It has been incorporated as a part of the model PPP Contract.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Yes. As per the model PPP Contract, the Agent (on behalf of the lenders), Authority and Project Company are all parties to the lenders’ direct agreement. The lenders have the right to be informed by the Authority prior to any termination of the Project Agreement, following which a termination standstill period

will be applied. Lenders will also have the right to appoint a temporary step-in entity and ultimately to novate the Project Agreement to a suitable substitute contractor. An undertaking of the Authority to make payments under the Project Agreement directly to the lenders following a Project Company default is sometimes included.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

No. There is no such debt-assumption mechanism contemplated in the model PPP Contract or under current practice.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

These are not covered under the legislation/regulations in general. However, various termination scenarios have been addressed below as per the model PPP Contract:

Termination for Authority default or voluntary termination by the Authority: The Authority is obliged to compensate (i) the senior debt (including hedging) liabilities; (ii) Project Company redundancy payments and sub-Project Company breakage costs (optional); and (iii) the loss of future IRR of the Project Company's shareholders, usually determined by reference to the base case IRR after taking account of the amounts previously paid by way

of distributions and/or under shareholder loans. These payments are adjusted by insurance payments.

Termination for Project Company default: If the lenders choose not to step-in under the direct agreement and sell the project themselves, the project could be retendered, and the compensation shall be the resale value. If there is no liquid market i.e. there is an insufficient number of contractors in the prevailing relevant markets to ensure a fair resale value, the compensation may be based on a NPV calculation taking account essentially of the net present value of all future unitary charges (ignoring deductions) less the net present value of all costs required to carry out the Project Company obligations. If there is no reasonable opportunity to carry out the project only outstanding senior debt (including hedging) liabilities may be paid.

Termination for prolonged Force Majeure: The Authority must compensate the Project Company for (i) senior debt (including hedging) liabilities; (ii) Project Company redundancy payments and sub-Project Company breakage costs; and (iii) equity contributions less amounts previously paid by way of distributions and/or under shareholder loans. Compensation for loss of profit is not included. These payments are adjusted by insurance payments.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Certain local requirements may be included in sub-Project Agreements for the provision of goods and soft-services, although there is no fundamental local content requirement. In addition, an exemption on import duty and value added tax may be unavailable where there is the opportunity to utilize indigenously produced equipment of similar quality.

## 28. Are there tax advantages available to PPP projects?

There are provisions permitting PPP investors to benefit from various fiscal incentives (for e.g. reduced import tax on capital goods, various tax holidays, exemption on sales tax and value added tax etc.) to reduce the cost of implementing the project and to enhance the viability of the project.

Currently the operation of physical infrastructure that is subject to an income tax exemption for the first ten years (100%, 100%, 80%, 70%, 60%, 50%, 40%, 30%, 20%, 10% respectively) include a deep sea port, elevated expressway, export processing zone, flyover, gas pipe line, hi-tech park, ICT village or software technology zone, IT park, large water treatment plant and supply through pipe line, LNG terminal and transmission line, mono-rail, rapid transit, renewable energy, sea or river port, toll road or bridge, underground rail and waste treatment plant. For developers of economic zones, these extend to a 100% exemption for the first ten years and 70% and 30% exemptions respectively for the next two years.

Effective from July 2017 the Government has declared a tax exemption for 10 years for PPP projects for the development of National Highways or Expressways and related Service Roads, Flyovers, Elevated and At-Grade Expressways, River Bridges, Tunnels, River port, Sea port, Airport, Subway, Monorail, Railway, Bus Terminals, Bus Depots, and Elderly care homes. The capital gain from the transfer of shares in such projects and royalties / technical assistance fees have also been exempted. Foreign technicians are entitled to get a 50% tax exemption for three years until the fifth anniversary of the commercial operation date (COD) of the project.

For independent power plants (“IPPs”) commencing production (COD) after January

1, 2015 (other than coal fired), the tax holiday is a 100% exemption during the first 5 years, a 50% exemption during the next three years, and a 25% exemption during the next two years. For coal fired IPPs contracting with the Government before June 30, 2020 and achieving COD before June 30, 2023, the available exemption is 100% for the first 15 years. For power projects, no import duty is charged in case of capital machinery and spares.

The VAT rate on exports is zero. For selected PPP projects, no import duty is charged in case of capital machinery and spares. Furthermore, all receivables by construction contractors, suppliers, legal service providers and consultancy / supervisory firms attributable to PPP projects have been exempted from paying any VAT.

## 29. What are the other incentives available to PPP projects?

Any specific project may get special incentives or other non-fiscal incentives to support the implementation of policy objectives or to enhance the ease and efficiency of delivering the project. These may include exemption from specific provisions related to insurance regulations, banking regulations, foreign exchange regulations, technology transfer regulations, employment of expatriate regulations, etc. In addition, the Government may accord finance assistance to the PPP project in the following manner:

- **Viability Gap Financing:** Viability Gap Financing (“VGF”) is meant for projects where financial viability is not ensured but their economic and social viability is high. VGF could be in the form of a capital grant or annuity payment or in both forms. VGF in the form of a capital grant shall be disbursed only after the private sector company has subscribed and expended the equity contribution required for the project. The VGF is to be

managed by the Finance Division and is for disbursement to the PPP Project Company, upon request by the line Ministry/implementing agency, as per the terms of the concession contract.

- **Infrastructure Financing:** The infrastructure financing is an arrangement for extending financing facilities for the PPP projects in the form of debt or equity through specialized financial institutions such as Bangladesh Infrastructure Finance Fund (BIFF) and Infrastructure Development Company Limited (IDCOL). The government may participate in such financing arrangements through necessary budget provision.
- **Financing against Linked Component:** Depending on the nature of PPP projects, the line Ministry/implementing agency may consider the financing and implementation of linked activities such as acquisition of land, rehabilitation and re-settlement, provision of utility services, construction of approach roads to the

main highways and activities of a similar nature in the following two forms:

- i) the financing will be part of the PPP project. The implementation may be done by the private investor or by the relevant line Ministry/implementing agency, as appropriate; or
- ii) the financing as well as the implementation will be done by the government. The necessary budgetary provision will be kept in the ADP. Implementation will be expedited by the government.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

The aggregate data is yet to be released by the Government and will be available at <https://www.pppo.gov.bd>.

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# BELARUS



Irina Chelysheva

## VLASOVA MIKHEL & PARTNERS

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP model in Belarus is at the early stage of development and it has not been used for the development of infrastructure projects yet, as there was no legal framework for PPP. There is a list of potential PPP projects which are planned to be implemented between 2017 and 2030; however, as of today there is no real practice of PPP projects in Belarus.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

As stated above, there is no real practice of PPP in Belarus. However, the list of potential PPP projects (as referred to in question 1 above) includes projects in energy and transportation infrastructure, social infrastructure and housing, and utilities infrastructure.

3. **Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

As of today, no PPP projects have actually been implemented. According to the national infrastructure plan, in the near future the government plans to implement 100 projects, including 48 social projects, 15 transport projects, 10 energy projects, 12 housing-and-communal projects and 15 construction projects.

### LEGISLATION & REGULATION

4. **What are the principal laws and regulations? Is there a framework PPP Law?**

The Law of the Republic of Belarus of 30.12.2015 N 345-Z “On Public-Private Partnership” (“**PPP Law**”) entered into force as of 02.07.2016. The PPP Law establishes the general framework for PPP in Belarus.

The following implementing regulations have been adopted: Resolution of the Council of

Ministers of the Republic of Belarus of 06.07.2016 N 532 (defines the procedural aspects of preparation of PPP projects and requirements regarding the documents), and Resolution of Ministry of Economy of Republic of Belarus of 27.07.2016 N 49 (includes the requirements for the feasibility study of proposals for the implementation of PPP projects).

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The centralized PPP authority is the National Centre of Public-Private Partnership which operates within the Ministry of Economy.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no specific restrictions for foreign investors to develop/operate PPP projects.

At the same time, according to the PPP Law, there are general restrictions applied to all companies (both domestic and foreign ones). Thus, a company cannot participate in a tender for the conclusion of a PPP agreement if:

- it is in liquidation or in reorganization, its property was seized/attached, or its activity was frozen;
- it was a party to PPP agreements, investment agreements or concessionary agreements with Belarus which were terminated due to non-performance or improper performance of its obligations;
- it does not have the required amount of monetary assets as required in accordance with the tender documentation of the PPP project; or

- it does not comply with other requirements established by the tender documentation of the PPP project (if any)

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

According to the PPP Law, if the Public-Private Partnership Agreement (“PPP Agreement”) stipulates the design and construction of an infrastructure object and the transfer of such object to the ownership of the Republic of Belarus, the PPP Agreement must stipulate the term of construction for the infrastructure object.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

The PPP Law does not define the force majeure events or the consequences of their occurrence. There is also no practice in this regard yet.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The PPP Law includes provisions governing the consequences of change in law. Thus, if legislation is changed in such a way that the private partner is largely deprived of what it was entitled to expect at the conclusion of the PPP Agreement, the parties of the PPP Agreement must amend the PPP Agreement in order to ensure the rights of the private partner (i.e. legal entity or person which concluded the PPP Agreement with the state partner).

The PPP Law does not stipulate directly for political and legal risks (e.g. expropriation, adverse court decisions). However, according

to the PPP Law, private partners have guaranteed rights stipulated for investors by Belarusian legislation as well as guaranteed protection of property and other rights granted by the Belarusian legislation and the PPP Agreements.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The PPP Law does not stipulate the concept of a “reinstatement test”.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

The PPP Law does not stipulate the concept of “uninsurability”.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The PPP Law stipulates that substitution of the private partner is allowed only with the consent of the public partner, unless otherwise stipulated in the PPP Agreement.

Thus, the substitution of the private partner is allowed in the following cases:

- where it is stipulated in the PPP Agreement;
- where it is required for the purposes of national security (inter alia, for the protection of the environment and historical and cultural values), public

order, the protection of morality, health of population and/or rights of other persons; or

- obtaining a court decision on the trigger of liquidation proceedings in respect of a private partner in accordance with the legislation of the Republic of Belarus on economic insolvency (bankruptcy).

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Yes, international arbitration is available for disputes with foreign private partners under the PPP Agreements. Unless otherwise established under the PPP Agreement or an international treaty, disputes can be resolved as follows:

- in ad hoc arbitration, established under the UNCITRAL Arbitration Rules;
- in ICSID arbitration – if the foreign private partner is a legal entity or a citizen of a state who is a signatory to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention, 1965).

It is not possible to have foreign law as the governing law of a PPP agreement. PPP agreements must be governed by Belarusian law.

The PPP law does not stipulate whether international arbitration and foreign law are available for agreements to be executed with lenders. As there is no direct prohibition, we believe that such option is possible. However, there is no real practice in this respect yet.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The PPP Law does not stipulate a regular market testing procedure for PPP projects. At the same time, the PPP law envisages that the private partner of the PPP project must be chosen upon the result of the tender.

There are some cases where a tender procedure is not mandatory, as follows:

- if the need of the PPP project in relation to the infrastructure object is subject to force majeure or other extra-circumstances that determine the impossibility of tender; or
- if the PPP project is related to the provision of defence capability and national security of the Republic of Belarus.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The PPP Law does not stipulate for an acceptance procedure. The implementing regulations have not been adopted yet.

**16. Are there any expected changes or reform to the existing legislation?**

No changes or reforms to the existing legislation are expected.

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The PPP Law does not stipulate specific payment mechanism provisions or provisions on inflation and/or foreign exchange protection. It is expected that relevant provisions will be included in specific PPP Agreements.

However, in relation to the payment mechanism, the PPP Law stipulates that:

- the public partner party to the PPP agreement can be subject to an obligation to provide monetary allocations in the state budget in accordance with legislation and the PPP Agreement;
- the private partner must ensure full or partial financing of its obligations in accordance with the terms of the PPP Agreement;
- financing of the PPP Agreement can be carried out using the assets of the private partner, funds borrowed by the private partner, assets in the budget of the Republic of Belarus, and other resources which are not prohibited by Belarusian legislation.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

No, the PPP Law does not include provisions on the rate of return or a cap on the rate of return for the project company or the sponsors.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

The PPP Law does not include provisions on a payment guarantee provided by the relevant public authority for PPP projects. The PPP Law stipulates that the private investor has guaranteed protection of property rights in

accordance with the PPP Agreement and the legislation of the Republic of Belarus.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

According to the PPP Law, the public partner is the Republic of Belarus represented by its bodies. Based on such definition we believe that obligations of the public partner are qualified as obligations of the Republic of Belarus.

**21. Are deductions from the service and availability payments subject to a cap?**

The PPP Law does not stipulate such caps.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The PPP Law does not stipulate such caps.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

The PPP Law does not stipulate such requirement.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The PPP Law stipulates that public partners, private partners, lenders to the private partners and other entities are entitled to conclude cooperation agreements for the period of execution of the PPP Agreement. Such cooperation agreement can stipulate, inter alia, the following provisions:

- Obligation of the public partner to inform the lenders to the private partner of non-

performance of the private partner's obligations which may lead to termination of the PPP Agreement;

- Procedure regarding a lien on an infrastructure object by lenders of the private partner which was constructed without the use of state budget assets; and
- Right of the lenders to request a change of the private partner in case of non-performance by the private partner of its obligations.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

The PPP Law does not stipulate such mechanism.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The PPP Law does not include provisions on such payment. It is possible that relevant provisions can be adopted in specific PPP agreements.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

The PPP Law does not stipulate such kind of incentives for PPP projects.

**28. Are there tax advantages available to PPP projects?**

The PPP Law does not stipulate tax advantages for PPP projects.

**29. What are the other incentives available to PPP projects?**

The PPP Law does not stipulate other incentives for PPP projects.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

There were no PPP projects implemented in Belarus in 2016.

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# BOSNIA AND HERZEGOVINA



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## GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The financing needs in public infrastructure in developing countries such as Bosnia and Herzegovina (“**BiH**”) significantly exceed the financial possibilities and require considerable debt, and a possible solution to the existing problems is the model of public private partnership.

Many advantages are reflected in the application of PPP models; the level of private sector involvement in public infrastructure begins to grow. We already have several companies whose interest in the PPP model has been confirmed, but it is still slightly unclear where the private sector can invest.

Therefore, the use of the PPP model is not as limited as before 2016. However, there remain a number of problems, such as the inconsistencies between laws in different levels of government.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

Despite the weak and slow development of the BiH economy and the fact that the application of the PPP model is at the initial stages, the PPP model is applied to infrastructure facilities in BiH: in road infrastructure in most cases and partially in the mining and mineral sector, the energy industry and agriculture.

Also, we find the application of the PPP model in the health care sector. Specifically, it was decided to improve the quality of available health services and provide a new level of service to patients, so that the system will include the private health institutions.

- 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

2016 was marked by a number of significant events that are in direct correlation with the BiH economy, and the PPP model has been recognized as one of the most important measures to improve the BiH economy and business environment.

Potentially desirable sectors in BiH, in which the realization of investments through PPPs can be achieved in a shorter period of time,

include: the energy sector (in particular investment in energy efficiency); health services; basic infrastructure (especially transport infrastructure); the sector of ecology (especially the solid waste management sector); and utilities.

We especially emphasize that on 29.5.2017 in Banja Luka was held the first press conference for the presentation of the project “Public-private partnership in BiH”. The project Public-private partnership is a project of the Office of the Coordinator for Public Administration Reform, funded by the Fund for Public Administration Reform, which includes the following points: the project implementation means a development of legislation in the field of PPP, which plans to harmonize existing legislation in this area; training and capacity building of relevant institutions for the implementation of partnerships and training the private sector about the opportunities for business in the context of the concept of PPPs; creating a favorable business environment for businesses; and educating the general public about the benefits of PPPs. The most important fact is that the project implementation will cover the whole territory of BiH and it is envisaged to be implemented by 26.11.2017, with a budget of 2,459,025.00 BAM.

## LEGISLATION & REGULATION

### 4. What are the principal laws and regulations? Is there a framework PPP Law?

In matters that are expressly conferred to the entities for regulation, these entities adopt their own legislation. Even though the entities’ legislation is to a certain extent harmonized, some legal issues may be resolved differently. Therefore, the BiH PPP legislation is a mixed set of state, entity and local authority PPP laws complemented by national, federal and local concession laws.

#### State level:

- Law on Concessions of Bosnia and Herzegovina (Official Gazette of BiH no. 32 of 7 November 2002)

#### Entity level:

Federation of Bosnia and Herzegovina (“**FBiH**”):

- Law on Concessions of FBiH (Official Gazette of the FBiH, number 40/02 and 61/06)

#### Republic of Srpska:

- Law on PPPs (Official Gazette of the Republic of Srpska number 59 of 2 July 2009)
- Law on Concession of Republic of Serbia (Official Gazette of the Republic of Srpska, number 59/13)

#### Local level:

- PPP Law of Sarajevo Canton from 2011
- PPP Law Unsko-Sanski Canton from 2012
- PPP Law Hercegovačko-Neretvanski Canton from 2013

### 5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

The institutional framework for PPP in BiH reflects the complex administrative system in the country with separate institutions at national and sub-national levels:

#### National level:

- Commission for Concession of BiH

FBiH:

- Commission for Concessions of FBiH

## Republic of Srpska:

- Department for Implementation of PPP Projects

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The aim of the Law on Public Private Partnership is to provide a transparent, non-discriminatory and clear legal framework for establishing the conditions under which local and foreign persons may implement PPP projects with public partners in Bosnia and Herzegovina.

When granting concessions, one of the general principles to be applied is the principle of transparency and non-discrimination according to the Law on Concessions of Bosnia and Herzegovina, which will be concretely achieved by the availability of rules and information related to the process of awarding concessions to all interested participants, and the granting of concessions under the same conditions to domestic and foreign entities.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Generally, Public Private Partnership is still very poorly legally regulated in Bosnia and Herzegovina.

The legislation in our country does not stipulate a deadline by which construction must be completed. Neither the Law on Concession nor the Law on PPP regulate this area directly, but a long-stop date for the completion of construction can be freely contracted between contractors. It must be emphasized that there are legal provisions related to the length of the contract between parties.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

Force majeure events are not directly defined in the laws regulating PPP projects. There is an article which states that to resolve disputes between the public and private partners, the legal regulations of Bosnia and Herzegovina will be applied, or the applicable law will be chosen by the parties. In other BiH laws could be found the definition of force majeure events.

In the Law on Obligations, force majeure events are defined as unpredictable events which are not possible to eliminate, such as earthquakes and massive flooding, and neither side is responsible for the consequences arising under the action of force.

According to Article 26 of the Law on Concessions of Bosnia and Herzegovina, the concession contract includes a description of events considered as force majeure.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Strong reforms and the adoption of strategic documents, laws and regulations significantly improve the business environment and create better conditions for foreign and domestic investment. The BiH Constitution, the Constitutions of the RS and FBiH, as well as the Statute of Brčko District BiH, guarantee the protection of private capital and ownership, market economy and protection of foreign direct investment in terms of revocation or limitation, the freedom to conduct economic and other activities, protection against any discrimination and other rights and freedoms, but the laws relating to PPPs do not regulate these issues directly.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The legislation of PPP does not determine what kind of insurance proceeds would be applied to reinstate the facilities or to repay the debt to lenders, but the answers to those question could be found in the project agreements, where the parties can freely regulate those questions.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

Project agreements represent the free will of contractors and we can assume that uninsurability can be recognized in those agreements, but there are no direct provisions in the law regarding uninsurability.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The contract may be terminated if the concessionaire or grantor does not fulfil their contractual obligations. In the period between applying for termination of the contract and resolving the dispute, the public partner takes over the project management in order to fulfil the obligations towards public needs.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Freedom of contract in the Law of Obligations BiH is accepted as one of the fundamental

principles of contract law, and that also comes to the fore in the area of Public Private Partnership.

Therefore, it is possible to have foreign law as the governing law in the settlement of disputes. International arbitration is available in a manner which the Law on Concession BiH envisages that the Concession Contract includes the way of resolving disputes, also including international arbitration to settle disputes if agreed by the parties.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

All Concessions do not have the same economic importance in terms of economic weight and the effects for BiH, and therefore, in accordance with the importance and the size of the concession, a pre-economic feasibility and/or feasibility study is envisaged.

The bodies in charge of activities and the facilities owner make a study of the economic justification for any project that is intended to give the concession prior to a public invitation for potential bidders. The feasibility study shall be submitted to the Commission for consideration and approval.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The manner and deadline for the handover of objects will be defined by the contract between the parties. The obligations of the concessionaire are to build and equip the object for its uninterrupted use and operation.

**16. Are there any expected changes or reform to the existing legislation?**

Since PPP is not fully regulated by the laws in BiH, there has been the adoption of the Law on Public Private Partnerships of BiH and the Federation of BiH. Also, three of the BiH Cantons (Sarajevo, Unsko-Sanski and Hercegovacko-Neretvanski Canton) have made their own Laws on PPP, so it is to be expected that other Cantons will do the same in the future.

PPP is still in the beginning of its legal regulation, so it is safe to say that many legal changes will be made in the future.

**FINANCING & INCENTIVES**

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The legal framework for PPP is inadequate to offer answers to many questions.

There is no legal provision, neither in the Law on Concession for BiH, nor in the Law on PPP in the Republic of Srpska, which regulates the payment mechanism for PPP projects.

The relevant legislation does not provide inflation and foreign exchange protection, but the legal situation for domestic and foreign parties is the same for the whole period of construction or execution of other works and in carrying out activities that are the subject of the concession. Also, the conditions for termination of the contract and the legal consequences in this case are the same for domestic and foreign parties. Although the payment mechanism is not legally regulated for PPP projects, it can be defined and regulated by the contract between the parties.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return for the project company or sponsors directly in the legislation, but the contract between the parties will define penalties and fees for non-fulfilment of the obligations by the contracting parties.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Unfortunately, there is no answer to this question that could be found in the laws relating to PPPs. It is important to recall that PPP is in its initial stages, and that we expect in the future some reforms. So, there is no payment guarantee provided by the relevant public authority for PPP projects.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

There is no legal provision in the PPP legislation in relation to this question. PPP in simple terms is a joint cooperative action of the public sector with the private sector for the provision of public services, construction, or the production of goods. Since the public sector is one of the contractors of concession, the public sector will also be responsible for the non-fulfilment of contracts, but the Treasury does not provide separate guarantees to the concessionaire or to the lenders.

**21. Are deductions from the service and availability payments subject to a cap?**

Deduction from the service and availability payments can only be defined and regulated by

the contract between the PPP parties, because the laws regulating concessions and PPPs do not have legal provisions to this issue.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The public authority as a contractor has the authority to conclude the contract under conditions it considers necessary. Therefore, the public authority may freely request any variations at the construction and operation stages.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

The laws do not stipulate any requirement to share any gains arising from refinancing of the PPP project with the public authority, but the parties may determine otherwise.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The lenders sign a direct agreement with the relevant public authority. Article 26 of the Law on Concessions of Bosnia and Herzegovina.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

There is no debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in case of termination of the project agreement. Article 26 of the Law on

Concessions of Bosnia and Herzegovina stipulates that the Concession Agreement include penalties and fees for the non-fulfilment of obligations by the parties.

Therefore, the public authority is not obligated to assume the debts of the project company to the lenders. In those cases, the project company stays obligated to the lenders.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

Questions about payments by the administration in case of termination of the project agreement depend on the concluded contract. Therefore, the contract will include the procedure in case of termination of the contract before the date of termination and all penalties and fees for non-fulfilment of obligations of the parties.

Payments to the sponsors, the project company and the lenders are not specifically defined by laws, and will accordingly apply as contracted.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Law marked the system of concessions as a form of private, foreign or domestic investments and creates an assumption that results in significantly positive effects for BiH as a whole.

The most important objectives to be achieved by concessions are the placement of a domestic or foreign capital in investment projects; the involvement of local

manufacturing and service capacity; reducing imports and increasing exports; increasing the level of employment; and increasing fiscal and para-fiscal revenues. Incentives for the domestic (local) manufacturing of equipment or materials used in the construction of PPP projects is reflected in the determination of concession fees, where an additional criteria for the calculation of concession fees is the representation of local products and services.

**28. Are there tax advantages available to PPP projects?**

Tax advantages are available to the PPP projects. When granting concessions in BiH, there will be applied the general principle of giving support to concessions projects, and that is reflected in the support of the customs and tax benefits in accordance with the law.

**29. What are the other incentives available to PPP projects?**

One of the other incentives available to PPP projects is when it is estimated that the royalty fee is not of prime importance for a concessions project that is of interest for BiH, the amount of such compensation may be reduced or symbolic.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

There are no reliable reports of the number, investment amounts and sector of the PPP projects developed in the jurisdiction of BiH during 2016 yet.

Many contracts have been cancelled and many contracts are still waiting.

There are also no reliable data about contracts made in the Cantons (of FBH).

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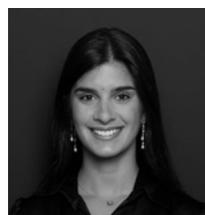
# BRAZIL



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## GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Public-private partnerships in Brazil are commonly used to develop infrastructure projects and are granted by way of a Concession, in which the private party is responsible not only for the operation and maintenance of the assets but also for financing and managing all required investment. PPPs are usually preceded by construction works or refurbishment of the asset, which is returned to the Granting Authority upon termination of the contract.

PPP arrangements in Brazil differ from common concessions – in those concessions, the concessionaire receives concession revenues and tariffs solely from users, not the Government. In a PPP Contract, the Project Company receives all or a part of the revenues directly from the Government, through the Granting Authority.

Concessions in PPP arrangements may be (i) Sponsored Concessions; or (ii) Administrative Concessions. In a Sponsored Concession, the private party is remunerated by tariffs paid by the users, plus a payment from the Granting Authority. In an Administrative Concession, the private party receives its remuneration directly from the Granting Authority.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

PPP arrangements can be used for a number of projects, in infrastructure and other sectors.

PPPs have been typically used for subways, water and sanitation, and sports arenas, but can be, and have been on occasion, used for health care, education, prisons and administrative centers. Services that are exclusive to the Public Administration, such as administrative police, regulation, and jurisdictional authority, cannot be entrusted to the private parties in PPP arrangements.

- 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

The first measure of the new Government upon taking office was the creation of the

Investment Partnership Program (“**PPI**”) with the purpose of increasing the partnership between the private sector and the Government for the implementation of infrastructure projects.

For purposes of the PPI, partnership agreements are those for common concession, sponsored concession, administrative concession, concession regulated by sector legislation, public service permission, public asset leasing, concession of real estate right and other private-public ventures that, by force of the strategic nature and their complexity, specificity, investment amount, long term risks and uncertainties involved, use a similar legal structure.

A total of 90 projects was announced under the PPI, including port terminals, power transmission lines, railroads and highways. These may take the form of PPPs, common concessions or other form of privatization.

New investments have been announced in railways, in consideration for early renewal of the contracts.

New auctions for federal toll roads have been announced, for highways crossing the States of Santa Catarina, Rio de Janeiro, São Paulo, and Minas Gerais, among others.

New leasings for port terminals have also been auctioned, as well as the concessions of four new areas in the ports of Santana (State of Amapá), Itaqui (State of Maranhão) and Paranaguá (State of Paraná).

New projects are expected in the public lighting area and sanitation (two areas where PPPs may be used). BNDES, the Brazilian National Development Bank, is conducting technical studies to structure those projects.

## LEGISLATION & REGULATION

### 4. What are the principal laws and regulations? Is there a framework PPP Law?

PPPs can be regulated on a Federal, State and Municipal level. On a Federal Level, PPPs are regulated by Law No. 11.079/2004 (“**Federal PPP Law**”). The following general rules also apply to the PPPs, when not conflicting with the Federal PPP Law: (i) Law No. 8.666/93 (“**Bidding Law**”), which sets out general rules for bidding procedures and procurements with the Public Administration; (ii) Law No. 8.987/95 (“**Public Concession Law**”) which establishes the regulation of the concessions, permissions and authorizations for the performance of public services; and (iii) Law No. 9.074/95, which sets out rules for the granting and extension of concessions for the performance of public services.

States and Municipalities can also enact their own specific PPP Laws, which have to follow the general rules and provisions of the Federal PPP Law.

### 5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

Federal Decree No. 8.385/05 created a Federal Public Private Partnership Managing Committee (the “**PPP Managing Committee**”) that is comprised of the Ministers of Planning and of Finance and the President’s Chief of Staff, and is responsible for defining which services should be prioritized and regulating the procedures for contracting under PPP arrangements.

PPPs are also regulated by the agency responsible for the sector in which the project

is developed; for instance, the inland transport sector is regulated by ANTT (Federal Law No. 10.233/01), and the maritime transport (Federal Law No. 10.233/01) and civil aviation sectors are regulated by ANAC (Federal Law No. 11.182/05). States and Municipalities may also have their own agencies and/or departments in order to regulate sectors within their jurisdiction (e.g., sanitation is regulated by the Municipalities).

Additionally, Federal Decree No. 8.791/16 approved the internal structure and the chart of the politically appointed positions in the PPI (“**PPI Council**”). The PPI Council defines priority services to be executed via a public-private partnership, coordinates, monitors, assesses and controls the PPI’s actions, and supports the sector measures necessary for those services to be executed, without prejudice to the legal authority of the applicable sector Ministries, bodies and entities. The PPI Council also exercises the tasks attributed to the body managing federal public-private partnerships, the National Council for Integration of Transportation Policies and the National Privatization Council.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The special purpose vehicle (“**SPV**”) that has to be set up for the purposes of developing a PPP should be Brazilian-based, but there are no general restrictions against foreign investors investing in or even holding control over the SPVs.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Project agreements (concession contracts) have long stop dates for completion of the construction, which vary depending on the Project.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

Force majeure is defined by law as the necessary event, whose effects were not possible to prevent or avoid. Each PPP agreement should have an objective allocation of force majeure risks, as provided in the Federal PPP Law. In general, force majeure events, especially when such events are not insurable, are borne by the Granting Authority, and cause a rescheduling of the obligations of the Project Company and/or a rebalance of the economic financial conditions of the Concession Agreement.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Fait du prince, such as change in law and court decisions, should be objectively allocated between the parties in the PPP Agreement, according to the Federal PPP Law. In general, such events are borne by the Granting Authority, and cause a rescheduling of the obligations of the Project Company and/or a rebalance of the economic financial conditions of the Concession Agreement. Expropriation of the PPP Contract, whereby the Granting Authority takes over the service and the Concession, without a default of the Project Company, may only occur with justified public interest and with prior indemnification to the Project Company.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Such determination depends on the provisions of the loan documentation and the PPP

Contract. As a general rule, insurance proceeds are given as a collateral as part of a loan security package. The Project Company may use up to a certain amount of insurance proceeds to reinstate the facilities. Above a certain amount, lenders are usually consulted and decide if the facilities should be reinstated or debt should be repaid.

PPP Contracts may also impose some restrictions on the proceeds being used for anything other than reinstating the facilities, especially if the service rendered by the Project Company is of a public service nature.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

PPP Contracts usually require the Project Company to contract insurance concerning the potential risks to which the projects may be exposed. Uninsurable risks arising from events of force majeure are usually borne by the Granting Authority. There is no legal definition of “uninsurability” in Brazilian law but very recently, toll roads projects in the State of São Paulo adopted the following examples of fortuity and force major events: (i) national and international wars that directly involve the performance of the agreement; (ii) acts of terrorism; (iii) nuclear, chemical and biological contamination, except when caused by actions performed by the concessionaire; and (iv) trade embargos from a foreign country. With respect to these projects, the parties may terminate the agreement in the event of fortuity or force major, with consequence not insurable in Brazil, and whose irreparable effects extend beyond ninety (90) days, or for a defined period agreed upon by the parties and when it is verified that such effects may irreversibly compromise the exploration of the concession.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through**

**step-in and/or substitution mechanisms in case of default of the project company?**

The Federal PPP Law allows the financiers and guarantors (such as bank guarantees) to step-in the PPP Project Company by means of (i) assignment of the control of the company; or (ii) temporary administration of the Project Company to promote the necessary financial restructuring and to ensure the performance of the public services. The PPP agreements may provide the requirements and provisions for step-in rights to be authorized. In this case, the temporary management authorized by the government does not imply financiers’ or guarantors’ liability with respect to taxes, charges, burdens, sanctions, obligations or commitments with third parties, including with the government and employees.

The Public Concessions Law authorizes temporary intervention by the Granting Authority as well as the termination of the PPP by forfeiture, in case of default by the Project Company under the PPP Contract. Forfeiture is to be preceded by a due process of law and the Project Company will be entitled to indemnification for the non-amortized investments.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The PPP agreement shall contain a dispute resolution mechanism, which may include an arbitration procedure. The arbitration must take place in Brazil, and be conducted in the Portuguese language in accordance with the Federal PPP Law. The contracts are governed by Brazilian Law.

- 14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Brazilian Federal Decree No. 8.428/2001 allows for a Procedure for an Expression of Interest (Procedimento de Manifestação de Interesse – PMI) through which the Public Administration requests a project feasibility study, opinions, investigations, data and technical information in relation to upcoming PPP projects. The Public Administration publishes a request for project studies and interested parties from the private sector request the authorization to submit the respective project study. The project study from the authorized parties of the private sector may be used, fully or partially, or not by the Public Administration. Furthermore, interested private sector parties may also propose studies for the structuring of PPPs to the Public Administration as an initiative for future PPPs.

- 15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Acceptance of the facilities is carried out in accordance with the PPP project agreements, as the PPP Law does not provide any specific mechanism. The acceptance process is performed by the Public Administration, which may hire a third party, if so agreed under the PPP agreement.

- 16. Are there any expected changes or reform to the existing legislation?**

No material reforms to the PPP Laws are envisaged at this time.

## FINANCING & INCENTIVES

- 17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

As described above, Concessions in PPP arrangements may be (i) Sponsored Concessions; or (ii) Administrative Concessions. In a Sponsored Concession, the private party is remunerated by tariffs paid by the users, plus a payment from the Administration. In an Administrative Concession, the private party receives its remuneration directly from the Administration. Both tariffs and payments from the Administration are adjusted for inflation, usually on an annual basis, based on indexes and calculations provided for in the PPP Contract, in accordance with the Public Concessions Law. There is normally no foreign exchange protection provided for in the PPP Contract.

- 18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

The law does not provide for guaranteed rates of return or a cap on returns of the Project Company; however, the reestablishment of the financial economic balance is guaranteed under law in case of materialization of events allocated to the Granting Authority.

- 19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

The pecuniary obligations undertaken by the Public Administration under the PPP agreement may be guaranteed by means of: (i) assignment of revenues; (ii) creation or use of

special funds provided under law; (iii) insurance with insurance companies which are not controlled by the Public Administration; (iv) guarantees granted by international bodies or financial institutions which are not controlled by the Public Administration; (v) guarantees granted by equity guarantor funds or state-owned companies created for such purpose; and/or (vi) other mechanisms authorized under the Federal PPP Law.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations under the PPP Contracts are solely of the Counterparty of the PPP Contract, which may be the Federal, State or Municipal Governments or State companies controlled by each of these entities. Treasury may provide guarantees to some of the PPP Contracts, by means of special funds created for backing up PPPs.

**21. Are deductions from the service and availability payments subject to a cap?**

Pursuant to the Federal PPP Law, the project agreements may establish a variable payment in favour of the private partner according to its performance, completion of goals, and the quality and availability standards defined under the project agreements. Project Company is also liable for penalties in case of unavailability of services. There are no general limits or caps to the deductions.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Pursuant to the Public Concession Law, the variations requested by the public authority in relation to the quantifiable aspects of the PPP project are subject to a cap of 25% of the PPP Contract.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Federal PPP Law establishes that the private partner should share with the Public Administration its financial gains arising from the reduction of the credit risk contained under the financing contracted by the Project Company.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Usually lenders do not sign direct agreements with the relevant Granting Authority. However, as the rights of the Project Company under the PPP Contract are granted as collateral to the lenders, it is common practice for the Granting Authority to receive and accept a notice from the Project Company, determining that any payments under the PPP Contracts have been assigned to the Lenders and should be deposited in special Project Company accounts or in accounts that the lenders may determine. The notice may also determine that lenders receive notice upon any request for forfeiture or intervention under the PPP Contract.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Granting Authority does not undertake to assume the debts of the Project Company in the event of termination. It agrees, however, to make all payments related to compensation for termination of the PPP Contract to the

Lenders, as the credit under the PPP Contract is given as a collateral for the lenders.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

In an event of expropriation (taking without a default by the Project Company), the indemnification should be paid prior to the termination. Though this is not a rule, some PPP Contracts provide expressly that, in such case, indemnification should cover at least the outstanding amount of the Loan.

In an event of forfeiture (termination due to a default of the Project Company), indemnification will be paid after the termination, upon a due administrative process, and penalties and losses will be deducted from such amount. The reversion upon the forfeiture of the PPP Contracts will cause payment of the damages for the investment instalments related to the reversible assets not yet amortized or depreciated. From the damages amount, the contractual penalties and damages caused by the concessionaire will be subtracted.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Private companies that use locally manufactured products or services may obtain an incentive composed by a percentage margin (up to 25%) which may be applied to increase its proposed remuneration. The percentage margin increase shall be based on the prices proposed by the other competing private companies that use foreign manufactured

products or services. Such incentive is obtained only if the use of locally manufactured products or services is duly evidenced and fulfils the conditions outlined in the regulation.

**28. Are there tax advantages available to PPP projects?**

The project agreements may provide that the amounts to be paid directly by the Public Administration in favour of the Project Company for the construction and acquisition of reversible assets could benefit from the deferment of the payment of certain federal taxes, as set forth in the Federal PPP Law. Such amounts paid directly by the Public Administration may be, upon receipt, excluded from the calculation basis of certain taxes and thereafter added to the tax basis proportionally to the PPP project term. State or Municipalities may have their own tax advantages for PPP Projects.

Project Companies may also benefit from other general tax incentives available for investments in the infrastructure sector. There are some special tax regimes that may apply depending on the nature of the activities performed by the Project Companies, as well as the regions where the projects are implemented. For instance, there are fiscal incentives for the development of projects in the transportation, ports, energy, basic sanitation, irrigation, O&G exploration, and development of nuclear power plants sectors, among others. Also, investments into certain areas of Brazil, such as the Amazon and Northeast regions, may also benefit from specific federal tax benefits.

**29. What are the other incentives available to PPP projects?**

Brazilian legislation provides incentives for the raising of funds by means of the issuance of debentures through public offerings, for the

purpose of infrastructure financing (“**Long-Term Infrastructure Debentures**”). Pursuant to Article 1 of Law 12.431, interest earned by non-Brazilian holders in connection with Long-Term Infrastructure Debentures could benefit from a 0% withholding rate (as opposed to the 15%/25% regular withholding rate). This benefit should apply only to those securities with maturity terms of more than 4 years, among other conditions.

Pursuant to Law 12.431, Brazilian individuals and corporate entities may also benefit from tax incentives granted in connection with debentures aimed at financing infrastructure projects prioritized by the Brazilian government. Earnings paid to Brazilian individuals are tax exempt, and to Brazilian entities are subject to a 15% withholding rate. The earnings from investment funds with at least 85% of their assets invested in such debentures benefit from the same tax treatment.

### 30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?

Information on PPPs developed in Brazil is not compiled in one database, as these Projects can be developed by Federal, State and Municipal Bodies across the country.

According to a study published on January 26, 2017 under the title “Brazil Private Sector Participation Program of 2016”, produced by “Radar PPP”, a private company founded in 2014 with the intention of organizing the public information available on the national PPP market, a total of 99 PPP agreements were executed since the promulgation of the Federal PPP Law in Brazil, and the sectors with the most PPPs developed are basic sanitation (18), solid waste (12), health (9), urban mobility (6), and public lighting (4).

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# CZECH REPUBLIC



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### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP model is not commonly used on the national level in the Czech Republic. Despite several attempts, only a few large PPP projects were implemented. Currently, the Ministry of Transport attempts to use the PPP model in new road infrastructure projects. In any case, the PPP model is still largely untested on the national level. On the regional and municipal level, the use of the PPP model is not that uncommon and is sometimes used to develop local infrastructure such as leisure infrastructure, water management facilities and senior home facilities.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

In the Czech Republic, the PPP model has recently been chosen by the Ministry of Transport for significant road transportation projects, such as the construction of the D4 expressway. On the regional and municipal level, projects in the sectors concerning water

management facilities, power and leisure infrastructure prevail.

3. **Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

The Czech Government approved a major PPP project for the construction of a 32 km stretch of the D4 motorway in Central Bohemia on January 13, 2016 and instructed the Ministry of Transport to arrange for the relevant tendering procedure.

### LEGISLATION & REGULATION

4. **What are the principal laws and regulations? Is there a framework PPP Law?**

The preparation and implementation of PPP projects is governed by the Act on the Public Procurement Process No. 134/2016 Coll. (“**Public Procurement Process Act**”) which merged previously divided regulation of concessions and public procurement into one law.

Aside from this largely procedural act, Act No. 89/2012 Coll., the Civil Code (“**Civil Code**”) is the principal law regulating the underlying contracts. Finally, acts regulating the powers of local and regional authorities also apply.

We note that several non-binding manuals for PPP projects were issued by various public bodies.

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The Office for the Protection of Competition (“Office”) is responsible for the enforcement of compliance with the Public Procurement Process Act. Besides the Office, the Ministry of Finance has the authority to issue an opinion concerning the conclusion of a PPP contract by a municipality, an allowance organization under the control of a municipality, or a private company established to fulfil public service obligations.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

Certain restrictions may apply to investors from third countries without an international treaty concluded with the EU. Moreover, specific restrictions could apply depending on the PPP project (e.g. in the energy sector). Apart from these, there are no general restrictions on foreign investors according to the Public Procurement Process Act.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The Public Procurement Process Act does not define the long-stop date for the completion of a construction. Such date could be defined by the public authority in the tender documents or the project agreement.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

The Public Procurement Process Act does not define force majeure events or the consequences thereof. Unless specifically

agreed in the project agreement otherwise, the subsidiary rules of the Civil Code apply. Under the Civil Code, force majeure is defined as an “extraordinary, unforeseeable and insurmountable obstacle created independently of party’s will”. When these conditions are met, the party in breach is released from the duty to provide compensation for such breach. However, if the obstacle arose from the parties’ personal circumstances, arose when the party was in default with performing its contractual duties, or was an obstacle which the party was contractually required to overcome, then such obstacle shall not release the party from its duty to provide compensation.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The Public Procurement Process Act does not regulate the allocation of political and legal risks, so it is up to the project agreement to allocate the risks between the parties. According to the Public Procurement Process Act, the selected tenderer (concessionaire) has to bear the operational risk associated with the enjoyment of benefits arising from the provision of services or the use of executed work.

Generally, the risks should be allocated to that party which is in the best position to mitigate them.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

None of the acts stated above provide for reinstatement and it would be up to the parties to include such provisions in the project agreement.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

Usually, the concept of “uninsurability” should be included in the project agreements. It is, however, up to the parties to include such provision as none of the acts stated above requires such clause to be part of the project agreement.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Czech legislation does not regulate step-in rights, so that it is up to the parties to the project agreement to set the applicable rules. The step-in rights of lenders could be typically exercised within the framework of a direct agreement.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The Public Procurement Process Act does not prohibit the application of foreign law as the governing law of concession agreements, with the exception of cross-border joint procurement procedure, which is prohibited for awarding of concessions (therefore also for cross-border PPP projects). Further, the choice of non-domestic law as well as international arbitration instead of national courts is rather unusual for public contracts. It should be noted that the various public bodies which may enter into a PPP project may have internal guidelines which could prohibit the use of foreign law or international arbitration in the agreements concluded by such a body.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Public Procurement Process Act does not provide for a regular market testing procedure. Such market testing procedure could be, however, included in the project agreement.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The process of acceptance of the facilities is not regulated by law and the acceptance is normally done by the public authority itself, or by the public authority in cooperation with an independent technical advisor.

**16. Are there any expected changes or reform to the existing legislation?**

The Public Procurement Process Act was adopted only recently (in 2016) so it is reasonable to expect changes to the current practice of PPP projects, as well as the origination of new case law to reflect the new legislation. Aside from uncertainties related to the application and interpretation of certain provisions of the Public Procurement Process Act, no significant changes in legislation are expected.

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The legislation described above does not provide for an inflation and/or foreign

exchange mechanism; this, however, does not preclude the parties from reaching their own agreement regarding such mechanisms. These mechanisms would be rather typical in more complex PPP projects.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

No, the legislation described above provides neither for any guarantee of return nor for any cap on the rate of return. This, however, does not preclude the parties from reaching their own understanding regarding this matter in the project agreement. We note, however, that the Public Procurement Process Act considers a transfer of operational risk (including risk of loss) to the concessionaire as a core element of a concession. If a mechanism of guaranteed rate of return is inserted, such an agreement could not be considered as a concession agreement under the Public Procurement Process Act.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

The public authority may agree to provide a payment guarantee. Whether or not such guarantee would be provided primarily depends on the nature of the project and the payment mechanism (i.e., whether the public authority itself pays under the project agreement or whether the project company is entitled to earn income on the basis of agreement with the public authority).

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

Whether or not an obligation of the public authority qualifies as a state obligation depends primarily on the character of the relevant public authority. If the public authority is a Ministry or other central governmental body, such obligations would be considered a state obligation. If, however, the PPP project is administered by a local (or regional) authority, it would not be a state obligation but rather an obligation of that specific local (or regional) public authority.

**21. Are deductions from the service and availability payments subject to a cap?**

The deductions and cap (if any) would be subject to agreement in the relevant documentation. In more complex projects, caps on deductions would be negotiated.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Generally, the PPP project has to be procured in accordance with the Public Procurement Process Act which disallows substantial changes to the concluded agreement. In general, it prohibits variations higher than the statutory limit which would increase the expected value of the concession by more than 10%. Further, (i) unforeseeable variation or (ii) necessary variations in cases when change of the tenderer would cause technical or economic reasons and would cause substantial difficulties to the public authority are permitted up to a limit of 50% of the original value. Also, the public authority may reserve the right to variations in tender conditions; such variation may not exceed 30% of the expected value.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

No, there is no statutory requirement. This would be a matter reserved for the parties to agree on.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The direct agreement would typically be signed among the public authority, senior lenders and the project company. Among other rights and obligations, the senior lenders would typically have the right to step into the project under predefined circumstances, such as in cases of a substantial breach of the project agreement by the project company or any of the financing documents so as to prevent the project from failure. The concept of direct agreement has never been, at least to our knowledge, tested before the Czech courts.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

No, there is no statutory debt assumption mechanism under the applicable legislation and any such right would have to be included in the project agreements.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The payments to be made are subject to the agreement of the parties.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No, there are no incentives for local manufacturers available under the PPP projects.

**28. Are there tax advantages available to PPP projects?**

No, there are no tax advantages directly available for the PPP projects.

**29. What are the other incentives available to PPP projects?**

The PPP projects could be eligible to receive other incentives, such as those relating to the specific sector. In case an incentive in the form of a subsidy is available, the corresponding amount should be taken into consideration when discussing the financial terms of the project.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

CONCESSION AGREEMENTS IN PROGRESS TO WHICH LOCAL GOVERNMENT UNITS ARE A PARTY, WITH AN OPINION BY THE MINISTRY OF FINANCE ISSUED ON OR BEFORE 12 JANUARY 2017		
Subject matter of Concession Agreement	Expected contract value of Concession Agreement in CZK	Contribution to overall value of concessionary projects
Water Management	61 840 000 075	87.3%
Power	3 091 184 000	4.4%
Social Services	2 219 377 110	3.1%
Transportation	843 158 900	1.2%
Leisure Infrastructure	2 682 450 318	3.8%
Other	157 062 253	0.2%
TOTAL	CZK 70 833 232 656	100.00%

Source (last access May 16, 2017): <http://www.mfcr.cz/cs/verejny-sektor/podpora-z-narodnich-zdroju/partnerstvi-verejneho-a-soukromeho-sekto/hodnota-koncesnich-smluv-ppp/2017/aktualizovany-prehled-municipalnich-konc-27244>

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# FINLAND



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### GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The so-called traditional PPP model has to-date been applied in four projects in Finland, all of which related to the construction of a highway. The aforementioned PPP projects have all been based on the Design-Build-Finance-Operate (“DBFO”) model.

Although the traditional PPP model has only been applied in a limited number of projects in Finland, variations thereof are quite commonly used to develop infrastructure and various other construction projects. In fact, public-private partnerships are often referred to as “lifecycle projects” (in Finnish: *elinkaarihanke*) in Finland. The lifecycle project concept is, however, broader than that of the traditional PPP model and essentially includes all projects where a single entity, whether publicly or privately owned, completes a project from the planning phase through to the construction phase and provides maintenance services for an agreed period of time, using public or

private financing. It should, however, be noted that private financing has rarely been used in connection with other PPP-type projects than the above-mentioned traditional PPP projects due to tax reasons. In the following, we focus mainly on the traditional PPP model, with lifecycle projects specifically mentioned where relevant.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

As noted in Section 1 above, the traditional PPP model has to-date only been applied in Finland in connection with the construction of certain highways. Application of the PPP model was also proposed in relation to the construction of a railway, but the project was subsequently terminated due to excessive tender cost. Lifecycle models, on the other hand, have been extensively used in connection with the construction of, inter alia, schools, sewage treatment centres and recreational facilities.

- 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

As noted above, the traditional PPP model has to-date only been applied in a handful of projects in Finland, whereas the so-called

lifecycle model is more commonly used. We understand that, in 2017, the lifecycle model is, or will be, applied to, among others, various construction projects relating to schools and care homes, such projects generally being commissioned by the relevant city or municipality. In addition to the lifecycle model, infrastructure projects have increasingly also been structured based on an alliance model. For example, the construction of a new tram line in Tampere, Finland, was originally proposed to be completed as a lifecycle project, but is now being implemented based on an alliance model. At the moment, we are not, however, aware of any new, definite, pure PPP projects in the pipeline of the government. On the other hand, discussion regarding possible areas for application of the PPP model is ongoing, but such projects remain, to our understanding, extremely tentative and potential application of the PPP model thereto is merely based on speculation at this stage.<sup>1</sup>

## LEGISLATION & REGULATION

### 4. What are the principal laws and regulations? Is there a framework PPP Law?

There are no specific regulations which govern only PPP projects, other than certain provisions in Finnish tax legislation. Most PPP projects are, however, governed by legislation regarding public procurement, including the Act on Public Procurement and Right of Use Agreements (1397/2016, as amended, “Public Procurement Act”) and the Act on Procurement Procedures and Right of Use Agreements of Entities Operating in the Water, Energy, Transport and Postal Services Sectors (1398/2016, as amended). In addition to the above, the Companies Act

(624/2006, as amended) and the Securities Market Act (746/2012, as amended) as well as, for example, insurance laws, environmental regulations and general principles of contract law and European Union regulations may also be applicable, depending on the project. To-date, other than the comprehensive reform of Finnish public procurement legislation completed in 2016, most of the legislative changes in Finland relating to PPP projects have been of a technical nature in order to facilitate the implementation of PPP projects and make the PPP model an attractive alternative for investors and procuring entities.

### 5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

There is no centralized PPP Authority or dedicated regulatory body which deals with PPP projects alone. Currently, the Market Court (in Finnish: *markkinaoikeus*) is the court of first instance in respect of public procurement proceedings, whereas the Finnish Competition and Consumer Authority (“FCCA”) (in Finnish: *Kilpailu- ja kuluttajavirasto*) generally oversees compliance with procurement legislation. Any person may report suspected non-compliance to the FCCA, and the FCCA may also initiate investigations on its own initiative. The FCCA may also prohibit the implementation of procurement decisions in whole or in part if it considers that the procuring entity has engaged in direct procurement without relevant basis provided therefore under the Public Procurement Act, provided, however, that such prohibition may not be enforced if a procurement agreement has already been made in respect of the matter. If the procurement entity has made such a direct procurement in respect of a procurement matter exceeding applicable EU or national thresholds (only in respect of certain service procurement) or in respect of a right of use agreement and a procurement agreement has already been made, the FCCA may, subject to certain

<sup>1</sup> Please also refer to Section 28 below regarding the need to harmonize the tax treatment of PPP projects.

limitations, propose the imposition of certain sanctions and penalties to the Market Court.<sup>2</sup>

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no restrictions for foreign investors to develop or operate PPP projects in Finland. In fact, foreign investors have been actively involved in PPP infrastructure projects, working together with local partners. Given the limited size of the Finnish market, the cooperation and participation of foreign investors and other contracting parties is a necessity for ensuring a competitive bidding and procurement process.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

As mentioned above, there is currently no specific legislation on public-private partnerships other than certain tax regulations. Thus, Finnish legislation does not stipulate a

long-stop date for the completion of construction and such date may be freely agreed upon between the contracting parties.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

Finnish law does not provide for a uniform definition of “force majeure events”, although, for example, the Finnish Sale of Goods Act (355/1987, as amended) sets out one definition thereof in relation to payment delays. The contracting parties may freely agree upon how force majeure events are defined. Under project agreements, force majeure events are generally defined as events beyond the contracting parties’ control, the results of which cannot reasonably be avoided or overcome, such as circumstances referred to in the Finnish State of Defence Act (1083/1991, as amended) or the Emergency Powers Act (1552/2011, as amended), including acts of war and revolts, and strikes, boycotts and natural disasters. Exceptional weather conditions have, in some cases, been explicitly excluded from force majeure events as the weather conditions in Finland are by definition harsh and extreme.

The parties are likewise free to agree on the consequences of force majeure events. Project agreements usually stipulate that in case a delay is attributable to a force majeure event, the public authority will reimburse the project company necessary costs for maintenance or a certain percentage of the service payment which would have been paid had there been no such delay. Generally, both parties have a right to terminate the agreement if a delay has continued for a certain predetermined period of time due to a force majeure event.

<sup>2</sup> Please also note that, pursuant to Chapter 14, Sections 132-133 of the Public Procurement Act (please also see Chapter 12, Section 123 of the Act on Procurement Procedures and Right of Use Agreements of Entities Operating in the Water, Energy, Transport and Postal Services Sectors (1398/2016)), the relevant procurement entity may (upon request of an interested party, provided that the request is made within 14 days of the interested party receiving notice of the relevant decision, or of its own initiative, within 90 days of making the relevant decision), under certain circumstances, annul/cancel such erroneous decisions or other resolutions made during the course of the procurement proceedings which have a judicial impact on the position of the bidders, and resolve on such matters again, provided that the original decision or other resolution was based on an error or mistake in applying the law or if new information has come to light, which may impact such decision or resolution or the preconditions for entering into the procurement agreement (in Finnish: *bankintaoikaisu*).

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Finnish law does not include any provisions on such risk allocation and it may be agreed upon between the contracting parties. Legal and political risks are usually shared between the parties during the investment phase but tend to shift towards the project company's responsibility during the maintenance phase. It is generally acknowledged that risks should be allocated to the party best positioned to manage them. In project agreements, the contracting parties may agree upon certain relief events in the event of, for example, substantial changes of law in order to allocate such risk more evenly.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

As mentioned above, there is currently very limited PPP project specific legislation in Finland. Accordingly, Finnish legislation does not provide for a specific reinstatement test in respect of PPP projects and the contracting parties are generally free to agree on the use of insurance proceeds. The contracting parties generally agree on a graduated veto right for the lenders or an obligation to obtain consent from the lenders in respect of the use of insurance proceeds, the scope of such right or obligation to depend on the damage and the amount of insurance proceeds in question. In the event that the insurance pay-out is minor or medium-sized, the proceeds are primarily intended to be used to reinstate and repair the assets, whereas larger insurance proceeds arising from, for example, total destruction of the assets, are usually used for prepayment of debt.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

The concept of “uninsurability” is generally recognized in project agreements in Finland. In the context of PPP project agreements, a risk may, for example, be considered uninsurable if the project company or service provider cannot obtain insurance for such risk from a reliable and reputable insurance company with solid financial standing from the relevant insurance market on agreed terms or if the premium for such insurance is prohibitively high.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

As mentioned above, there is currently very limited PPP project specific legislation in Finland. Project agreements generally allow step-in by both the public authority, in the event of a breach of the project agreement by the project company, and the lenders, in the event of the public authority contemplating terminating the project agreement.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The parties to project agreements and direct agreements may select international arbitration as the method of dispute resolution. Although there is no limitation on the application of foreign law as governing law in PPP project agreements, in practice public authorities generally only tend to enter into agreements governed by Finnish law.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Although existing legislation does not provide for a regular market testing procedure per se, pursuant to the Public Procurement Act, the procuring entity may conduct a market consultation or study before commencing procurement proceedings and provide information on plans and requirements regarding the proposed procurement to suppliers. In completing such market consultation or study and in planning and implementing the procurement proceedings, the relevant procuring entity may rely on the advice of independent experts, other public authorities or suppliers, provided that such actions do not disrupt competition or result in measures contrary to the principles of non-discrimination and openness.<sup>3</sup>

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The contracting parties are largely free to agree on the terms and conditions of the acceptance procedure, including, for example, the appointment of an independent technical adviser for such task. Generally, however, at least the public authority and the project company take part in acceptance inspections after which minutes of such inspection are prepared and ultimately the public authority provides a certificate or other documentation

<sup>3</sup> Please see Chapter 9, Section 65 of the Public Procurement Act and corresponding provisions under Chapter 8, Section 69 of the Act on Procurement Procedures and Right of Use Agreements of Entities Operating in the Water, Energy, Transport and Postal Services Sectors.

declaring that the inspection has been passed satisfactorily or the parties undertake measures to remedy any shortcomings. The specific requirements for passing such inspections and for the acceptance of the facilities are determined based on project agreements.

**16. Are there any expected changes or reform to the existing legislation?**

The European Union directives on public procurement (2014/24/EU and 2014/25/EU) and concessions (2014/23/EU) have been transposed into Finnish legislation as of 1 January 2017<sup>4</sup>, resulting in a major reform of Finnish public procurement laws. No other major reforms or significant changes to existing legislation relating to PPP projects are currently expected, although discussions remain ongoing in respect of potential amendments to Finnish tax legislation in order to harmonize the tax treatment of PPP projects (whether, for example, pure PPP projects or in the form of lifecycle projects) and make the preconditions for using private financing in connection with lifecycle projects a more attractive alternative.

**FINANCING & INCENTIVES**

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

As noted above, there is currently very limited PPP project-specific legislation and the payment mechanism also remains unregulated. Two types of payment mechanisms have been used in the four-above-mentioned traditional PPP infrastructure projects undertaken in Finland to-date: a shadow toll payment mechanism in the first project and an

<sup>4</sup> Please note certain limited exceptions regarding provisions that will only enter into force in 2018.

availability-based payment mechanism in the three subsequent projects. Under the shadow toll arrangement, payment is based on, for example, traffic volume, whereas availability-based payments are made for general availability as well as the availability of the road in question at an agreed service level. The parties generally agree on the specific terms and conditions of the applicable payment mechanism in a service agreement or other project document. Service and availability payments are generally tied to an index, such as the Cost Index of Civil Engineering Works. The contracting parties are generally also free to agree on further protection against inflation.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

As mentioned above, there is currently very limited PPP project specific legislation in Finland. Although the tender and the project documents usually set forth an expected rate of return, there is generally no guaranteed rate of return or cap on the rate of return. However, the tender documents may contain provisions on how the financial benefit arising from changes between the lenders' initial financing commitment and the final terms of financing is shared between the public authority, the project company and the sponsors.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

In general, the State does not provide payment guarantees for PPP projects. See, however, Section 20 below for further discussion regarding the public authority's payment obligations. On the other hand, in projects implemented using the lifecycle model

discussed in Section 1 above, wherein the municipality as public authority generally owns the project company, the contracting parties may agree that the municipality shall provide a payment guarantee.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The State budget, decided on by the Finnish parliament for one budgetary year at a time, may include an authorization, limited in amount and purpose, for a given public authority to enter into agreements and incur expenses, the appropriations for such expenses to be taken from the State budgets for the following years. Although such appropriations may be carried over for use during the two subsequent budgetary years, the amount thereof may not be exceeded.

However, according to Section 88 of the Constitution (731/1999, as amended), everyone has the right to collect their legitimate receivables from the State regardless of the State budget. Furthermore, legal scholars have been of the view that Section 88 of the Constitution would be applicable to contractual liabilities under agreements between State agencies and private parties, although neither Finnish legislation nor legal literature provide further guidance on the application of Section 88 of the Constitution or on any procedures in relation to its application. Provided that the public authority belongs to the central administration of the State and essentially acts as an agency representing the State, it is thus likely that the State would stand behind the obligations of the public authority even if the State budget and specifically the amount of funds allocated to the project in question therein were to be exceeded.

**21. Are deductions from the service and availability payments subject to a cap?**

The contracting parties are largely free to agree on the specific terms and conditions applicable to deductions from service and availability payments. Deductions may be made from service and availability payments based on, for example, quantitative, temporal or qualitative defects in the agreed service. Usually, the contracting parties would also agree on a cap for such deductions.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Although the parties to project agreements are generally free, under the principle of freedom of contract, to decide on any amendments thereto (or, limitations to such right), the Public Procurement Act also contains certain detailed provisions regarding the amendment of procurement contracts during their term. In general, procurement contracts and framework arrangements relating to (i) procurement matters which exceed certain EU thresholds (e.g. EUR 5,186,000 (not including VAT) in respect of certain construction projects); (ii) certain service procurement matters which exceed national thresholds (e.g. EUR 300,000 (not including VAT) in respect of certain service procurement matters); and (iii) right of use agreements (EUR 500,000 national threshold (not including VAT)), cannot be significantly amended during the relevant contract or framework term without conducting a new procurement process as set out under the Public Procurement Act. Such significant amendments include, for example, amendments that considerably extend the scope of the relevant contract or replace the original contracting counterparty with another party.

On the other hand, such restriction does not limit changes to the procurement contract or framework arrangement if, among others:

(i) such amendments are based on contractual provisions which were known at the time of the procurement proceedings and mentioned in the procurement documentation or provisions relating to the amendment thereof and such provisions are clear, precise and unambiguous and do not change the general nature of the procurement contract or framework arrangement; (ii) such amendments are required due to circumstances a diligent procurement entity could not have been able to foresee and do not affect the general nature of the contract; or (iii) the original counterparty needs to perform additional services or tasks which were not included in the original agreement and changing the counterparty is not feasible due to economic or technical reasons and would result in material harm or additional costs for the procuring entity. It should, however, be noted that the value of the changes referred to under (ii) and (iii) above may not exceed 50% of the value of the original agreement.<sup>5</sup>

In addition, the contracting parties generally also agree on cost compensation to be paid in the event that modifications are made to project documentation, the specific details thereof to be agreed on between the contracting parties.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Even though there is no requirement *per se* to share gains arising from refinancing of the PPP project, sharing refinancing gains with the public authority is usually recognized in project agreements, which set forth the terms and conditions for doing so in further detail.

<sup>5</sup> Please see Chapter 14, Section 136 of the Public Procurement Act and corresponding provisions under Chapter 12, Section 124 of the Act on Procurement Procedures and Right of Use Agreements of Entities Operating in the Water, Energy, Transport and Postal Services Sectors.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Lenders usually sign a direct agreement or a tripartite agreement with the relevant public authority and the project company. The lenders generally have a step-in right if the public authority is contemplating terminating the project agreement for reasons attributable to the project company as well as a right to assign the relevant project agreement to a third party approved by the public authority.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Finnish law does not provide for such a mechanism and, to our knowledge, the project agreements that have been used in pure PPP projects to-date do not include any provisions whereby the public authority would undertake to assume the debts of the project company. See, however, Section 26 below for further discussion regarding compensation payable by the public authority upon termination of the project agreement.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The parties to a project agreement are largely free to agree on the repercussions of termination thereof. Project agreements

generally, for example, stipulate termination compensation payable by the public authority to the project company depending on whether termination or rescission of the agreement is due to reasons attributable to the public authority, the project company or without cause. Such compensation may include, for example, the aggregate of service payments due and payable at such time, outstanding debt to the lenders and related break costs as well as the market value of equity, less any termination compensation payable by the project company to the public authority and the fair net value of the property remaining in the possession of the project company post-termination.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

To our knowledge, there are no general incentive schemes, which would apply to domestic manufacturing of equipment or materials for use in PPP projects specifically. See, however, Section 29 below for further discussion regarding incentives payable in relation to PPP projects.

**28. Are there tax advantages available to PPP projects?**

Although no specific tax advantages are available to PPP projects, some legislative changes have been undertaken to facilitate the implementation thereof. The specific provisions regarding PPP projects in the Business Tax Act (360/1968, as amended) and the Value Added Tax Act (1501/1993, as amended) only, however, apply to road and railway projects and only to projects undertaken by the State, thus excluding PPP projects implemented by municipalities. As noted above, there is, however, ongoing discussion that the tax treatment of different types of PPP projects and lifecycle projects should be harmonized.

**29. What are the other incentives available to PPP projects?**

Although there are no PPP project specific incentives per se other than as set out under Section 28 above, PPP projects may be eligible for various types of governmental incentives, subsidies and aid, whether provided on a national or European Union level, such as funding from the European Union's Trans-European Transport Network or, for example, under the European Fund for Strategic Investments.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

As noted above, although variations of the traditional PPP model are relatively commonly applied in Finland, only a few of the projects completed to-date can be considered pure PPP projects in the traditional meaning of the concept. Most recently, in 2015, highway E18 Hamina-Vaalimaa was financed as a PPP project, with investment costs of approximately EUR 265 million and total costs (including planning, construction, maintenance and financing) of approximately EUR 378 million, being significantly less than originally budgeted. Although the lifecycle model, as well as other PPP type project models, have been applied in various projects, we are not aware of the traditional, pure PPP model being applied in any new infrastructure/construction projects in Finland during 2016.

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# FRANCE<sup>1</sup>



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## GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

Two types of public-private partnerships (“PPPs”) are mainly used in France: (i) concession agreements, which have been used for decades, serve to implement major infrastructure projects such as canals, motorways, water distribution systems and toll bridges and (ii) partnership contracts, used since 2004, which are comparable to Private Finance Initiative (PFI) contracts.

Usually, for new projects, when a public authority decides to assign the performance and the operation of a project to a private entity, the Build-Operate-Transfer or Build-

Operate-Own-Transfer models of contract are used.

However, if the public authority is assigning the management of a public service or infrastructure which has already been built, then the Transfer of Operation Rights type of contracts are usually used.

2. Which sectors apply a PPP model to develop infrastructure projects?

In France, PPPs are used in various economic sectors (e.g., transport, health, justice, education, urban equipment, environment, energy efficiency, telecommunications and culture). For example, in 2016, some landmark projects were finalized in the education sphere<sup>2</sup> and with regard to concession agreements, major agreements were executed in the transport sector.<sup>3</sup>

<sup>1</sup> The authors are French lawyers registered at the Paris bar. The answers to the questionnaires relating to Senegal, Morocco, Guinea and Ivory Coast are based on their knowledge of the applicable regulations and on their experience of PPP projects implemented in these countries. The accuracy of these answers remains however subject to the confirmation by lawyers duly registered in the said countries.

<sup>2</sup> E.g. a 28-year partnership contract for the financing, design, construction, and maintenance of a new facility for the *Ecole Centrale Supélec* near Paris by a consortium formed by Bouygues Bâtiment Ile-de-France, Bouygues Energies & Services, FIN Partner I and HICL Infrastructure Company Limited and a 25-year partnership contract for the financing, design, construction, operation and maintenance of two University of Lorraine buildings by Eiffage Concessions.

<sup>3</sup> The A355 Strasbourg bypass motorway concession and the A45 Lyon-Saint Etienne bypass motorway concession.

**3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

Despite the difficult financial climate faced by some public authorities, there are some new PPP projects in the pipeline in France, such as the CDG-Express project for the building and operation of a direct railway line from Charles de Gaulle international airport to the centre of Paris.<sup>4</sup>

## LEGISLATION & REGULATION

**4. What are the principal laws and regulations? Is there a framework PPP Law?**

The transposition of the European directives pertaining to concession agreements and public procurements<sup>5</sup> has substantially modified existing French PPP laws which included several distinct legal regimes (i.e., administrative long-term leases, temporary occupation permits, partnership contracts and concession agreements).

Today, there are two types of PPP agreements: (i) the agreements where the private party is directly paid by the public entity (e.g. partnerships contracts) and (ii) agreements where the private party is paid by the users (e.g. concession agreements).

French PPP legislation has been consolidated and is now categorized into:

- the ordinance No. 2015-899 dated 23 July 2015 (“**Public Procurement Ordinance**”) and its implementing

<sup>4</sup> Law No. 2016-1887 dated 28 December 2016.

<sup>5</sup> Directives No. 2014/23/EU, No. 2014/24/EU and No. 2014/25/EU.

decrees No. 2016-360 and No. 2016-361 dated 25 March 2016 (“Public Procurement Decree”) which transposed the 2014/24/EU and 2014/25/EU public procurement directives<sup>6</sup> and which regulate the partnership contracts; and

- the ordinance No. 2016-65 of 29 January 2016 (“**Concession Agreement Ordinance**”) and its implementing decree No. 2016-86 dated 1 February 2016 (“**Concession Agreement Decree**”) <sup>7</sup>, which transposed the 2014/23/EU directive pertaining to concession agreements and which regulate the concession agreements.

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

One major actor in the PPP sector in France is the Infrastructure Finance Support Service (*la mission d'appui au financement des infrastructures*) (“**Fin Infra**”). The Fin Infra is a dedicated unit within the Ministry of the Economy that assists public bodies in the implementation of partnership contracts.<sup>8</sup> The Fin Infra, which assists and advises public authorities in the preparation and negotiation of partnership contracts, has to issue an opinion about the financial sustainability of each partnership contract.<sup>9</sup> This requirement appears to be an efficient way of avoiding the financial difficulties which can occur during the implementation of partnership contracts.

<sup>6</sup> Directives 2014/24/EU and 2014/25/EU related to public procurement, which were approved by the European Parliament on 15 January 2014 and adopted by the Council on 11 February 2014.

<sup>7</sup> Ordinance No. 2016-65 dated 29 January 2016 about concession agreements.

<sup>8</sup> The Fin Infra was created by a Decree No. 2016-522 dated 27 April 2016 and replaced the “MAPPF”.

<sup>9</sup> Article 76 of the Public Procurement Ordinance.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The legislative framework for PPPs does not place any restrictions on foreign investors. Moreover, direct or indirect discrimination regarding investors or operators coming from European Union member States, from third countries parties to the Government Procurement Agreement of the World Trade Organization<sup>10</sup> or to Free Trade Agreements to which the Union is party is strictly prohibited<sup>11</sup>.

Contracts have to be awarded on the basis of objective criteria that ensure compliance with the principles of transparency<sup>12</sup>, non-discrimination and equal treatment<sup>13</sup>, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous.

Therefore, in accordance with the European directives<sup>14</sup>, public authorities from all members States (including France) must ensure equal treatment and not commit direct or indirect discrimination against economic operators from other Member States.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

<sup>10</sup> [https://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm).

<sup>11</sup> Subparagraph No.98 of the 2014/24/EU Directive regarding Public Procurement contracts opening statement.

<sup>12</sup> Article 18 of the 2014/24/EU Directive regarding Public Procurement contracts.

<sup>13</sup> Article 1 of the Public Procurement Ordinance and Article 1 of the Concession Agreement Ordinance.

<sup>14</sup> Directives No. 2014/23/EU, No. 2014/24/EU and No.2014/25/EU.

The Public Procurement Ordinance and the Concession Agreement Ordinance do not impose a long-stop date for the completion of construction.

However, the legislation clearly provides that both partnership contracts<sup>15</sup> and concession agreements<sup>16</sup> are entered into for a period to be determined in light of the period needed to amortize the investments required.

Regarding the duration of the construction works the most common practice is that the parties determine specific clauses pertaining to the maximum duration of such works in the contracts.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

Under French case law, force majeure events are defined as an event beyond a party's control which the party could not reasonably have provided against before entering into the contract and which the party could not reasonably have avoided or overcome provided that the event is not substantially attributable to the other party. For example, natural disasters, wars or strikes can be categorized as force majeure events.

French law does not expressly provide for the consequences of a force majeure event occurring. To get a sense of the potential consequences it is necessary to consider French case-law and French administrative law principles.

Usually, when this event is temporary, the private entity cannot be held responsible if it does not fulfil its contractual obligations

<sup>15</sup> Article 39 of Ordinance No. 2015-899 dated 23 July 2015 provides that the period of performance has to be determined in the contract.

<sup>16</sup> Article 34 of the Concession Agreement Ordinance.

during the duration of the force majeure event. However, when the event is not temporary, the agreement can be terminated by the judge<sup>17</sup>. In both cases, the public authority can unilaterally decide to terminate the contract.

When the contract is terminated as provided for in the contract, the private entity will be indemnified on the basis of the “useful expenses” theory developed by the French Administrative Supreme Court<sup>18</sup>.

In practice, the parties would define the consequences of force majeure events occurring under the contract.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Article 70 of the Public Procurement Ordinance provides that the parties have to include a specific clause in the partnership contract pertaining to the allocation of risks between the parties. This is modelled on the contractual practice of optimal risk sharing.

As regards concession agreements, French legislation does not impose any obligations. Pursuant to the freedom of contract principle, parties can agree on the consequences of political and legal risks occurring. Nevertheless, it should be noted that the risk regarding the operation of the works (which implies, among other things, real exposure to market fluctuation) are always borne by the private entity (the concessionaire)<sup>19</sup>. However,

<sup>17</sup> « *Synthèse - Délégations de service public* » Stéphane Braconnier, Emmanuel Kalnins, LexisNexis, date of update 27 July 2015.

<sup>18</sup> French Administrative Supreme Court, 19 April 1974, *Société Entreprise Louis Segrette*, No. 82518.

<sup>19</sup> It should be borne in mind that this risk is the main feature of concession agreements and is the main criteria to distinguish concession agreements and partnerships contracts.

for most of the potential political and legal risks, French administrative case-law already defines the consequences of their occurrence.

For example, if the public authority, using the public power (*puissance publique*), enacts an administrative measure which makes performance of the agreement more difficult or expensive for the private entity, the latter can obtain full financial compensation<sup>20</sup>.

Finally, as regards potential cancellation or termination of concession agreements by a judge following a third-party challenge, both the PPP Agreement Ordinance<sup>21</sup> and the Concession Agreement Ordinance<sup>22</sup> define the quantum of financial indemnification applicable. In such cases, the concessionaire may request to be indemnified for the expenses incurred under the concession agreement which have benefitted the public authority, including financing costs.

From a project finance perspective, this express reference to the theory of “useful expenses” (*dépenses utiles*) should be reassuring for both sponsors and lenders.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Under French law the reinstatement test is not envisaged. Pursuant to the freedom of contract principle, such a test may be included in a PPP agreement.

<sup>20</sup> For example, French Administrative Supreme Court, 28 April. 1939, *Cie des chemins de fer de l'Ouest*, Rec. CE 1939, p. 275, RDP 1940, p. 58, concl. Josse (see: *Le Lamy Droit Public des Affaires* 2015, No. 2845)

<sup>21</sup> Article 89.

<sup>22</sup> Article 56.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

The concept of “uninsurability” is not specially defined or provided for under French legislation. However, the parties can freely stipulate that risk above a certain threshold will no longer be insured provided that such article does not conflict with any mandatory provisions under French law.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

French PPP legislation does not expressly provide that step-in clauses or substitution mechanisms have to be included in PPP agreements.

However, in practice, substitution mechanisms are provided by the direct agreements usually entered into between the lenders and the public authority. Indeed, in this type of agreement, it is often provided that lenders are allowed to request, under certain circumstances and with prior approval of the public authority, the private entity’s substitution.

As regards concession agreements, pursuant to French administrative case law, in cases of early termination, the public authority substitutes the private entity to ensure that the public service is still provided to users (in compliance with the public service continuity principle)<sup>23</sup>.

<sup>23</sup> French Administrative Supreme Court, 19 December 2014, No. 368294, AJDA 2014. 2503.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Under French administrative law, arbitration procedures are not authorized for public authorities. This prohibition is a general principle of French public law<sup>24</sup>, but there are some legal exceptions<sup>25</sup>.

As regards concession agreements, according to a decision from the French Administrative Supreme Court dating back to 1966, the parties are not allowed to include arbitration provisions in concession agreements<sup>26</sup>. However, in light of the recent evolution in the legislation,<sup>27</sup> it is not certain that such prohibition is still effective.

Partnership contracts are one of the legal exceptions and an arbitration procedure can be provided for in the agreement. Under Article 90 of the Public Procurement Ordinance, an arbitration procedure can be used to settle disputes arising during the performance of the partnership contract. However, it is specified that only French law can apply to the arbitration procedure, and when the public authority is the French State, Article 90 states that the arbitration procedure has to be authorized by decree.

<sup>24</sup> French Administrative Supreme Court, Opinion, 6 March 1986 No. 339710.

<sup>25</sup> Exceptions are listed in Article L. 311-6 of French Code of Administrative Justice.

<sup>26</sup> French Administrative Supreme Court, 20 May 1966, *Sieur Meunier*, No. 58839, Rec. CE 1966, p. 343.

<sup>27</sup> As regards specifically the French legislation regarding the partnership contracts (i.e. Article 9 of the Public Procurement Ordinance).

PPP agreements are always governed by French law and parties cannot agree otherwise<sup>28</sup>.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

French legislation does not provide for a regular market testing procedure. However, according to the freedom of contract principle, such test probably may be included in a PPP agreement.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The acceptance procedure is governed by the provisions of the French Civil Code<sup>29</sup>.

Under these provisions, the acceptance of the work (*réception*) is the act by which the owner of the work declares that it accepts the work with or without reservation.

The acceptance occurs at the demand of the more diligent party, if not amicably, then judicially. In any case, it is a unilateral act of the owner which shall be pronounced adversarial.

The perfect completion period (*garantie de parfait achèvement*) is a period of one year, after the acceptance of the works.

**16. Are there any expected changes or reform to the existing legislation?**

The transposition of the European directives pertaining to concession agreements and public procurements has substantially modified the existing French PPP laws which included several distinct legal regimes with strong specificities (i.e., administrative long-term leases, temporary occupation permits, partnership contracts and concession agreements).

While preserving certain specificities of French law, the new provisions aim to simplify, clarify and unify the existing legal framework governing the award and implementation of concession and partnership contracts in accordance with recent French and European case law.

In light of the recent major reform of the French PPP legal framework, no substantial changes are expected in the near future.

However, it should be noted that to further clarify the legal regime which applies to public law contracts, the French Economy Ministry decided to seize the opportunity provided by the 2014 European directives transposition to simplify the French Public Procurement Code and to prepare a new code encompassing all public law contracts (including partnership and concession agreements) that should be published in the next few months<sup>30</sup>.

<sup>28</sup> Article 9 of the Public Procurement Ordinance and Article 8 of the Concession Agreement Ordinance provide that the listed public authorities are subjected to the Ordinances' provisions when they use PPP agreements.

<sup>29</sup> Article 1792-6 of the French Civil Code.

<sup>30</sup> <http://www.boamp.fr/Espaceacheteurs/Actualites/Calendrier-de-la-reforme-des-marches-publics-2016>.

## FINANCING & INCENTIVES

### 17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?

Under a concession agreement, the operating risk is transferred to the concessionaire and this transfer necessarily implies a real exposure to market fluctuations. As such, the compensation of the concessionaire is linked to the results of such operation. Therefore, the concessionaire's compensation mainly arises from service users<sup>31</sup>.

However, this requirement does not prevent the payment of subsidies by the procuring authority. Given the requirements that could be imposed by the concession agreement, maintaining the financial viability and economic balance of the concession agreement is necessary so that the concessionaire does not apply higher rates to service users. For example, significant financial contributions are paid in concession projects related to rail infrastructure such as high-speed rail and motorways. Local authorities usually subsidize public transport or school catering concessions.

Apart from the revenue collected from service users and subsidies granted by public authorities, the concessionaire may also earn additional revenues (e.g., proceeds from side activities such as advertising and fines).

As regards partnership contracts, they are characterized by the payment of rents by the public authority to the private partner<sup>32</sup> throughout the term of the contract. This remuneration is determined for the services provided by the private entity (works, intangible investments, supplies and services)

<sup>31</sup> Article 32 of the Concession Agreement Ordinance.

<sup>32</sup> Article 83 of the Public Procurement Ordinance.

and is divided into several parts. One part represents the compensation of the private entity for the supply of equipment and the cover costs for servicing the loans contracted to carry out the investment, financing costs, taxes and fees that the private entity pays on its investments. The compensation also takes into account the services provided by the private partner. Finally, the compensation of the private entity must cover the maintenance costs and expenses for major maintenance and the renewal of certain infrastructures.

Partnership contracts should define the terms of the rents calculation and disbursement of the payment, which may be monthly, quarterly or half-yearly.

Under partnership contracts, the compensation is not necessarily fixed as it can take into account:

- (a) the completion of performance objectives – the compensation of the private entity may depend on performance targets set in the partnership contract. Premiums or bonuses may be paid (e.g., if the works are completed before the date specified in the contract). Likewise, penalties (e.g., in case of a delay in completion) may reduce the amount of the rent to be paid by the public authority; and
- (b) the collection of ancillary revenues – French law allows the private entity to develop structures and equipment in order to benefit from complementary incomes.

Finally, the Public Procurement Ordinance specifies that should a partnership contract include the transfer of a public service management, the contractor could receive direct payments from service users on behalf of the public authority responsible for this public service. As such, the cash flows of each party will have to be clearly distinguished in order to avoid any confusion with the legal framework applicable to concessions.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return for the project company or sponsors under French law. However, pursuant to the freedom of contract principle, such a mechanism may be included in PPP agreements.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

There are no state guarantees per se issued for PPPs in France.

However, in early 2009, the State established a guarantee system for priority PPP projects in response to the financial crisis, which was affecting a number of very large PPPs. The Fin Infra examined four projects worth a total of over €13 billion, but only one project – under a concession agreement scheme – was selected to benefit from the guarantee: the high-speed railway – *Sud Europe Atlantique* – which was the biggest rail PPP ever launched in Europe (with total financing of €7.8 billion). This concession agreement was granted by *Réseau Ferré de France* to a consortium led by VINCI and the State guaranteed a €1.06 billion senior secured debt to the lenders.

Unlike the State, local authorities may guarantee loans assumed by the project company under a concession agreement or a partnership contract.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the administration are not qualified as Treasury obligations. Furthermore, French law does not provide for separate guarantees to be granted by the Treasury to the concessionaire or the lenders. It should be noted that such guarantees are not usually provided in partnership or concession agreements. The guarantees issued to the benefit of the private partner are most of the time issued by financial institutions.

**21. Are deductions from the service and availability payments subject to a cap?**

Under the Public Procurement Decree, partnership contracts may include variation of the terms of the private entity's payment<sup>33</sup>. Furthermore, as outlined in question 16, under partnership contracts, the payment of the private entity is linked to performance objectives and therefore penalties may reduce the amount of the rent to be paid by the public authority.

It should be noted that the rent paid by the public authority may be reduced depending on the amount of ancillary revenues collected by the private entity.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Being long-term agreements, PPP agreements often include specific clauses for the review of contractual terms, such as tariff-variation clauses, indexation clauses and meeting clauses.

Amendments can also be entered into, but only if the overall structure of the contract is not materially altered.<sup>34</sup> Administrative case law protects the co-contracting party of the administration. In fact, the economic balance of the contract must be maintained and the

<sup>33</sup> Article 161 of the Public Procurement Decree.

<sup>34</sup> Article 65 of the Public Procurement Ordinance.

private co-contractor must be adequately compensated for the damages suffered.

The Concession Agreement Decree clarifies the legal framework applicable to concession agreements' amendments by setting out six circumstances in which valid modification of the concession agreement is permitted<sup>35</sup>.

For example, the Concession Agreement Decree provides that concession agreements may be amended provided that the amendment amount is less than (i) the European threshold published in the Official Journal of the French Republic and (ii) 10% of the original concession agreement<sup>36</sup>.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Under French law, there is no requirement to share any gains from refinancing of the PPP project with the public authority. However, it is a common practice to include in PPP agreements refinancing gains sharing clauses. Generally, the refinancing gains sharing takes account of the rate of return (*taux de rentabilité interne*) and the term of the contract<sup>37</sup>.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The public authority (including the State) may enter into direct agreements with the private party and its lenders to cover specific issues (cancellation or nullity of the concession agreement or the partnership contract) and preserve the lenders' interests.

<sup>35</sup> Article 36 of the Concession Agreement Decree.

<sup>36</sup> Paragraph 6 of the Article 36 of the Concession Agreement Decree.

<sup>37</sup> Decree No. 2011-85 of 21 January 2011 approving the concession agreement entered into for the operation of the motorway A 63.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Both the Concession Agreement Ordinance<sup>38</sup> and the Public Procurement Ordinance<sup>39</sup> provide that the public authority may assume the useful financial expenses incurred by the private entity in case of judicial termination or the cancellation of the contract subsequent to a third-party claim. However, the legislation does not specify whether the payable financial expenses cover the debts of the project and in particular the full amount of equity. In any case, the parties shall agree on such a mechanism.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The provisions for early termination are the same for partnership contracts and concession agreements.

(a) Termination on the grounds of general interest

Should the public authority be a public entity, it cannot waive its unilateral right to terminate a public law contract on the grounds of general interest<sup>40</sup>. The quantum of the indemnity owed

<sup>38</sup> Article 56 of the Concession Agreement Ordinance.

<sup>39</sup> Article 89 of the Public Procurement Ordinance.

<sup>40</sup> French Administrative Supreme Court, 2 May 1958, Distillerie de Magnac-Laval, Rec. p. 246.

to the private entity is the highest of all termination cases.

(b) Termination for contractual breach by the public authority

To terminate a concession agreement on the basis of a contractual breach by the public authority, the concessionaire must request such termination before the relevant administrative jurisdiction. The concessionaire would then be entitled to be indemnified in accordance with the principles established by administrative case law, namely, to be indemnified in respect of losses suffered, as well as in respect of the loss of profits. Recent case law confirmed the possibility to include in a contract, not related to the performance of the public service, a provision allowing the private entity to terminate the contract for a contractual breach by the public authority.<sup>41</sup> Consequently, certain partnership contracts not related to the performance of the public service could potentially include such contractual provision.

Except for these types of termination, the terms and conditions of other forms of termination can be freely negotiated by the parties.

(c) Termination for force majeure

If a force majeure event or an unforeseen event occurs, the PPP agreements may be terminated and the contract will usually provide that the private entity will be indemnified on the basis of the “useful expenses” (*dépenses utiles*) theory developed by the French Administrative Supreme Court. As it is a jurisprudential theory, it is still difficult to determine which costs are deemed to be useful expenses and consequently are to be indemnified. However, financial expenses

should be indemnified.<sup>42</sup>

In any case of termination, it is preferable to contractually provide the financial consequences and terms of payment of owed indemnities in the contract.

One of the major points of both the Public Procurement Ordinance<sup>43</sup> and the Concession Agreement Ordinance,<sup>44</sup> is the enshrinement of the principle of indemnification of financial expenses incurred under the partnership or the concession agreement in case of judicial cancellation following a third-party challenge.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

The Public Procurement Decree provides that during the awarding procedure, the public entity can introduce criteria or restrictions based on (i) the origin of all or part of the works, supplies or services offered in the tenders or (ii) on the nationality of the bidders<sup>45</sup>.

**28. Are there tax advantages available to PPP projects?**

There are no specific tax advantages available to the PPP projects provided for in the Public Procurement Ordinance and the Concession Agreement Ordinance.

<sup>41</sup> French Administrative Supreme Court, 8 October 2014, Société Grenke Location, No. 370644.

<sup>42</sup> The French Administrative Supreme Court has recently held that financial expenses can be considered as useful expenses (French Administrative Supreme Court, 7 December 2012, *Commune de Castres*, No. 351752). However, it must be specified that in this case, the concession agreement was not terminated on the grounds of a force majeure.

<sup>43</sup> Article 89 of the Public Procurement Ordinance.

<sup>44</sup> Article 56 of the Concession Agreement Ordinance.

<sup>45</sup> Article 3 of the Public Procurement Decree.

**29. What are the other incentives available to PPP projects?**

There are no other incentives for the PPP projects provided for in the Public Procurement Ordinance and the Concession Agreement Ordinance.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

In France, PPPs are implemented in many economic sectors (e.g., transport, health, justice, education, urban equipment, environment, energy efficiency,

telecommunications and culture) for more than €100 billion of activity each year.

Despite a climate of ideological distrust and the decreasing number of executed agreements due to the weak economic climate, a closer look at 2017 activity seems to indicate a possible renewal of confidence in PPPs for the coming years.

However, even though few PPP projects were implemented in France during year 2016, it should still be noted that some landmark projects were finalized that year in the education sphere and in the transportation sector.<sup>46</sup>

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<sup>46</sup> Please refer to answers to questions Nos. 2 and 3.

# GEORGIA



**Sandro  
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## MGALOBlishvili KIPANI DZIDZIGURI (MKD)

### GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Despite having no PPP law or comprehensive Concession law, PPP model is still quite frequently used to develop infrastructure projects in Georgia.

As the practice shows, Build Operate Transfer and Build Own Operate types of PPP model are the most commonly applied ones. In sport infrastructure development Build Transfer Operate scheme is also applicable.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

So far BOT agreements have been used for development of transport infrastructure (such as sea ports and airports); BOO is mainly used for power generation (mainly including HPPs) while BTO is considered to be applied for development/rehabilitation of sport infrastructure. In addition to transport, energy and sport infrastructure, PPP model has

recently been applied for the development of healthcare infrastructure; however, the project is on an early stage at the moment.

- 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

The largest PPP projects which is being planned and implemented at this stage is Anaklia Sea Port (details can be found at <http://www.anakliadevelopment.com/>). In this case BOT model is applied. Also, there are interesting plans related to the development of sport infrastructure (details can be found at <http://ppp.ge/en/construction-sports-infrastructure-scale-unparalleled-georgia-implemented-correct-public-private-partnership-model/>).

### LEGISLATION & REGULATION

- 4. What are the principal laws and regulations? Is there a framework PPP Law?**

There is no framework PPP law however such law is in drafting process (to our information draft law shall be presented by the government of Georgia before the parliament until the end

of 2017). Law of Georgia on the Procedure for Granting Concessions to Foreign Countries and Companies which was adopted in 1994 is less operative and is not usually applied for PPP projects as described above. The law defines concessions as “long-term lease agreements” and seems to be limited to natural resources and activities related thereto. Moreover, the law contains very few provisions regarding the selection of the concessionaire and provides for the adoption of regulations in this respect. Despite this, no regulations can be identified. Despite the existence of certain positive elements, the law does not constitute a sufficiently solid legal ground for the development of PPP.

Due to this, almost all PPP projects implemented or initiated so far are regulated by the resolutions of the government of Georgia adopted mainly on case-by-case basis. Despite this, for certain fields where number of PPP projects has been implemented, the government has adopted framework resolutions providing rules applying to PPP projects in those particular fields only. For example, resolution N 214 of the Government of Georgia dated August 21, 2013 approved the rules for expression of interest in technical-economical examination, building, owning and operation of electric plants in Georgia.

Power of the government to take decision on disposal of state-owned property for the means of implementing PPP projects is derived from the Law of Georgia on State Property.

Recently the government repeatedly expressed its willingness of development of PPP in Georgia by adopting PPP Policy Document on June 6, 2016. The Policy Document explains the background of application of PPP concept in Georgia and need of further development of thereof. The Document provides the models of public-private partnership, the main principles of such cooperation and the means of state support of such projects. According to the Policy Document, PPP projects will be

implemented according to the predefined procedures, including the stage of project initiation, preparation of project, bidding procedures or making direct agreements.

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There is no principal regulatory body for PPP however in practice it is the government of Georgia in cooperation with the respective ministries (agencies) which regulates PPP matters and designates bodies (or special commissions) for the particular large PPP projects.

According to the recently adopted Policy Document, there shall be developed institutional system for the purpose of identification, forming, assessment, approval, financing and monitoring of PPP projects. The new centralized authority will be accountable to the government and will have a leading role in management of PPP projects.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no such restrictions.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Usually dates for the completion of construction are prescribed in the project agreements. Moreover, in most cases the long-stop dates are envisaged in the requests of expression of interest on the particular project.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

There is no pre-defined or model force majeure clause. Thus, there is no uniform definition of force majeure events.

Rather standard clause envisaged in one of PPP project agreements reads as follows:

*“Party shall be deemed not to be in default or in breach of any obligation under this Agreement if and to the extent that such failure is caused by any Force Majeure Event. ... The affected Party shall use all reasonable efforts to mitigate and minimize the effects of any occurrence or re-occurrence of any Force Majeure Event on the performance of its obligations under this Agreement... The affected Party shall promptly notify the other Party of any Force Majeure Event and any relief from performance claimed by the affected Party. The affected Party shall promptly notify the other Party of the end of any Force Majeure Event and the effects thereof upon the performance of the affected Party, and of the steps taken in accordance with Clause XXX and progress with those steps. If it is agreed or determined that a Force Majeure Event has occurred and that Force Majeure Event (or the consequences thereof) has existed for a continuous period in excess of eighteen (18) months, and is still continuing then either Party may, for as long as the circumstances referred to in Clause XXX continue, terminate this Agreement by notice to the other and such termination shall take effect on a date one (1) month thereafter unless during that one (1) month notice period the circumstances referred to in Clause XXX cease to apply (in which case the notice shall be treated as null and void). ...”*

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

As mentioned, until the adoption of PPP law, there is no comprehensive legal framework for most of the matters particularly for PPP projects. Thus, allocation of risks is either provided in the project agreements or they are regulated according to the general rules applicable to protection of ownership (Constitution and Civil Code of Georgia) as

well as by the Law of Georgia on Promotion and Guarantees of Investments.

The law provides that *“during implementation of investment and entrepreneurial activities, rights and guarantees of foreign investors may not be less than rights and guarantees enjoyed by natural and legal persons of Georgia”*. The law further provides:

*“1. Investments shall be fully and unconditionally protected by the legislation of Georgia.*

*2. Deprivation of an investment may take place only in cases directly determined by law, by court decision and upon urgency determined by the organic law and only with appropriate compensation.*

*3. Decision on deprivation of investments as well as terms of compensation may be appealed to the courts of Georgia unless otherwise provided in the agreement between the parties or in the international agreements of Georgia.”*

In practice as well, PPP project agreements provide for compensation in case of expropriation.

As concerns the change in law, one of PPP project agreements provides the following:

*“if [investor] suffers damages, losses or cost overruns that are directly attributable to a Change in Law, [investor] shall be entitled to payment of such damages, costs or losses, or [public body] avails to [investor] such other protection that leaves [investor] in no better and no worse a position following such Change in Law, at [public body’s] sole discretion. [Investor] shall notify [public body] of its right to claim pursuant to this Clause promptly and, in any event, within 6 months of becoming aware of the act, omission or circumstance that gives right to make such Claims.”*

As concerns the adverse court decisions, both the law and project agreements are usually silent on this.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The law is silent on this. This matter is regulated by project agreements to certain extent. For example, one of the project agreements reads as follows:

*“[Investor] shall procure that any Lenders shall agree not to prevent the utilisation of Insurance Proceeds in reinstatement and/or replacement, subject only as provided in the Lender Direct Agreement. If any Lenders exercise their rights under the Lender Direct Agreement to use the Insurance Proceeds in discharge of any indebtedness under the any other funding document approved by [public body] for the purposes of this Agreement, [public body] shall have the right to terminate this Agreement by notice with immediate effect to enable it to comply with its obligations to reinstate in accordance with paragraph XXX.”*

**11. Is the concept of “uninsurability” recognized in the project agreements?**

Yes. Usually uninsurable risks are defined as the Insured Risks in respect of which insurance cover is no longer available in the worldwide market.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Yes, such option is prescribed by the law. Project agreements also provide for the right of step-in.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have**

**foreign law as the governing law of these agreements?**

Yes, international arbitration is available for the settlement of disputes under the project agreements and direct agreements with lenders. Most frequently ICC (International Chamber of Commerce) option is applied.

As concerns the application of foreign law as the governing law, it is negotiable on case-by-case basis; however, to our best knowledge Georgian law is a governing law for most of the agreements.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The law does not envisage the procedure of market testing and we are not aware of any project agreement providing for it.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

As the law does not provide general framework for this, method of acceptance of the facilities is worked out on case-by-case basis; however, in practice independent technical advisers as well as project companies are involved in the acceptance process and it is not performed only by the public authority.

**16. Are there any expected changes or reform to the existing legislation?**

Yes. As mentioned above, the government of Georgia in cooperation with EBRD and other international financial institutions is currently working on draft PPP law which is expected to provide comprehensive legal framework for PPP projects.

**FINANCING & INCENTIVES**

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

While the law is silent on payment mechanisms, inflation and/or foreign exchange, these matters are regulated on case-by-cases through the project agreements.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return, as far as we are aware.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

There is no such payment guarantees prescribed by the law; however, payment options may vary on case-by-case basis through the project agreements.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

It much depends on the structure of the project and which public sector representative (public authority/public company/fund) is the party to the project agreement. There is no unified approach towards the matter.

**21. Are deductions from the service and availability payments subject to a cap?**

They may be; however again, it is agreed on

case-by-case basis, depending on the nature of project and the sector in which the project is implemented.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Yes.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

There is no fixed requirement; however, it may be in specific projects.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

We are not aware of a project where the lenders signed a direct agreement with the relevant public authority. One of the project agreements provided for the following: “[public body] will enter into a Direct Agreement with Lenders (if any) for the purpose of financing the relevant part of the Works if reasonably required by the Lenders” however to our best knowledge, no such agreement has been signed.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

The law does not provide such mechanism. As concerns the practice, we are not aware of a case when the public authority undertook to assume the debts of the project company to the lenders.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

Again, there are no unified rules for such occurrences however in one of PPP project agreements it is provided as follows:

*“If the agreement is terminated due to the breach by the public authority, the private investor will be entitled to terminate the agreement and will receive the payment the Debt Amount; Hedging Amount; the Adjusted Equity Amount; and Termination Liabilities less the Termination Deductions.*

*If the agreement is terminated due to the force majeure, termination payment will be the Debt Amount + the Hedging Amount + ((Existing Equity Amount + the Initial Works CAPEX) \* XXX% - Termination Deductions - any Rectification Costs).*

*If the agreement is terminated due to the breach by private party, the Termination Payment shall be a positive amount equal to the aggregate of the Debt Amount and the Hedging Amount less the Termination Deductions.”*

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Generally, there are no rules regulating this

matter at this stage of development of PPP laws in Georgia; however, such specific terms may be prescribed for particular projects and be envisaged in government resolutions and/or in EOI document.

**28. Are there tax advantages available to PPP projects?**

At this stage no tax advantages are available; however, as per our knowledge, tax advantages may be prescribed by the PPP law which is to be adopted.

**29. What are the other incentives available to PPP projects?**

At this stage no particular incentives are available; however, as per our knowledge, certain incentives may be prescribed by the PPP law which is to be adopted.

You can also find various incentives for the development of particular projects on case-by-case basis according to the government resolutions.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

There is no official statistics separately for PPP projects. As noted, the most frequent PPP projects are implemented in sphere of energy and infrastructure. Total amount of investments for the ongoing and already implemented projects is more than USD 1 billion.

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# GREECE



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## DRAKOPOULOS LAW FIRM

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP model has been used to develop major infrastructure projects, such as the Rion-Antirion Bridge and the Attiki Odos Highway. Various models, including BOT and BLOT, are used.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

The PPP model is used in public administration, healthcare, education, and the prison system.

3. **Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

The construction of the major western-Greece national highway of Athens – Patras – Ioannina is being developed as a PPP project.

### LEGISLATION & REGULATION

4. **What are the principal laws and regulations? Is there a framework PPP Law?**

The PPPs are regulated by L. 3389/2005 and L. 4412/2016.

5. **What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

PPP's are regulated by the Special Secretariat for PPPs (PPP Unit established within the Ministry of Finance), which identifies ventures that can be procured as PPPs, and the Inter-Ministerial Committee for PPPs (IMCPPP) that approves such ventures.

6. **Are there any restrictions for foreign investors to develop/operate PPP projects?**

No.

7. **Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

No.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

Force majeure events occur on occasions that parties could not have predicted even by exercising extreme diligence. Depending on the clauses in each contract, what force majeure usually results in is a temporary suspension of the contract that, if exceeding a reasonable time, can lead to contract termination.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

No such risks are likely to occur.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

No such test is envisaged.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

No such concept is recognized.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

No such provision exists as per the applicable legislation.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of**

**these agreements?**

Yes, the parties are free to opt for arbitration as a means of dispute resolution. As per the applicable law, the parties are again free to choose a foreign law to govern their agreement, which shall apply subject to the mandatory law provisions of the law that would normally govern their contract.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

No.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The facilities developed as PPPs are being accepted by a committee set up by the Governing Body of each PPP (municipality, prefecture, etc.). The Special Secretariat for Public-Private Partnerships (SSPPP) (<http://sdit.gov.gr/en/information/the-Special-Secretariat/general>) can hire independent parties to develop a pre-delivery check on the facilities.

**16. Are there any expected changes or reform to the existing legislation?**

No.

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

Each PPP contract provides for the respective payment methods (lump sum, payment from

earnings, etc.).

18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?

No.

19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?

No.

20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?

Yes.

21. Are deductions from the service and availability payments subject to a cap?

Such deductions are subject to a cap only if stipulated in the PPP contract.

22. Are variations that the public authority may request at the construction and operation stages subject to a cap?

No.

23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?

No.

24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?

No.

25. Is there a debt assumption mechanism, whereby the public authority

undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?

No.

26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?

Such payments shall be determined ad hoc on the basis of the respective project contract.

27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?

No.

28. Are there tax advantages available to PPP projects?

PPP private parties have no obligation to pay capital gains on accumulated interest rates.

29. What are the other incentives available to PPP projects?

PPP projects enjoy an easier VAT return.

30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?

Two major PPP projects have been developed during 2016 in the infrastructure sector.

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# GUINEA<sup>1</sup>



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## GENERAL

**1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

In order to support sufficient economic growth and reduce poverty, the Republic of Guinea uses PPP agreements to address the country's substantial needs and to develop major new infrastructure and rebuild existing ones, especially in the sectors of mining, agriculture and services.

Since 1998<sup>2</sup>, a specific legal framework has been implemented for build-operate-transfer (“BOT”) agreements, which are types of PPP agreements. Agreements pertaining to the

<sup>1</sup> The authors are French lawyers registered at the Paris bar. The answers to the questionnaires relating to Senegal, Morocco, Guinea and Ivory Coast are based on their knowledge of the applicable regulations and on their experience of PPP projects implemented in these countries. The accuracy of these answers remains however subject to the confirmation by lawyers duly registered in the said countries.

<sup>2</sup> Law No. 97/012/AN dated 1 June 1998.

“Financing, Building, Operating, Maintenance and Transfer” of infrastructure<sup>3</sup> can be entered into by public authorities and private parties.

In a BOT project, a public entity authorizes a private company to develop and operate a facility for a limited period. This company finances, owns and constructs the facility and operates it commercially for the project period. Usually, this type of agreement is used for building new infrastructures.

**2. Which sectors apply a PPP model to develop infrastructure projects?**

The PPP model is used in all economic sectors for the development of infrastructure and the management of public services. This includes among other things: hydro power infrastructure (dams and plants); mining infrastructure; transport infrastructure (roads, harbours, railways, and airports); telecommunication infrastructure; agricultural facilities; public facilities; tourist infrastructure; and social infrastructure such as education and health.

Pursuant to the Guinean Public Procurement Code, public service delegation agreements can be entered into in all sectors where public services are, or are supposed to be, managed.

<sup>3</sup> Article 1.1 of Law No. 97/012/AN.

Since 1990, private sector participation in infrastructure, totalling US\$ 1.3 billion, has been concentrated in the telecoms sector through divestitures and new projects implementation.<sup>4</sup> However, major PPP transactions have also taken place in the transport,<sup>5</sup> mining, water and electricity sectors.

### 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?

There are a few new PPP projects in the pipeline of the Guinean Government, especially in the hydroelectric sector.

Guinea plans to conduct studies for the development, under the PPP model, of new mega-hydroelectric dams (the 285 MW Amariah dam on the Konkouré river and the 100 MW Morissanako dam on the Sankarani river<sup>6</sup>). In 2016, the preliminary steps to build and operate a 280 MW hydro power plant in Koukoutamba<sup>7</sup>, and the 450 MW Souapiti dam on the Konkouré river<sup>8</sup>, both under a PPP model, have been implemented.

<sup>4</sup> <http://ppi.worldbank.org/snapshots/country/guinea>.

<sup>5</sup> Such as a 25-year port concession agreement for the Conakry container terminal.

<sup>6</sup> [https://books.google.fr/books?id=ua84AAAAQBAJ&pg=PA84&dq=dams+guinea+PPP+model&source=bl&ots=XMheblLQH&sig=vCJ0\\_ktEMupyt70qQNz0MiXxSGg&hl=fr&sa=X&ved=0ahUKEwic6\\_Lz14PUAhWrDMAKHTR9AhgQ6AEIMjAC#v=onepage&q=dams%20guinea%20PPP%20model&f=false](https://books.google.fr/books?id=ua84AAAAQBAJ&pg=PA84&dq=dams+guinea+PPP+model&source=bl&ots=XMheblLQH&sig=vCJ0_ktEMupyt70qQNz0MiXxSGg&hl=fr&sa=X&ved=0ahUKEwic6_Lz14PUAhWrDMAKHTR9AhgQ6AEIMjAC#v=onepage&q=dams%20guinea%20PPP%20model&f=false) (page 84).

<sup>7</sup> <http://www.portail-omvs.org/infrastructure-regionale/barrages/projets-barrages>

<sup>8</sup> <https://www.imf.org/external/pubs/ft/scr/2016/cr16262.pdf>

## LEGISLATION & REGULATION

### 4. What are the principal laws and regulations? Is there a framework PPP Law?

In order to facilitate the development of infrastructure projects, the Republic of Guinea enacted Law No. 97/012/AN dated 1 June 1998 (“**BOT Law**”) authorizing the private sector to finance, build, operate, maintain and transfer infrastructure. Indeed, public authorities can enter into different types of BOT agreements, such as build-and-transfer agreements (“**BT**”), develop-operate-and-transfer agreements (“**DOT**”) and rehabilitate-own-operate agreements (“**ROO**”).<sup>9</sup>

The PPP legal framework is complemented by the Guinean Public Procurement Code (“**Public Procurement Code**”) enacted by Decree 2012/128/PRG/SGG dated 3 December 2012. This Code regulates public procurement contracts, including a specific type of PPP agreement, the “public service delegation agreement” (a type of concession agreement).

This type of agreement, usually authorized in relation to existing assets or an existing utility, gives a concessionaire a long-term right to use all utility assets conferred, including responsibility for operations and some investment. The concessionaire bears the risk for the condition of the assets and for investment.

### 5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

Except for public service delegation agreements, there is no dedicated regulatory body for PPP agreements.

<sup>9</sup> Article 1 of the BOT Law.

As regards public service delegation agreements, the regulatory body is the Regulatory Authority of Public Procurement Contracts (*“l’Autorité de Régulation des Marchés Publics”*).<sup>10</sup>

This body is responsible for, among other things, ensuring the regular application of the Public Procurement Code provisions, drafting and updating methodological handbooks for potential bidders and public authorities, setting up a data bank of public procurement contracts and controlling company certification procedures.

In addition to this regulatory body, there exists:

- The National Public Procurement Contracts Directorate. Its main mission is to implement the contract awarding process. It is exclusively responsible for receiving and opening the bids, evaluating them, selecting a temporary private entity and sending its choice to the Ministry of Finances for approval.<sup>11</sup>
- The Public Procurement Contracts and Major Projects Administration (*“Administration et Contrôle des Grands Projets et des Marchés Publics”*), an entity directly under the control of the Guinean President.<sup>12</sup> It is in charge of controlling the regular application of the public procurement laws and the public procurement contracts awarding procedure and performance.<sup>13</sup>

## 6. Are there any restrictions for foreign investors to develop/operate PPP projects?

The legislative framework for PPPs does not place any restrictions on foreign investors.

Nevertheless, it should be noted that in relation to public service delegation agreements, a criteria of national preference can be taken into account in the selection of the tenders in order to support the domestic Guinean economy.<sup>14</sup>

For example, during the bid evaluation phase the public authority can decide to apply an increasing percentage on the price of tenders by foreign bidders.

## 7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?

Guinean PPP legislation does not impose a long-stop date for the completion of construction in BOT agreements.

However, the BOT Law does provide that BOT agreements are entered into for a period determined by the depreciation period of the selected investments, financing terms and the type of construction and services to be performed.<sup>15</sup> The period must also be determined in accordance with a feasibility study.

It is common practice that the parties would determine specific clauses pertaining to a maximum duration for the construction in the contracts.

<sup>10</sup> Chapter 3 of the Public Procurement Code.

<sup>11</sup> Article 9 of the Public Procurement Code.

<sup>12</sup> Article 10 of the Public Procurement Code.

<sup>13</sup> Articles 11 and 12 of the Public Procurement Code.

<sup>14</sup> Articles 65 and 66 of the Public Procurement Code.

<sup>15</sup> Article 12 of the BOT Law.

As regards public service delegation agreements, the period of the contract as well as the schedule for the completion of each step must be defined under contractual provisions.<sup>16</sup>

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

Guinean PPP legislation does not especially provide for the consequences of a force majeure event occurring during the performance of BOT agreements. It only states that contract duration can be modified in case of a force majeure event.<sup>17</sup>

In relation to public service delegation agreements, the Public Procurement Code<sup>18</sup> defines a force majeure event and the consequences of its occurrence. It states that a force majeure event occurs when: there is a practical difficulty which is due to causes outside of the private entity's control and which hinders the private entity in fulfilling its contractual obligations.

As the Guinean PPP legislation does not provide for all the potential consequences of a force majeure event occurring, the parties are free to agree on the consequences of this type of event in respect of the other provisions of the agreement (i.e. early termination, etc.).

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The Guinean State provides that a list of guarantees<sup>19</sup> may be awarded to a private party

to limit the consequences of political and legal changes which could directly impact upon the PPP agreement's performance and economic rationale.

For example, the State ensures unrestricted importation of equipment and supplies<sup>20</sup>, free movement of capital necessary for the project implementation<sup>21</sup> and subsidies if the services to be provided under the BOT agreement cannot be sold at the price defined in the agreement.<sup>22</sup>

In relation to public service delegation agreements, the legislation does not provide any specific political and legal risk allocation.

In any case, parties can agree on the consequences of certain risks occurring as long as it complies with the BOT Law's provisions pertaining to risk guarantees.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Under Guinean legislation no reinstatement test is provided. Pursuant to the freedom of contract principle such a test may be included in BOT agreements. However, in practice, public entities are keen to reinstate the facilities rather than repay debt to the lenders.

**11. Is the concept of "uninsurability" recognized in the project agreements?**

The concept of "uninsurability" is not specifically defined or provided for under Guinean legislation. However, the parties can freely stipulate that risk above a certain

<sup>16</sup> Article 85 of the Public Procurement Code.

<sup>17</sup> Article 12.2 of the BOT Law.

<sup>18</sup> Article 109 of the Public Procurement Code.

<sup>19</sup> Article 7 of the BOT Law.

<sup>20</sup> Article 7.2.1 of the BOT Law.

<sup>21</sup> Article 7.2.4 of the BOT Law.

<sup>22</sup> Article 7.2.13 of the BOT Law.

threshold will no longer be insured provided that such article does not conflict with any mandatory provisions under Guinean law.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

In cases of early termination, the lenders can ask the public authority to substitute the private entity for a third party if such a party is able to ensure the proper performance of the contract and is qualified enough to carry out the PPP project.<sup>23</sup>

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Guinean PPP legislation allows BOT agreements to stipulate that disputes can be settled through international arbitration.<sup>24</sup> Arbitration clauses in BOT agreements will need to set out this procedure (e.g. seat of arbitration, language of the arbitration, procedural law applicable).

Parties can choose the law that governs the contract. If no specific governing law is chosen by the parties then Guinean law applies automatically.

In relation to public service delegation agreements, the Public Procurement Code does not expressly specify that an arbitration procedure can be used to settle disputes. However, in the case of a dispute arising during the contract's performance, prior to any

judicial or arbitral remedy, the private entity has to first seek remedy from the public authority or a higher administrative authority.<sup>25</sup> Therefore, we can assume that it is possible for parties to public service delegation agreements to choose an international arbitration procedure to settle potential disputes.

Finally, the Public Procurement Code does not expressly provide that foreign laws can govern contracts.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Guinean PPP legal framework does not provide for a regular market testing procedure to procure the services to be provided by the private entity.

Such a test is also not provided for in public service delegation agreements or BOT agreements.

However, in accordance with the freedom of contract principle, such a test may be included in the contracts entered into between the private entity and its subcontractors (i.e. with the contractor and/or the operator).

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Guinean PPP legislation does not provide a specific acceptance procedure once the construction works of the infrastructure are completed. However, parties can freely include

<sup>23</sup> Article 12.6 of the BOT Law.

<sup>24</sup> Article 13 of the BOT Law.

<sup>25</sup> Articles 133 and 134 of the Public Procurement Code.

a particular procedure under the PPP agreement provisions.

Under the Guinean Building and Housing Code (*Code de la Construction et de l'Habitat Guinéen*), a technical control has to be done<sup>26</sup> and an acceptance procedure has to be performed.<sup>27</sup> The acceptance phase consists in a contradictory procedure involving the construction contractor (*entrepreneur*) and the project owner (*maître d'ouvrage*).<sup>28</sup>

#### 16. Are there any expected changes or reform to the existing legislation?

Although Guinea has a framework PPP law (the BOT Law), the use of PPP agreements is not widespread among public authorities. This may be due to the lack of guidelines, the absence of a strategic framework with clear political support, and the lack of sufficient expertise for the technical structuring of such agreements and projects.

The solution to this problem would be to strength the capacity of public authorities to plan, coordinate and implement projects.

It should be pointed out that, pursuant to Decree dated 17 October 2014 and following a formal request from the Guinean President, Alpha Condé, the Presidential Council about Investments and Public Private Partnership ("*Conseil Présidentiel des Investissements et des partenariats publics et privés*")<sup>29</sup> has been implemented.

This new entity, acting under the President's authority, is supposed to promote a direct

dialogue between the State, the private sector and the civil society to identify and remove barriers to investment in the country.<sup>30</sup> In light of this we can expect future changes to the Guinean PPP legal framework based on the work and recommendations of the Presidential Council about Investments and Public Private Partnership.

### FINANCING & INCENTIVES

#### 17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?

Under the BOT Law<sup>31</sup>, the payment of the private entity is provided either by the public authority or by the users (royalties, fees and other costs under the usage tariffs).

In respect of public service delegation agreements, the Public Procurement Code provides that payment of the private entity comes from the revenues generated from operating the project.<sup>32</sup>

Finally, as regards inflation and/or foreign exchange protection and pursuant to the BOT Law<sup>33</sup>, the public authority guarantees to foreign investors the free transfer of (i) the income generated by their investments; (ii) the dividends due to foreign shareholders; and (iii) the liquidation proceeds of such investments.

#### 18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?

The BOT Law refers to a rate of return (*taux de rentabilité raisonnable*) for BOT agreements

<sup>26</sup> Articles 43 to 45 of the Guinean Building and Housing Code.

<sup>27</sup> Articles 46 to 48 of the Guinean Building and Housing Code.

<sup>28</sup> Article 46 of the Guinean Building and Housing Code.

<sup>29</sup> Article 1 of Decree dated 17 October 2014.

<sup>30</sup> Article 2 of Decree dated 17 October 2014.

<sup>31</sup> Article 1.3 of the BOT Law.

<sup>32</sup> Article 1 of the Public Procurement Code.

<sup>33</sup> Article 7.2.4 of the BOT Law.

that shall not exceed 12% unless otherwise agreed<sup>34</sup>. There is no similar provision in the Procurement Code. However, in accordance with the freedom of contract principle, such a mechanism may be included in public service delegation agreements.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Under the BOT Law<sup>35</sup>, the public authority undertakes to provide a payment guarantee (*subvention d'équilibre*) to the private entity in the event that the services under BOT agreements are sold locally at lower prices than those provided for in the PPP agreement.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the administration are not qualified as Treasury obligations. Furthermore, Guinean law does not provide for separate guarantees to be granted by the Treasury to private entities. It should be noted that such guarantees are not usually provided for in BOT agreements. The guarantees provided for the benefit of the private partner are mainly given by financial institutions.

**21. Are deductions from the service and availability payments subject to a cap?**

Deductions from the service and availability payments are not specifically provided for under the BOT Law. However, such clauses can be included in BOT agreements in

accordance with the freedom of contract principle.

In respect of public service delegation agreements, the Public Procurement Code<sup>36</sup> provides that the private entity's payment is substantially provided by the revenue generated by operation of the service, but does not specify whether deductions from service payments can be made. In practice, such clauses are included by the parties in public service delegation agreements.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Guinean law is silent on the question of whether variations may be subject to a cap. However, in accordance with the freedom of contract principle, the parties may agree to such a cap.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

There is no requirement to share any gains arising from refinancing of the PPP project with the public authority under Guinean law. However, in accordance with the freedom of contract principle, gains sharing clauses may be agreed by the parties.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

There is no requirement to enter into direct agreements under Guinean law. However, as outlined in question 11, the BOT Law<sup>37</sup> authorizes lenders substitution rights in case of termination of BOT agreements.

<sup>34</sup> Article 1.23 of the BOT Law.

<sup>35</sup> Article 7.2.13 of the BOT Law.

<sup>36</sup> Article 1 of the Public Procurement Code.

<sup>37</sup> Article 12.6 of the BOT Law.

It should be noted that in general under direct agreements, the lenders will be entitled to intervene or “step-in” the shoes of the project company or the contractors in respect of the key project agreements. The step-in rights are usually triggered when either the project company or the contractors have defaulted or there is reasonable belief that they will default in the near future. Step-in-clauses allow the lenders to take over the project company, the project itself or to obtain control rights to make decisions on behalf of the project company. Thereafter, the lenders may take over the project or appoint a professional third party to take over the project.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Neither the BOT Law, nor the Public Procurement Code, provides for a debt assumption mechanism whereby the public authority undertakes to reimburse the debt of the project company to the lenders. However, in accordance with the freedom of contract principle, such a mechanism may be included in BOT agreements.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The BOT Law<sup>38</sup> only provides for payments to be made by the public entity to the project

<sup>38</sup> Article 12.5.2 of the BOT Law.

company in case of termination for a reason of national defence. However, in accordance with the freedom of contract principle, other cases of termination may trigger payments to be discharged by the administration to the private entity.

Besides, it should be also noted under the BOT Law<sup>39</sup>, the public authority guarantees a proper compensation to the private entity in case of early handover.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

There is no incentive for domestic manufacturing of equipment or materials used in the construction of PPP projects under the BOT Law.

However, in respect of public service delegation agreements and as outlined in question 5 above, a “national preference” percentage can be applied during the selection of the tenders which takes account of domestic manufacturing of equipment.<sup>40</sup>

**28. Are there tax advantages available to PPP projects?**

The BOT Law<sup>41</sup> provides that the private entity is exempted from any tax or customs royalties and guarantees a stable tax regime. There is no similar provision in the Public Procurement Code.

**29. What are the other incentives available to PPP projects?**

The BOT Law<sup>42</sup> guarantees to the private

<sup>39</sup> Article 7.2.12 of the BOT Law.

<sup>40</sup> Articles 65 and 66 of the Public Procurement Code.

<sup>41</sup> Article 10 of the BOT Law.

<sup>42</sup> Article 9.3 of the BOT Law.

entity the benefit of all incentives granted under the Guinean Investment Code.

Furthermore, in respect of large investments implemented in sectors of particular importance to the national economy and public interest, the BOT Law<sup>43</sup> provides full exemption from taxes, a reduced VAT as well as pricing structure similar to the one applicable to oil products.

Finally, in addition to financial incentives, the BOT Law<sup>44</sup> provides to the private entity a full range of incentives, including the freedom to choose subcontractors, freedom to import goods, materials, equipment, machinery, spare parts and consumables and all the necessary public permits and authorizations required to implement the PPP project.

### 30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?

Although infrastructure development is one of the key priorities of the Guinean State, it should be noted that investments in PPP projects have been relatively minor up to 2012. However, since then, major projects have been developed in Guinea, such as the rehabilitation and extension of the electricity network of Conakry.<sup>45</sup> Moreover, a major PPP project, namely the 240 MW Kaleta hydro power plant, was inaugurated in 2015 and it tripled the country's installed hydropower capacity to 368 MW.<sup>46</sup>

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<sup>43</sup> Article 9.6 of the BOT Law.

<sup>44</sup> Article 7.2 of the BOT Law.

<sup>45</sup> [http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2015/CN\\_data/Cn\\_Long\\_FR/Guinee\\_2015.pdf](http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2015/CN_data/Cn_Long_FR/Guinee_2015.pdf).

<sup>46</sup> <https://www.worldenergy.org/data/resources/country/guinea/hydropower/>

# HUNGARY



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## LAKATOS, KÖVES AND PARTNERS

### GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP model is currently not a model favoured or used for new projects in Hungary. In the mid-2000s, the Build-Operate and the Build-Operate-Transfer models were the most frequently used models. When the financial crisis hit Hungary, the government announced a moratorium on PPP projects and initiated a review of the existing PPP contracts.

Considering that the PPP model is currently not used for new projects in Hungary, our answers relate to existing PPP agreements entered into several years ago.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

In the early-mid 2000s, Hungary applied the PPP model most notably in highway

construction, for example in the constructions and refinancing of the M5 and M6 motorways.

The PPP model was also used in other infrastructure projects, such as the building and operation of prisons. Between 2002 and the beginning of the financial crisis the development of transport, educational, sports and social infrastructure became a main policy goal; as the State lacked the necessary resources needed for the implementation, it was decided to use the PPP model to implement these projects. With the benefit of hindsight, it can be seen that some of these projects were successful, such as the motorways, and some others, such as the recreational and educational facilities, have proven to be too expensive for the State.

- 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

There are no new PPP projects in Hungary. The government's approach of not favouring the model has not changed. The primary focus is on EU-funded projects.

## LEGISLATION & REGULATION

### 4. What are the principal laws and regulations? Is there a framework PPP Law?

As there is no official definition of PPP in Hungarian law, no clear distinctions can be made when categorising a project as a PPP project. Hungary does not have a separate PPP law establishing the framework for PPP projects. The following key legal acts may be relevant depending on the characteristics of the project.

- Act CXLIII of 2015 on Public Procurement;
- Act XVI of 1991 on Concessions; and
- Act V of 2013 on the Civil Code.

### 5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

In contrast to some other European countries, there is no centralized PPP authority in Hungary. The PPP projects were usually ordered and supervised by the relevant ministries, most frequently by the Ministry of National Economy.

### 6. Are there any restrictions for foreign investors to develop/operate PPP projects?

Hungary, being a member of the EU, has no general restrictions applying only to foreign investors. In the projects initiated in the 2000s a wide range of foreign players participated (e.g. Strabag, Mota-Engil, Hochtief, etc.). Since the changes of government in 2010 the environment has been generally negative towards PPP structures. To the extent that infrastructure projects have been effected the

contractors have more frequently been local players.

The only real limitation is that under the Hungarian Fundamental Law (i.e. constitution) and under the Act CXCVI of 2011 on the national properties of Hungary, no company may receive funds from the public budget or be granted with the right to utilize national assets which does not qualify as a "transparent company". A "transparent company" is generally a company: (i) whose beneficial owner is identifiable; (ii) whose tax residency is in the EEA, or in a country with which Hungary has a bilateral treaty on the elimination of double taxation; (iii) which is not a controlled foreign entity under the law on corporate tax; and (iv) whose shareholder with a stake of more than 25% does fall under points (i) - (iii) above. Any company whose shares are traded on an EEA country's stock exchange is also deemed to be a "transparent company". Accordingly, if a foreign investor fails to meet the above criteria, it is questionable whether the State would be in a position to conclude a PPP agreement with it, as any PPP agreement, *per se*, may qualify as an agreement under which funds are received from the public budget and/or the right to utilize national assets is granted.

Notwithstanding, there may be certain sectoral laws/regulations which may limit foreign investors to participate in the PPP projects in certain sectors (e.g. requesting local presence, local licenses, etc.); however, these are general and common restrictions applying to everyone in the given sector.

### 7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?

The PPP agreements usually contain strict deadlines requiring the investor to complete the construction within a certain period of time (combined with penalty payment

obligations in case of any delay and/or a termination right to the State in case of material delay). These long-stop dates, however, are individual contractual obligations and do not derive from the legislation.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

Force majeure events are usually defined as the occurrence of the following events or circumstances:

- a. act of war (whether declared or undeclared), invasion, armed conflict, or act of foreign enemy in each case arising or imminently threatened or directly affecting Hungary, and deferring or hindering the construction and/or operation of the PPP project;
- b. revolution, riot, insurrection, civil commotion, sabotage or terrorism in each case arising or imminently threatened within and affecting Hungary, and deferring or hindering the construction and/or operation of the PPP project;
- c. strikes;
- d. nuclear explosion, radioactive or chemical contamination or ionising radiation or biological contamination of the project sites;
- e. fire; explosion; lightning; severe storm, tempest, snow storm, snow, hail or freezing rain; flood; earthquakes; or landslide; but only where it causes any material and unavoidable damage to the PPP project and/or it damages all or any material part of the project site, except if any of the above is attributed to the investor/operator;
- f. a legally imposed quarantine, which could not be anticipated by the affected party,

and therefore the affected party could not take precautions, and which prevents or delays the construction and/or operation of the PPP project; or

- g. embargo or trade sanctions having an adverse effect on the performance of the PPP agreement.

The consequence of a force majeure event, if it occurs during the construction period, is either the extension of the time available to complete the project or, if the force majeure event is continuing for more than an agreed time period (e.g. 30-60 days), either party has the right to terminate the PPP agreement (and the parties are not entitled to compensation for any loss of income or consequential damages). If the force majeure event occurs during the operation period, the consequence is usually the termination of the agreement; however, if not terminated, the availability fee usually remains payable.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

It is usual for the investors to require the State to provide a covenant/undertaking that during the term of the PPP agreement the State will not intervene in or interrupt the project (except in extraordinary circumstances, e.g. in the event of war, riot, revolution, embargo, etc.). The breach of this obligation is considered as a “relief event”.

Expropriation or direct change in law (adversely affecting the investment environment) is usually considered as an event of default by the State enabling the investor to terminate the agreement and claim full compensation. There are also examples when the change of law provides a right to either of the parties to request the amendment of the

project agreement, the failure to agree on such amendment which enables any of the parties to terminate the relevant agreement.

In addition, Hungary is party to several bilateral investment treaties, providing additional comfort to foreign investors. In case the investor may rely on a bilateral investment treaty (“BIT”), note that the BITs usually provide protection against expropriation. In one way or another, almost all of the BITs prescribe that Hungary may not expropriate or nationalise or adopt any other measures having equivalent effect to expropriation and nationalisation, the investment of the other contracting country’s investors, unless the following circumstances are met:

- a. the expropriation, nationalisation (or any other measure having equivalent effect) is for public purpose relating to the internal needs of that contractual party;
- b. the expropriation, nationalisation (or any other measure having equivalent effect) is subject to due process of law;
- c. the expropriation, nationalisation (or any other measure having equivalent effect) is non-discriminatory; and
- d. the expropriation, nationalisation (or any other measure having equivalent effect) is followed by the payment of prompt, adequate and effective compensation.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

It is market practice to require the investor to have sufficient insurance policies in place covering both the construction and the operation risks. It is also common practice to stipulate that insurance proceeds are applied

for the restitution (reinstatement) of the PPP project (unless the insurance proceeds cover consequential damages and the reimbursement of third party liability claims).

This requirement, however, is not a statutory requirement, only a common market practice.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

The investor shall take out and maintain insurance during the whole period, covering each phase of the PPP project. The concept of “uninsurability” is not recognized in the Hungarian market as not only one particular asset but the construction and operation in its entirety is insured. The failure to maintain the insurance is usually considered as an event of default.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The Concession Act stipulates, as a general rule, that the concessionaire may not be substituted without the consent of the State. However, the parties may agree in the project agreement that if the concession company becomes insolvent, the funders may substitute the concession company with another concession company which becomes the legal successor of the original concession company for the purpose of the PPP project.

As mentioned above, the State’s intervention in the PPP project is generally restricted and considered as an event of default by the State. Notwithstanding, in case of default by the authorized company, the State may (depending on the subject of the project) have certain contractual rights to take over the project and

substitute the authorized company with another state-owned entity.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Yes, it is possible to have any foreign law as the governing law of the PPP agreements and the parties are free to opt for any international arbitration forum as their dispute resolution forum under the PPP agreements.

Please note, however, that under Act CXCVI of 2011 on national properties, there is a general limitation regarding the State's dealings with any assets forming part of national property. If the subject matter of the PPP agreement would form part of the national property (whose definition is vague and subject to a case-by-case interpretation and, most importantly, the question "what are the requirements of an agreement to relate to national property and thus to fall under the scope of this provision?" remains open), there would be a risk that the following restriction would apply: in respect of an agreement relating to national property situated within the borders of Hungary, only the Hungarian language, Hungarian governing law and the jurisdiction of Hungarian courts (including arbitration) could be stipulated.

Subject to these specific restrictions relating to "national property", which are likely to be relevant for many PPP projects, there is general freedom on choice of law and jurisdiction. The reason for this is that Law Decree 13 of 1979 on Private International Law ("**Conflicts Law**") and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("**Rome I Regulation**") confer on the parties to an

international contractual transaction almost total autonomy in choosing the law which is to govern such a contract, provided that the presence of a "foreign" (i.e. non-Hungarian) element in the transaction can be proven. The fact that one of the parties to the PPP agreement is a non-Hungarian resident satisfies the above requirement. Therefore, the parties to the PPP agreements may validly enter into contracts governed by, and interpreted in accordance with, any foreign law.

The same applies to the selection of an international arbitration forum as the dispute resolution forum. Considering that the parties are generally free to determine the contents of their agreements, they may also opt for international arbitration. In addition, Hungary has also ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**Convention**"), therefore, as a general rule, any arbitration award granted in other member states will be recognized and enforced by the courts of Hungary (subject to the qualifications set out in the Convention), provided it is enforced in compliance with applicable Hungarian civil procedure laws and the procedures established by the Hungarian legislation on commercial arbitration for the enforcement of arbitration decisions, insofar as such award is not contrary to public policy in Hungary.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The concession right is granted to the authorized company for a fixed period of time. During this time, the authorized company enjoys an exclusive right and obligation to perform the concession related activity.

Although market testing may not be statutorily prohibited, it would most probably be

considered as a breach under the relevant project agreement if not specifically envisaged in these agreements.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The acceptance of the facilities is usually documented in an acceptance certificate. The handover procedure usually involves various technical experts, engineers and advisers. The handover procedure is organised by the project company where the representatives (and advisors) of both sides are invited. During the handover, a handover protocol is recorded in which each party may make its comments and reservations. It is also common that the handover of the project occurs in different phases and thus the State has time to comment on the acceptance of the facilities performed and determine whether the project company has complied with all the requirements for the completion. In case of dispute, the parties generally refer the question to an independent expert or arbitration.

**16. Are there any expected changes or reform to the existing legislation?**

We do not foresee any changes in the foreseeable future.

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

All payments under the PPP projects are subject to the issuance of a written invoice and the issuance of a certificate of performance.

The payment deadline for the invoice is usually 15-45 days. The operation and availability fees are usually due and payable on a monthly basis, the concession fee annually. Set-off is usually permitted.

In case of dispute, the disputing party should usually challenge the invoice with a written letter explaining the reason of the non-payment. If the parties cannot settle their dispute amicably, the dispute may be referred to an expert/arbitration by any of the parties.

No exchange control applies in Hungary. Since the Act XCIII of 2001 on Lifting Foreign Exchange Controls entered into force in June 2001 and the trade in Hungarian Forints is completely liberalised, there are no (central bank or other) exchange controls or prohibitions on remitting or repatriation of proceeds in force in Hungary, therefore, no Hungarian regulatory approval or other consent is required for any payments to be made in either Hungarian Forints or a foreign currency.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There are no such statutory caps. The project agreements, on a case-by-case basis, may provide for certain guaranteed return on the investment, but this is unusual.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

It is not common that the State provides any payment guarantee to the investor.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

No, obligations of the administration do not qualify as State obligations. Under Hungarian laws, the PPP projects are not accounted as state deficits. In the mid-2000s this circumstance made the PPP projects popular in Hungary, since the State budgets were already in a large deficit and the EU, IMF and other multinational institutions did not allow further deficit to be created in the State budget levels. As PPP projects were allowed to be accounted outside of the State budget deficit, the State became keen to support the private sponsors in the PPP projects.

It is not common that the State provides a separate guarantee to the concessionaire or the lenders.

**21. Are deductions from the service and availability payments subject to a cap?**

There are no statutory limitations. The relevant agreements sometimes provide that the deduction cannot result in the payments made to the project company being less than the amount of a minimum fixed fee.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The only statutory limitation is that the variation request cannot result in the realization of a different project and in case the variations are material, there may be a need to comply with certain administrative procedures under the Public Procurement Act – and in the worst case scenario the State may be obliged to issue a new tender due to the material changes compared to the original tender.

As far as the realization of the variation requests is concerned, it is generally agreed that any increase in the costs due to a variation request shall be borne by the State. The project company is generally obliged to comply with these requests, however, if the request would result in a significant increase of the project costs (usually set around 15-30%) or the variation request is not in line with the best practices, the project company has the right to request the opinion of an independent technical expert.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

There is no legislative requirement.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

It is not market practice that lenders also sign the project agreement with the State. The project agreement is concluded only between the State and the project company. We are not aware of any practice that the lenders sign a separate direct agreement with the State.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

There are no such debt assumption mechanisms.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

It depends on a case-by-case basis.

In the most common build-operate structure the State pays a fixed service fee (availability fee and operation fee) and receives a concession fee.

The amounts payable upon termination of the project agreement depend principally on the reasons for the termination. If the termination is a result of an event of default by the State, it must compensate the investor for its full damage, including loss of profits and consequential damages. If the termination is due to the project company's default, the State is usually obliged to pay a compensation, the level of which is set out in a matrix and depending on the date of the termination and the result of the termination.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No specific incentives are available, however, in the form of a development tax allowance (see below), new developments of a certain present value or serving the creation of new jobs are supported.

**28. Are there tax advantages available to PPP projects?**

There are no specific tax advantages aimed at supporting PPP projects.

However, various tax allowances are available – in the form of reduction of the payable corporate income tax (levied at the rate of 10% up to HUF 500m of the positive tax base and at 19% on the excess amount) for development projects in certain industries/undeveloped areas of Hungary. By such tax allowance, the developer may reduce its payable corporate income tax by 80% at maximum. The amount of the tax allowance is related to the costs of the development and can be applied during a period of ten years.

**29. What are the other incentives available to PPP projects?**

Depending on the terms of the tender, the PPP project may receive governmental grants (e.g. from European funds).

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

As far as we are aware the PPP activity in Hungary is very limited. We are not aware of any major classic PPP projects that occurred in 2016 in Hungary.

**LAKATOS, KÖVES AND PARTNERS**

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# IVORY COAST<sup>1</sup>



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## GENERAL

- 1. Is the PPP model commonly used to Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP contract model is commonly used in Ivory Coast to develop major infrastructure projects. The first Ivorian PPP agreement (which was a concession agreement) entered into force in 1960 in the water sector between the national water utility of Ivory Coast and

the Ivorian company SODECI.<sup>2</sup>

From 2012, with the adoption of a new decree pertaining to partnership agreements, Ivorian law recognizes two categories of contracts for the financing, construction, operation, servicing and maintenance of infrastructure and public assets. These are: (i) public service delegation agreements, where the contract holder generates revenue through the commercial operation of a project (in particular the fees paid by users); and (ii) partnership agreements where a private sector entity is paid rents by a public entity for building and operating infrastructure.

As such, the public authority has to determine the exact nature of the contract that is agreed, taking into account the services to be performed and the payment conditions of the private entity.

In both public service delegation agreements and partnership agreements, the public authority can assign the design, build and operation of a project to a private entity (i.e. Build-Operate-Transfer or Build-Operate-Own-Transfer agreements). However, under a

<sup>1</sup> The authors are French lawyers registered at the Paris bar. The answers to the questionnaires relating to Senegal, Morocco, Guinea and Ivory Coast are based on their knowledge of the applicable regulations and on their experience of PPP projects implemented in these countries. The accuracy of these answers remains however subject to the confirmation by lawyers duly registered in the said countries.

<sup>2</sup> <https://library.pppknowledgelab.org/PPIAF/documents/1694>. The operation of urban public distribution of drinking water in Ivory Coast and in Abidjan was delegated to SODECI under concession agreements (*affermage*).

particular type of contract known as a *contrat d'affermage*, the public authority can only assign rights to the management of a public project that has already been built (i.e. Transfer of Operation Rights contracts).

Given the needs of the Ivory Coast in terms of infrastructure, we note that the Ivorian State launched reforms in 2016 in order to modernize the PPP legal framework.<sup>3</sup>

## 2. Which sectors apply a PPP model to develop infrastructure projects?

PPP agreements are commonly used in Ivory Coast for the development of infrastructure and the management of public services in the following sectors: water, education, health and transport.<sup>4</sup>

Since 1990, eleven PPP projects, totalling US\$ 1,966 million<sup>5</sup>, have reached financial close mainly in the water and transport sectors. This includes the Henri Konan Bédié bridge (the first public-private partnership scheme of its kind in West Africa<sup>6</sup>).

## 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?

There are several new PPP projects in the pipeline in Ivory Coast, and especially in the transport and energy sectors, such as the concession agreement for building the Ore Railway from Man to San Pedro, the concession agreement for building and operating the urban train of Abidjan and the

affermage contract (*contrat d'affermage*) for the operation and maintenance of the Soubré hydroelectric dam (275 MW) and its associated energy evacuation network.<sup>7</sup>

## LEGISLATION & REGULATION

### 4. What are the principal laws and regulations? Is there a framework PPP Law?

The Ivorian PPP legal framework is characterized by its dualism.

In order to facilitate the development of infrastructure projects, Ivory Coast recently created a new category of contracts called partnership agreements and implemented this through Decree No. 2012-1151 dated 19 December 2012 (“**PPP Decree**”). Moreover, the institutional framework pertaining to partnership agreements is set up by Decree No. 2012-1152 dated 19 December 2012 as modified by Decree No. 2014-246 dated 8 May 2014 (“**PPP Institutions Decree**”).

Public service delegation agreements used for decades in Ivory Coast (i.e. concession agreements and *contrats d'affermage*) are today governed by the Ivorian Public Procurement Code enacted by Decree No. 2009-259 dated 6 August 2009 and modified by Decree No. 2013-308 dated 8 May 2013, Decree No. 2014-306 dated 27 May 2014 and Decree No. 2015-525 dated 15 July 2015 (“**Public Procurement Code**”).

<sup>3</sup> See question 15 of this chapter.

<sup>4</sup> Article 4 of Decree No. 2012-1151.

<sup>5</sup> <https://pppknowledgelab.org/countries/c%C3%B4te-d%E2%80%99ivoire>

<sup>6</sup> <http://www.globalconstructionreview.com/news/ivory-coast-g4et4s-n8e8w-p0p0p-br4id4ge/>

<sup>7</sup> <http://www.ppp.gouv.ci/listit2project/energy/6/64.html>

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

At present, pursuant to the PPP institutions Decree<sup>8</sup>, there are three bodies which regulate partnership agreements in Ivory Coast.

The most important body is the *Comité National de Pilotage des PPP* (“**CNP-PPP**”). Its main mission is to, among other things: devise strategies to develop PPP agreements; submit new drafts of new rules to the government in order to upgrade the PPP legal framework; give its approval regarding infrastructure projects using PPP agreements; and give approval to awarding procedure documents and evaluation criteria, etc.<sup>9</sup>

The other regulatory bodies are the *Secrétariat Exécutif des PPP* (“**SE-PPP**”) and the *Cellule d’Appui des PPP* (“**CA-PPP**”), which have been created to provide support to the CNP-PPP.

With regard to public service delegation agreements, none of the regulatory bodies detailed above is involved in implementation and performance. Article 2 of Decree No. 2009-260 dated 6 August 2009 established the regulatory body known as the *Autorité Nationale de Régulation des Marchés publics*. This institution regulates the public procurement sector<sup>10</sup>; among other things, it provides support to the government in defining new rules, assists in developing strategies regarding the implementation of public procurement contracts, conducts independent audits of public procurement contracts in force, and settles disputes related to awarding procedures and contract performance.

<sup>8</sup> Article 3 of the PPP Institutions Decree.

<sup>9</sup> Article 4 of the PPP Institutions Decree.

<sup>10</sup> Article 3 of Decree No. 2009-260 dated 6 August 2009.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The legislative framework for PPPs does not place any restrictions on foreign investors.

However, it should be noted that in any awarding procedure for public service delegation agreements, a criteria of national preference can be taken into account in the selection of the tenders in order to support the domestic Ivorian economy.

During the bids evaluation phase, the public authority can decide to apply a margin of preference (*marge de préférence*) from 1% to 15% to the tenders of bidders from the Economic Community of West African States (“**ECOWAS**”).

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Ivorian PPP legislation does not impose a long-stop date for the completion of construction in PPP agreements.

However, the PPP legislation does provide that PPP agreements must define the performance period and the terms and conditions of any potential extension<sup>11</sup>.

Moreover, it is common practice for parties to determine specific clauses pertaining to a maximum duration for the completion of construction in contracts.

<sup>11</sup> Article 22 of the PPP Decree.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

As in other civil law countries, force majeure events are described in Ivorian case law as an “*unforeseeable and irresistible event, including external causes*”. Therefore, force majeure is defined as an event beyond a party's control which the party could not reasonably have foreseen before entering into the contract or which the party could not reasonably have avoided or overcome provided that the event is not substantially attributable to the other party.

The events that could be defined as force majeure events in the context of PPPs include natural disasters, war, hostilities (whether war is declared or not), invasion, act of foreign enemies, rebellion, terrorism, revolution, insurrection, military or usurped power, civil war, riot, commotion, disorder, strike or lockout by persons other than the parties' personnel.

Moreover, the PPP Decree<sup>12</sup> provides that direct negotiation procedure can be used by the public authority to enter into PPP agreements (rather than using the normal public tender procedure) in case of a force majeure event.

As regards public service delegation agreements, the Public Procurement Code<sup>13</sup> provides that in case of force majeure, mutually agreed contracts (*contrats de gré-à-gré*) can be used and late penalties can be partially or totally waived<sup>14</sup>.

Although Ivorian PPP legislation largely does not cover the consequences of a force majeure event occurring during the term of a PPP agreement, parties are still free to agree on the

consequences of this type of event for other elements of the agreement (i.e. early termination etc.).

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The PPP Decree<sup>15</sup> provides that partnership agreements have to include a specific clause pertaining to the allocation of risks between the parties. This is modelled on the contractual practice of optimal risk sharing.

Under the PPP Decree<sup>16</sup>, the State ensures that tax legislation, customs procedures and financial regimes during the entire period of the PPP agreement's performance remain stable. In addition, it ensures that when the authorized company cannot use adjustment clauses under the agreement, modifications regarding tax laws and financial regulations do not affect the financial model and the financial and economic balance of PPP agreements already in force.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Under Ivorian law, no reinstatement test is provided. Pursuant to the freedom of contract principle, such a test may however be included in PPP agreements.

<sup>12</sup> Article 17 of the PPP Decree.

<sup>13</sup> Article 96.2 of the Public Procurement Code.

<sup>14</sup> Article 109.3 of the Public Procurement Code.

<sup>15</sup> Article 22 of the PPP Decree.

<sup>16</sup> Article 23 of the PPP Decree.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

The concept of “uninsurability” is not specifically defined or provided for under Ivorian legislation. However, the parties can freely stipulate that risk above a certain threshold will no longer be insured provided that such article does not conflict with any mandatory provisions under Ivorian law.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Ivorian PPP legislation is silent as to whether or not substitution clauses or step-in clauses have to be included in PPP agreements. Therefore, it seems that the parties can freely stipulate such clause to be included.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Pursuant to the PPP Decree,<sup>17</sup> only Ivorian law can govern project agreements and direct agreements with lenders.

It provides<sup>18</sup> that disputes between a public authority and a private entity shall be settled according to the procedure the parties agreed on under the agreement. Therefore, if the parties agree on an international arbitration clause, this procedure can be used if a dispute arises.

<sup>17</sup> Article 29 of the PPP Decree.

<sup>18</sup> Article 30 of the PPP Decree.

However, disputes regarding the awarding procedure cannot be settled through an arbitration procedure given that only the *Autorité Nationale de Régulation des Marchés Publics* has jurisdiction over this matter<sup>19</sup>.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Ivorian PPP legislation does not provide for a regular market testing procedure to procure the services to be provided by the authorized company.

Such a test is also not provided for in public service delegation agreements or partnership agreements.

However, in accordance with the freedom of contract principle, such a test may be included in the contracts entered into between the private entity and its subcontractors (i.e. with the contractor and/or the operator).

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Ivorian PPP legislation does not provide for a specific acceptance procedure once the construction works of infrastructure are completed.

In practice, the procedure of acceptance is defined by the parties in the contractual provisions. It is usually provided that the acceptance procedure is divided into two phases.

<sup>19</sup> Article 30 of the PPP Decree.

Firstly, once the construction works are completed, a “temporary acceptance” phase takes place. During this phase, the public authority controls the compliance of the works with the laws and the contractual and technical specifications. After this period, the private party can be asked to undertake complementary works. Once the latter are performed, a “definitive acceptance” phase can take place.

#### **16. Are there any expected changes or reform to the existing legislation?**

The Ivorian government recently decided to reform existing PPP legislation.

The aim is to unify the current legal framework which is divided into the Public Procurement Code and the PPP Decree in order to take into account the goals pursued by the 2005 West African Economic and Monetary Union’s (“WAEMU”) directives on public procurement contracts awarding procedure and performance<sup>20</sup>.

It should be noted that changes in the legislation could help the country meet the government’s 2020 deadline for reaching emerging economy status. Among Ivory Coast’s planned projects, there are 94 PPP agreements, offering several opportunities for foreign investors to participate in the development of the country<sup>21</sup>.

## **FINANCING & INCENTIVES**

#### **17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

<sup>20</sup> Newsletter “Objectif Afrique”, n° 19 dated 5 February 2016, page 11.

<sup>21</sup> <http://www.oxfordbusinessgroup.com/news/lac%C3%B4te-divoire-multiplie-les-projets-dinfrastructures-de-grande-envergure>.

Under the PPP Decree, the payment of the private entity is provided either by the public authority or by the users<sup>22</sup>. Generally, the payment provided by the public authority is linked to performance objectives.

As regards public service delegation agreements, the private entity is compensated from income derived from service users and such payment is substantially linked to service operation outcomes.

In addition, as regards inflation and/or foreign exchange protection, the PPP Decree<sup>23</sup> provides that the Ivorian State guarantees to the operators a stable financial system for the duration of the PPP agreements. It is also specified that a change in law in respect of financial matters shall not result in changes to the economic balance of partnership agreements.

Furthermore, in respect of public service delegation agreements, the Public Procurement Code<sup>24</sup> provides that public service delegation agreements must guarantee a legal, financial and accounting framework for the benefit of both parties.

The “Franc Zone” is an economic and monetary union whose members include France, Ivory Coast and fourteen other African States. Its core principles are laid down in the Monetary Cooperation Agreement of 1972 between the Bank of Central African States (“BCAS”) and France, and the Cooperation Agreement of 1973 between the West African Monetary Union (“WAMU”) and France. These principles revolve around an unlimited convertibility guarantee whereby the French Treasury guarantees without any limits the conversion of CFA francs to euros, and a fixed exchange rate between the CFA

<sup>22</sup> Article 1 of the PPP Decree.

<sup>23</sup> Article 23 of the PPP Decree.

<sup>24</sup> Article 181 of the Public Procurement Code.

franc and the euro. In exchange for pegging the CFA franc to the euro and for the unlimited convertibility guarantee, BCAS and WAMU undertake to deposit some of their foreign exchange reserve with the French Treasury in an operational account whose mechanism is governed by the aforementioned cooperation agreements.

In Ivory Coast and more generally in the entire Franc Zone, key hedging related issues are quite typical for this type of transaction. These include, in respect of the borrower, establishing capacity and authority, and in respect of the jurisdiction, confirming enforceability of the hedging documentation and foreign judgments, as well as determining whether any licensing and/or consent requirements exist. ISDA Master Agreements have been used in the past by Ivorian borrowers with foreign entities.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return for the project company or sponsors under Ivorian law. However, pursuant to the freedom of contract principle, such a mechanism may be included in partnership agreements and public service delegation agreements.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Neither the PPP Decree nor the Public Procurement Code provides for a specific payment guarantee provided by the relevant

public authority for PPP projects. However, pursuant to the freedom of contract principle, such a mechanism may be included in both partnership agreements and public service delegation agreements.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the administration are not qualified as Treasury obligations. Furthermore, Ivorian law does not provide for separate guarantees to be granted by the Treasury to the concessionaire or the lenders. It should be noted that such guarantees are not usually provided in partnership agreements and public service delegation agreements. The guarantees issued to the benefit of the private partner are usually issued by financial institutions.

**21. Are deductions from the service and availability payments subject to a cap?**

Deductions from the service and availability payments are not specifically provided under the PPP Decree. However, such clauses can be included in partnership agreements pursuant to the freedom of contract principle.

In respect of public service delegation agreements, the Public Procurement Code<sup>25</sup> provides that the private entity's payment is substantially provided by the service operation incomes but does not specify whether deductions from service payments can be provided. In practice, such clauses are provided by the parties under public service delegation agreements.

<sup>25</sup> Article 3 of the Public Procurement Code.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The PPP Decree<sup>26</sup> provides for the conditions of variations and amendments to partnership agreements but there is no reference to a cap.

**23. Is there a requirement to share gains any arising from refinancing of the PPP project with the public authority?**

There is no requirement to share gains arising from refinancing of the PPP project with the public authority under the PPP Decree. However, the parties are free to agree to such a mechanism.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Although Ivorian PPP law does not specifically refer to direct agreements, it is common practice that the lenders and the relevant public authority will sign direct agreements.

Under direct agreements, the lenders will be entitled to intervene or “step-in” the shoes of the project company or the contractors in respect of key project agreements. The step-in rights are usually triggered when either the project company or the contractors have defaulted or there is a reasonable belief that they will default in the near future. Step-in-clauses allow the lenders to take over either the project company or the project itself, or to obtain control rights to make decisions on behalf of the project company. Thereafter, the lenders may take over the project or appoint a professional third party to take over the project.

<sup>26</sup> Section III of Chapter V of the PPP Decree.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

The PPP Decree<sup>27</sup> provides that the parties must provide for indemnification clauses but does not specifically refer to any debt assumption mechanism. Therefore, the parties can freely agree on a mechanism for the benefit of the lenders.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

Although it does not regulate the payments to be made by the administration in cases of termination, the PPP Decree requires, as outlined in question 24, that the parties agree on indemnification clauses under partnership agreements.

In respect of public service delegation agreements, payments are to be made by the administration in cases of termination except in case of contractual breach by the private entity.<sup>28</sup> This compensation is strictly linked to the expected loss of profit and is calculated at the termination date unless otherwise provided for in the public service delegation agreements.

<sup>27</sup> Article 28 of the PPP Decree.

<sup>28</sup> Article 144 of the Public Procurement Code.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Although there is no clear incentive for domestic manufacturing of equipment used in the construction of PPP projects, it should be noted that it follows from the PPP Decree<sup>29</sup> that one of the main principles that governs partnership agreements is the promotion of such agreements as a source of: (i) development of Ivorian companies, in particular small and medium-sized businesses; and (ii) growth and employment, especially through professional development opportunities for young people and upskilling of the local workforce.

**28. Are there tax advantages available to PPP projects?**

There are no specific tax advantages under the PPP Decree other than, as the case may be, those referred to in the Investment Code dated 7 June 2012. For instance, this code provides for a range of tax exemptions<sup>30</sup> and customs charges reductions<sup>31</sup> available to projects implemented in the eligible sectors.

**29. What are the other incentives available to PPP projects?**

There are incentives available to PPP projects in addition to those referred to in the Investment Code dated 7 June 2012. For instance, some incentives are available to small and medium-sized companies such as exemption from registration fees for all documents subject to registration and the provision by the Ivorian State of the lands

<sup>29</sup> Article 6 of the PPP Decree.

<sup>30</sup> Article 37 of the Investment Code.

<sup>31</sup> Article 45 of the Investment Code.

necessary for the implementation of the projects.<sup>32</sup>

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

Four main PPP projects<sup>33</sup> were developed during 2016 in the energy and tourism sectors for an aggregate amount of US\$ 1.8 billion.<sup>34</sup>

Moreover, it must be pointed out that in connection with the National Development Plan (*Plan National de Développement*) for 2016-2020<sup>35</sup>, US\$ 50 billion<sup>36</sup> is expected to be invested in several projects, with more than half of this amount (US\$ 31.2 billion) to be provided by the private sector in infrastructure, agriculture and security. A part of this amount is aimed at developing PPP projects.

<sup>32</sup> Article 49 of the Investment Code.

<sup>33</sup> The building and operation of a library (*la Bibliothèque de la Renaissance Africaine*) and two coal-fired power plants located in San Pedro as well as the building of a solar plant in Korhogo and a pipeline to import LNG.

<sup>34</sup> <http://www.ppp.gouv.ci/listit2projetsignes/Construction/7/67.html>

<sup>35</sup> This is an ambitious economic and social recovery and development program launched by the Ivorian Government on 9 December 2015 to make Ivory Coast an emerging country by 2020.

<sup>36</sup> <http://www.gcpnd.gouv.ci/gcpnd.php?lang=en>

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# JORDAN



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## ALI SHARIF ZU'BI ADVOCATES & LEGAL CONSULTANTS

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Yes. However, the type of PPP models that may be implemented vary depending on the nature of the project.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

Generally, PPP models in Jordan apply to all kinds of sectors that aim to yield a positive impact on the Jordanian economy, including the services offered in Jordan.

3. **Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the future?**

To the best of our knowledge, the government is currently involved with several PPP projects, including projects pertaining to education, transportation infrastructure, wastewater treatment and recycling of waste. Further, as

indicated in our answer to question (2) above, PPP models are generally applied to all kinds of sectors regardless of their nature.

### LEGISLATION & REGULATION

4. **What are the principal laws and regulations? Is there a framework PPP Law?**

The principal laws and regulations that govern PPP projects in Jordan are (i) the Public-Private Partnership Law No. 31 of 2014 (“**PPP Law**”), (ii) the Regulation for Public-Private Partnership Projects No. 98 of 2015 (“**PPP Regulation**”), and (iii) the Policy for Public-Private Partnership Projects.

5. **What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

By virtue of the PPP Law, a PPP Board chaired by the Prime Minister (“**Board**”) and a PPP Unit (“**Unit**”) were established as the principal regulatory bodies for PPP in Jordan. Each of the Board and the Unit enjoy a distinct function in relation to regulating and facilitating the works of PPP in Jordan. For instance, the Board is entitled to issue the final approval on the PPP, after the Unit recommends it.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no restrictions under the PPP Law or the PPP Regulation prohibiting foreign investors from participating in PPP projects in Jordan. However, pursuant to the Regulation of Foreign Investments and its amendments No. 54 of 2000, a foreign investor may not own more than 50% of the share capital for any project relating to, among other things, architecture, construction and brokerage.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

There are no laws or regulations stipulating a long-stop date for the completion of construction. Long-stop dates are to be agreed upon by the parties under the PPP agreement.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

Article 247 of the Jordanian Civil Law No. 43 of 1976 defines a force majeure event as “an event (not caused by the parties to the contract), which makes the performance of the contract impossible, and thus results in the automatic termination of the contract”. If the performance of the contract is rendered partially impossible by virtue of the force majeure event, then the contract shall only automatically terminate with regards to the part that is impossible to perform.

Article 37(j) of the PPP Regulation stipulates that a PPP agreement must expressly include provisions governing a force majeure event, the consequences of such event, and the mechanism of indemnification in the occurrence of such an event.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Article 37(j) of the PPP Regulation stipulates that the political and legal risks will be allocated between the parties in accordance with the terms of the PPP agreement unless such political and legal risks contravene Jordanian public policy.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Article 37(h) of the PPP Regulation stipulates that the PPP agreement should include a provision governing the insurance policies required to cover the risks which may be associated with the project. Therefore, the reinstatement is left to be governed by the PPP agreement as agreed upon by the parties.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

There are no provisions in the PPP Law and PPP Regulation to this effect.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Articles 37(k) and (l) of the PPP Regulation stipulate that the agreement should contain provisions governing step-in, take-over and early termination and the rights and obligations of each party in such cases.

- 13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Article 16 of the PPP Law stipulates that Jordanian law shall be the governing law of PPP agreements. However, Article 16 of the PPP Law stipulates that the parties are entitled to agree to settle their disputes through alternative dispute resolution, which includes arbitration.

- 14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Yes. Article 7(10) of the PPP Law provides that the PPP Unit shall be responsible for the review and documentation of the feasibility studies and technical reports. Furthermore, Article 11 of the PPP Law stipulates that the Unit shall prepare a survey and a continuity report to be submitted to the PPP Board for approval.

- 15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

There are no express provisions governing how the acceptance of the facilities is to be performed, therefore the issue is left for the contracting parties in the PPP agreement. However, Articles 5(b/3) and 37(e) of the PPP Regulation stipulate that the competent governmental bodies mentioned in the PPP agreement shall exercise the power to follow

up and monitor the parties' performance of their obligations under the PPP agreements.

- 16. Are there any expected changes or reform to the existing legislation?**

There are currently no pending bills or reforms that will amend or replace the existing legislation governing PPPs in Jordan.

## FINANCING & INCENTIVES

- 17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

There are no express provisions regulating the payment mechanism or inflation and/or foreign exchange protection in the relevant legislation. These matters are to be agreed upon by the parties in the PPP agreement.

- 18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

The PPP Law and the PPP Regulation do not provide express provisions regulating the guaranteed rate of return or a cap on the rate of return.

- 19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

No.

- 20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

No.

**21. Are deductions from the service and availability payments subject to a cap?**

There are no express provisions in the PPP Law and PPP Regulation governing the service and availability payments.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Article 14 of the PPP Law stipulates that the cost of the variations shall not exceed 20% of the total cost of the project. However, the Council of Ministers is entitled to approve the variations so long as the cost of which does not exceed 50% of the total cost of the project.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

No.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

No.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

No.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the**

**project agreement and are they payable in all termination scenarios including project company default terminations?**

There are no express provisions in the PPP Law and PPP Regulation governing the payments to be made by the administration to the sponsors, the project company and the lenders.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No.

**28. Are there tax advantages available to PPP projects?**

No.

**29. What are the other incentives available to PPP projects?**

In practice, PPP projects provide private sectors with additional investments required for the project from Jordanian authorities and the opportunity to contribute in international projects with the government of Jordan. Furthermore, PPP projects enable the efficient allocation of the risks arising out of the project onto the party that can bear the risk the most.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

Information relating to the number, investment amounts and sectors of the PPP projects developed in Jordan is not accessible to the public.

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# KAZAKHSTAN



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## WHITE & CASE KAZAKHSTAN LLP

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP model has just started to be applied in the infrastructure projects. There were a number of smaller concession (BOT type) based projects in 2005-2014 (construction of regional power line and railway line, reconstruction of Aktau International Airport). The first of a kind significant PPP based (BTO type concession) infrastructure project is the construction and operation of the 66 km motor road “Big Almaty Ring Road (“**BAKAD**)”, which was initiated in 2015 and pursued through 2016, but has not yet reached commercial closing.

Recently, the Government has started to focus its attention and efforts on developing small-scale regional PPP projects in the health-care, education, housing and utilities, and agriculture sectors using various types of PPP models, including through reconstruction and further leasing of facilities, BOT, BTO, etc.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

The PPP model is allowed for any sector of the economy; at the same time, certain types of property may not be PPP/concession objects, such as land, water, property of national security bodies, military equipment, backbone railway network, etc. (defined by the Order of President).

3. **Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

The Government attempts to utilize the PPP model more and more frequently, and there are ongoing PPP projects in various regions of Kazakhstan in different spheres, including construction of heat and power plants, construction and operation of water supply facilities, hospitals, airport terminal, roads and rail transport lines.

### LEGISLATION & REGULATION

4. **What are the principal laws and regulations? Is there a framework PPP Law?**

Law No. 379-V ZRK On Public-Private Partnership, dated 31 October 2015 (“**PPP**”

Law”), and Law No. 167-III ZRK On Concessions (“**Concessions Law**”) are the principal laws pertaining to PPP and concession projects.

The PPP Law, being recently adopted, remains largely untested and there is currently no assurance as to how its provisions will be implemented in practice. To the best of our knowledge, to date, no project has been completed in accordance with the Concessions Law or PPP Law (earlier PPP projects were implemented in the absence of definitive statutory regulation).

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The Ministry of National Economy is primarily responsible for the state policy and framework for implementation of PPP projects and coordination of the PPP activities within the country, while each central government authority (ministry) is responsible for country-scale PPP projects within its sectors of responsibility and local governors (*akims*) are responsible for smaller-scale regional PPP projects in their respective regions.

In addition, state-owned institutions, such as Kazakhstan Public-Private Partnership Centre<sup>1</sup> and Kazakhstan Project Preparation Fund<sup>2</sup>, are active players in relation to preparation and development of PPP projects.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no restrictions for foreign investors to develop/operate PPP projects. There is, however, a general restriction for foreign entities/persons to directly manage and

operate a telecom trunk network (management and operation through a Kazakhstan based subsidiary is allowed) and the general limitation for foreign entities/persons to own or operate more than a 49% stake in a legal entity carrying out certain activities in the telecom industry, unless approved by the Government.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The long-stop date concept is not mentioned in the legislation, but it may be regulated in a PPP/concession agreement. Recently, we have seen a long-stop date clause in the draft concession agreement for the BAKAD project.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

The PPP Law does not define force majeure events nor does it regulate the consequences of their occurrence. The Concessions Law provides that, with respect to concession projects “of significant importance” (to be defined by the Government), occurrence of force majeure events is a ground for early unilateral termination of a concession agreement by either party with compensation to be made in accordance with the provisions of the concession agreement.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The PPP Law requires the risks to be allocated in a PPP agreement in such a manner that would allow a risk to be borne by a party who is best placed to manage such risk.

<sup>1</sup> <http://kzppp.kz/>

<sup>2</sup> [http://kppf.kz/?page\\_id=1093&lang=en](http://kppf.kz/?page_id=1093&lang=en)

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The legislation does not envisage a reinstatement test. A recent draft concession agreement for the BAKAD Project provides that all insurance proceeds shall be used for reinstatement works.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

In our recent experience, a project agreement did recognize the concept of uninsurability.

**12. Does legislation allow the relevant public authority or the lender to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Both the PPP Law and the Concessions Law allow lenders to substitute a private partner/concessionaire in case of default, but only with respect to the projects “of significant importance” as determined by the Government.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

In the case of PPP/concession projects “of significant importance”, if a private partner or at least one of the shareholders of a concessionaire is a Kazakhstan non-resident, international arbitration is available with the forum to be determined in the respective agreement. Also, according to the recently adopted Arbitration Law, any civil disputes

irrespective of whether or not there is a foreign element can be referred to arbitration, although certain exemptions exist.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

No.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

As a general rule, acceptance of a constructed object is performed by the employer (i.e. project company) itself together with the contractor, an independent technical adviser (Technical Consultant) and the author of the project (Author).

**16. Are there any expected changes or reform to the existing legislation?**

Given that the PPP Law has been adopted less than two years ago and its aim was to enhance the framework for PPPs, currently no reform or major changes are expected.

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

Both the PPP Law and the Concessions Law envisage possibility for a private partner to receive compensation of its investment and/or operation costs, management fee and/or availability payments. The Concessions Law

allows for a concession agreement governing the project “of significant importance” to establish a mechanism of exchange rate risk mitigation, while the PPP Law, as mentioned above, requires a PPP agreement to allocate risks to the party which can best control them, which, in respect of inflation and foreign exchange risk, presumably, shall be the public partner.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

In general, there is no cap on the rate of return nor is there a guaranteed rate of return provided for in the legislation. At the same time, a rate of return is determined by the project developing authority and is set out in the project concept or the tender documentation for the project or feasibility study.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

The state may provide a state guarantee for loans attracted by a private partner/concessionaire to finance the project or state suretyship for revenue-yielding bonds issuance, provided that, with respect to concessions, the facility will subsequently be transferred into state ownership. Availability payment is also possible, as mentioned above.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

With respect to the republican-scale PPP/concession projects, the obligations of a

public partner/grantor are the obligations of the State and not the obligations of a particular ministry or other authority, while in relation to regional PPP/concession projects, the obligations of a public partner/grantor are the obligations of the local executive bodies (governors) which are separated from the obligations of the central (republican) Treasury. The republican Treasury is not responsible for the obligations of regional authorities and does not provide guarantees in relation thereto.

**21. Are deductions from the service and availability payments subject to a cap?**

A cap on deductions from the availability payments may be set out in a project agreement.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

At the legislation level – no, but a cap may be negotiated in a project agreement.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

There is no explicit legal requirement to share gains from refinancing with the state; however, we have seen such a requirement in a concession agreement.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The PPP Law and the Concessions Law allow for a direct agreement to be signed between the lender and public authorities. While as of today there was not any direct agreement concluded in Kazakhstan, according to the mentioned laws, the lenders in a concession project shall have the following rights:

- a) to request substitution of the concessionaire and to propose a new concessionaire candidacy in case of material violation by the concessionaire of its obligations under the concession agreement triggering termination thereof;
- b) to request substitution of the concessionaire and to propose a new concessionaire candidacy in case of material violation by the concessionaire of its obligations under the agreements with the lenders resulting in acceleration of obligations; and
- c) to appoint a temporary manager in case of a concessionaire's substitution, to determine the procedure for such appointment, the authority and the term of office of the temporary manager.

The lenders in a PPP project would have the right provided for in subparagraph a) above *mutatis mutandis*.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Not regulated on the statutory level.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default termination?**

The general rule is that in case of unilateral premature termination of a PPP agreement

(irrespective of the grounds and the party who initiates the termination), the private partner would be entitled to demand compensation of payments and damages as set out in the respective project agreement.

With respect to concession projects, in case of unilateral premature termination of a concession agreement by the concessionaire due to the grantor's default, the concessionaire partner would be entitled to compensation of damages arising as a result of such default. The public authority is entitled to unilaterally terminate a concession agreement in the interests of the public and the state (the grounds to be defined in the concession agreement), and in this case the grantor must compensate the damages arising as a result of such termination.

As concerns the concession projects "of significant importance", the concessionaire would be entitled to compensation of its costs and damages in case of termination due to Grantor's default, Concessionaire's default or force majeure; the exact scope of such compensation shall be set out in the respective project agreement.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No.

**28. Are there tax advantages available to PPP projects?**

No tax advantages are granted specifically for PPP projects, although certain tax advantages can be granted separately based on an investment contract under the Law on Investments or otherwise (e.g. for projects implemented in special economic zones).

**29. What are the other incentives available to PPP projects?**

The PPP Law and the Concessions Law provide for several types of state support available to private partners/concessionaires:

- a) transfer of exclusive IP rights owned by the state;
- b) provision of state in-kind grants (land, equipment, machinery etc.);
- c) project co-financing by the state; and
- d) state's consumption guarantee in respect of the output produced by the project.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

There are eight ongoing PPP projects since 2016, such as the construction of hospitals, roads and rail transport lines; all of them are at the concession proposal development or development of tender documentation stages. The total investment amount for these projects is equal to approximately 1.3 billion USD.

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# KINGDOM OF MOROCCO<sup>1</sup>



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## GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Until 2015, infrastructure projects were implemented in Morocco only under the model of a concession agreement and a delegated management agreement (*gestion déléguée*) that can be classified in the same category of contracts because the private partner is compensated by third party revenues.

Since 2015, PPPs can also be implemented under the model of a partnership contract (*contrat de partenariat public-privé*).

As such, Moroccan law establishes two categories of global contracts for the financing, construction, operation, servicing and maintenance of structures, facilities and public assets: (i) concession agreements and delegated management agreements whereby the contract holder is mainly remunerated by the commercial operation of the work (in particular by fees paid by users) and (ii) partnership contracts whereby the contract holder is mainly remunerated by public entity payments from the commissioning date of the work until the end of such agreement.

Based on the envisaged project, the grantor will determine the type of contract to be concluded. It will take into consideration the services to be performed and the payment conditions of the private entity.

For concession agreements, delegated management agreements and partnership contracts, the grantor can assign the design, build, and operation of a project to a private entity (*i.e.* Build-Operate-Transfer or Build-Operate-Own-Transfer agreements).

However, under a particular type of contract known as a *contrat d'affermage*, the grantor can only assign rights to the management of a public project that has already been built (*i.e.* Transfer of Operation Rights contracts).

<sup>1</sup> The authors are French lawyers registered at the Paris bar. The answers to the questionnaires relating to Senegal, Morocco, Guinea and Ivory Coast are based on their knowledge of the applicable regulations and on their experience of PPP projects implemented in these countries. The accuracy of these answers remains however subject to the confirmation by lawyers duly registered in the said countries.

## 2. Which sectors apply a PPP model to develop infrastructure projects?

The PPP model is used in all economic sectors for the development of infrastructure and the management of public services.

Major areas in which PPPs are implemented include transport (in particular motorways and ports), higher education and agriculture<sup>2</sup>.

In 2016, the Ministry of Equipment intended to continue to develop the PPP model for the construction and operation of motorways<sup>3</sup>, ports and airports.

## 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?

There are several new PPP projects in the pipeline, especially in the renewable energies and transportation sectors.

As regards the energy sector, once completed, the following PPP projects will have a huge impact on that sector: the 5 wind farms project to build and operate wind farms in Tanger (100 MW), Midelt (150 MW), Jbel Lahdid (200 MW), Tiskrad (300 MW) and Boujdour (100 MW) and the Noor PPP project for the building and operation of a complex of 4 photovoltaic power plants with a total capacity of up to 580 MW located in Ouarzazate.<sup>4</sup>

<sup>2</sup> <http://www.oxfordbusinessgroup.com/analysis/morocco-increases-role-private-sector-0>

<sup>3</sup> <http://www.morocoworldnews.com/2015/12/176337/moroccos-three-largest-highway-projects-for-2016/>

<sup>4</sup> <https://www.kfw-entwicklungsbank.de/PDF/Entwicklungsfinanzierung/L%C3%A4nder-und-Programme/Nordafrika-Nahost/Projekt-Marokko-Solar-2015-EN.pdf>

As regards the transportation sector, the following PPP projects are worth mentioning: a 120 km motorway project from Marrakech to Safi; a 190 km motorway project from Meknès-Fès-Tétouan-Tanger; a cargo airport project in Casablanca; and the Nador West Med Port, an energy port with its related facilities (a deep-water port specialising in the import, trans-shipment and storage of energy products).<sup>5</sup>

In addition, the use of PPP is under study for the realization of car parks in the Casablanca area.

## LEGISLATION & REGULATION

### 4. What are the principal laws and regulations? Is there a framework PPP Law?

The legal framework applicable to concession agreements was established by several sector specific laws<sup>6</sup> but the main framework pertaining to the concession schema is the Law No. 54-05 dated 14 February 2006 on delegated management agreements<sup>7</sup> (“**Delegated Management Law**”).

<sup>5</sup> <https://www.oxfordbusinessgroup.com/analysis/sea-change-major-project-aims-make-region-maritime-transport-hub>

<sup>6</sup> Law No. 4-89 relating to motorways (dated 6 August 1992); Law No. 15-02 relating to ports and creating the Ports National Agency (*Agence Nationale des Ports*) and the Ports Operating Company (*Société d'Exploitation des Ports*) (dated 23 November 2005); Law No. 52-02 relating to the organization and the operation of the national railway network (dated 7 January 2005); and Law No. 25-79 creating the Airports National Office (*Office National des Aéroports*) as amended by Law No. 14-89 and Law No. 1-93-140.

<sup>7</sup> Law No. 54-05 dated 14 February 2006 (Official Bulletin No. 5404 dated 16 March 2006) and Decree No. 2-06-362 dated 9 August 2006 (Official Bulletin No. 5454 dated 7 September 2006)

However, through Law No. 86-12 of 24 December 2014<sup>8</sup> (“**PPP Law**”) and its implementing decree No. 2-15-45 of 13 May 2015 (“**PPP Decree**”)<sup>9</sup>, Morocco recently introduced the partnership contract, a new category of BOT.

According to the PPP Law, the partnership contract is a contract whereby a grantor (*i.e.* the State and its public institutions) entrusts a private partner with a comprehensive project relating to the design, construction, conversion, maintenance, operation or management of works, as well as the financing of the latter.

The PPP Law was introduced in order to create a unified and incentivizing framework conducive to the development of infrastructure projects in Morocco and to increase visibility for both foreign and local investors. In consideration of the best international practice, the PPP Law was drafted after analysing the legal frameworks applicable to public-private partnership contracts in various countries, such as France, Spain and Egypt.

The main difference between a concession based schema and a partnership contract is that the private partner is remunerated – in its entirety or partially – by the public authority.

##### **5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The PPP Decree created a commission, mainly composed of representatives of various Moroccan ministries, set up under the aegis of the Ministry of Economy and Finance in order to identify a list of projects to be carried out as

<sup>8</sup> The PPP Law was published in the Official Bulletin No. 6332 dated 5 February 2015.

<sup>9</sup> The implementing decree No. 2-15-45 dated 13 May 2015 was published in the Official Bulletin No. 6365 dated 1 October 2015.

PPPs and validate preliminary assessments prepared by grantors before launching tenders.

This commission will also provide support for grantors through issuing opinions on partnership contracts implementation (e.g. during the award of the partnership contract or for amendment projects).

The underlying goal of this commission is to ensure the financial sustainability of each partnership contract in order to avoid financial difficulties for Moroccan public entities.

In respect of delegated management agreements, there is no specific regulatory body.

##### **6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

Neither the PPP Law nor the Delegated Management Law places any restrictions on foreign investors.

Nevertheless, it should be noted that the PPP Decree<sup>10</sup> specifies that in any awarding procedure, criteria of national preference can be taken into account in the selection of the tenders in order to support the domestic Moroccan economy.

For example, the grantor can decide to apply a percentage increase on the price of tenders presented by foreign bidders.

In addition, the grantor can also provide in the tender documentation for the awarding procedure criteria linked, for example, to the part of national companies, goods and services coming from Morocco which are involved or used to perform the future contractual obligations.

<sup>10</sup> Article 35 of the PPP Decree.

## 7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?

The PPP Law and the Delegated Management Law do not impose a long-stop date for the completion of construction.

However, the PPP Law does provide that partnership contracts are entered into for a maximum duration of thirty years that can be extended to fifty years depending on the complexity and the technical, economic and financial features of the project.<sup>11</sup> The duration is determined by the depreciation period of the selected investments, the financing terms and the type of construction and services to be performed.

The Delegated Management Law also provides that concession agreements are entered into for a limited period of time that cannot exceed the depreciation period of the selected investments.<sup>12</sup>

As such, the most common practice is that the parties determine specific clauses pertaining to a maximum duration for the construction in the contracts.

## 8. How are force majeure events defined, and what are the consequences of their occurrence?

As in other civil law countries, force majeure events are described in the Moroccan law<sup>13</sup> as an “unforeseeable event” for the parties. Therefore force majeure events are defined as (i) an event beyond a party's control, (ii) which the party could not reasonably have provided

against before entering into the contract and (iii) which the party could not reasonably have avoided or overcome provided that the event is not substantially attributable to the other party.

More particularly, the Moroccan law<sup>14</sup> specifies certain force majeure events: natural disasters (flood, drought, fire, storms, invasion of grasshoppers), invasion and the “*fait du prince*”.

The PPP Law<sup>15</sup> provides that force majeure events have to be defined in the contract.

Moreover, the PPP Law provides that the parties have to define precisely the consequences of a force majeure event occurrence to preserve the economic balance of the agreement, given that the partnership contract can be terminated in case of force majeure.<sup>16</sup>

The Delegated Management Law<sup>17</sup> only specifies that contractual provisions have to provide for termination in case of force majeure events.

## 9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?

The PPP Law provides<sup>18</sup> that partnership contracts have to include a specific clause in the PPP contract pertaining to the allocation of risks between the parties. This is modelled on the contractual practice of optimal risk sharing. The PPP Law specifies that the risks

<sup>11</sup> Article 13 of the PPP Law.

<sup>12</sup> Article 13 of the Delegated Management Law.

<sup>13</sup> Article 268 of the Code of Obligations and Contracts (as promulgated by Dahir 9 Ramadan 1331).

<sup>14</sup> Article 269 of the Code of Obligations and Contracts (as promulgated by Dahir 9 Ramadan 1331).

<sup>15</sup> Article 26 of the PPP Law.

<sup>16</sup> Article 17 of the PPP Law.

<sup>17</sup> Article 10 of the Delegated Management Law.

<sup>18</sup> Article 16 of the PPP Law.

linked to the different phases of the project must be identified and detailed.

Moreover it is specified that each type of risk has to be borne by the party who can bear it in the most efficient way, in order to minimize potential costs, and in consideration of public interest and the project specificities.

The Delegated Management Law does not provide for such obligation.

In general, in PPP contracts, the risks linked to expropriation and changes in law are assumed by the public entity.

In relation to adverse court decisions pertaining to the validity of the agreement, the allocation of risks is often provided for in direct agreements.

It is common practice that for court decisions pertaining to the early cancellation of the PPP, the risk is borne by the public entity. However, a private entity would bear such risk in case of breach of its contractual obligations.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Under Moroccan law, the reinstatement test is not envisaged<sup>19</sup>. Pursuant to the freedom of contract principle, such a test may be included in a PPP agreement.

However, based on our experience of PPP projects in Morocco, public entities are keen to reinstate the facilities rather than repay debt to the lenders.

<sup>19</sup> No laws or regulations seem to prohibit such test.

**11. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The concept of “uninsurability” is not specially defined or provided for under Moroccan legislation. However, the parties can freely stipulate that risk above a certain threshold will no longer be insured provided that such article does not conflict with any mandatory provisions under Moroccan law.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The PPP Law recognizes a substitution right, whereby the public authority can replace the private partner with a substituted entity in order to ensure the continuity of the public service, notably in the event of a serious breach of its contractual obligations.<sup>20</sup> The terms and conditions of such substitution have to be determined in the partnership contract.

The PPP Law also provides that the lenders can ask the public authority to substitute the private partner with a new entity, in case of serious breach of its contractual obligations.

By contrast, the Delegated Management Law does not provide for such rights. Nevertheless, delegated management agreements and concession agreements can provide for step-in rights for the grantors or the lenders in accordance with project finance practice.

It is interesting to note that the PPP Law provides for rights for lenders. Indeed, the step-in right for lenders in international project finance projects is always requested by the lenders despite the fact that it is rarely implemented in practice.

<sup>20</sup> Article 21 of the PPP Law.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The PPP Law provides that the project agreement can provide for disputes to be settled through an international arbitration procedure under the partnership contract<sup>21</sup>. In such case, the agreement must specify the applicable international arbitration procedures. Moreover, in addition to an arbitration procedure, parties can agree on conciliation proceedings or a mediation process under contractual clauses.

Arbitration procedures can also be used to settle disputes in respect of delegated management agreement performance<sup>22</sup>.

Then, as is required by international law, the arbitration clauses of all the PPP agreements must define the conditions of the arbitration procedure (*i.e.* seat of the arbitration, language of the arbitration, the applicable procedural law).

In addition, even if arbitration procedures are permitted, Moroccan legislation in respect of PPP agreements does not expressly provide for the possibility of project agreements and direct agreements to be governed by foreign laws.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Moroccan legislation does not provide for a regular market testing procedure. However,

<sup>21</sup> Article 27 of the PPP Law.

<sup>22</sup> Article 9 of the Delegated Management Law.

according to the freedom of contract principle, such a test probably may be included in a PPP agreement.

Such a test is also not provided for in concessions or partnership agreements.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Neither the PPP Law nor the Delegated Management Law provides for a special procedure for the acceptance of the facilities built (*procédure de réception*).

The acceptance procedure is not clearly defined for PPPs under Moroccan law<sup>23</sup>. Article 769 of the Code of Obligations and Contracts<sup>24</sup> provides that during a ten-year period, the private partner will be presumed liable to the grantor (or to the person acquiring the work) for latent defects and damages, including damages resulting from sub-soil conditions, which impair the strength of the work.

As in other civil law countries, the acceptance is pronounced by the owner once the work is suitable for its purpose (*réception provisoire*). If reparations and adjustments on the work are needed, the owner can establish punch list items (*liste des réserves*) that have to be confirmed by the contractor. The items or tasks will need to be repaired or completed prior to a determined date. After the complete reparation, the final acceptance of the work is pronounced by the owner.

<sup>23</sup> However, for public procurements, articles 65 and seq. of the “CCAG-T” (approved by Decree No. 2-99-1087 dated 29 Moharrem 1421) provide for a specific acceptance procedure of the work.

<sup>24</sup> As promulgated by Dahir 9 Ramadan 1331.

The final acceptance by the owner of the facilities (*i.e.* the grantor, the public entity) is a crucial event because upon acceptance, the owner takes control and ownership of the project and the risk of loss passes from the private entity to the owner.

**16. Are there any expected changes or reform to the existing legislation?**

Given the changes recently introduced by the PPP Law, no major reform of existing legislation is expected.

**FINANCING & INCENTIVES**

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

*In respect of partnership contracts:*

Under the PPP Law<sup>25</sup>, the payment of the private entity shall be made, in its entirety or partially, by the public authority. In the event where the public authority fails to pay entirely the private entity's payment, the latter may be remunerated by the users and/or the cash flow generated by the project. In any case, the remuneration is linked to performance objectives, guaranteeing the fulfilment of partnership contracts.

Neither the PPP Law nor the Delegated Management Law specifically provides for inflation and/or foreign exchange protection for PPP projects.

*In respect of delegated management agreements:*

Under the Delegated Management Law<sup>26</sup>, the private entity receives payments from the users.

This law<sup>27</sup> also specifies that delegated management agreements may authorize the private entity to collect, on behalf of the public authority, state taxes, royalties, funds or investments.

Delegated management agreements must specify, as applicable, the calculation methods of the entrance fees and the royalties paid by the private entity, as well as the contributions or interest in the financing of the public service that could be discharged by the public authority to the private entity.

It is also provided that delegated management agreements set out the principles and the pricing terms of the delegated service and the conditions and rules of adjustment and amendment or revision of the pricing or the remuneration.

Furthermore, the Delegated Management Law provides that such pricing or remuneration clauses must take into account not only the financial balance of delegated management agreements, but also the productivity gains, cost savings from improved management, and delegated management agreements' performance.

Consequently, in respect of inflation and/or foreign exchange protection, it should be noted that neither the PPP Law nor the Delegated Management Law provides for such protection. However, it should be noted that, in the Kingdom of Morocco, foreign investors benefit from a convertibility system that guarantees complete freedom to transfer the income generated by these investments and the retransfer of the liquidation proceeds or the investments sale.

<sup>25</sup> Article 15 of the PPP Law.

<sup>26</sup> Article 2 of the Delegated Management Law.

<sup>27</sup> Article 29 of the Delegated Management Law.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return for the project company or the sponsors under Moroccan law. However, pursuant to the freedom of contract principle, such a mechanism may be included in both partnership contracts and delegated management agreements.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Neither the PPP Law nor the Delegated Management Law provides for a specific payment guarantee provided by the relevant public authority for PPP projects. However, it is common practice in PPP agreements that a public entity (which is not necessarily the contracting authority) provides a first-demand bank guarantee to cover certain of its obligations.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the administration are not qualified as Treasury obligations. Furthermore, Moroccan law does not provide for separate guarantees to be granted by the Treasury to the concessionaire or the lenders. It should be noted that usually such guarantees are provided neither in partnership contracts nor in delegated management agreements.

**21. Are deductions from the service and availability payments subject to a cap?**

The PPP Law<sup>28</sup> provides that, in case of a contractual breach by the private entity, partnership contracts must determine the conditions whereby penalties shall be deducted from the private entity's remuneration, but such deduction is not subject to a cap. There is no similar provision under the Delegated Management Law.

As such, pursuant to the freedom of contract principle, the cap mechanism may be included in both partnership contracts and delegated management agreements.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

*In respect of partnership contracts:*

Although the variations requested by the public authority are not subject to a specific cap, the PPP Law<sup>29</sup> provides that any amendment to partnership contracts must not alter the balance of such contracts.

*In respect of delegated management agreements:*

Pursuant to the Delegated Management Law<sup>30</sup>, delegated management agreements may allow the parties to reconsider the delegated management operation conditions in accordance with the principle of public service adjustment and with the financial balance of delegated management agreements. However, no cap is set in the Delegated Management Law.

<sup>28</sup> Article 19 of the PPP Law.

<sup>29</sup> Article 23 of the PPP Law.

<sup>30</sup> Article 19 of the Delegated Management Agreement.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Under Moroccan law, there is no requirement to share any gains from refinancing of the PPP project with the public authority. However, according to the freedom of contract principle, gain sharing provisions may be included in a PPP agreement.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

There is no requirement to enter into direct agreements under Moroccan law. However as outlined in question 11, the PPP Law specifies that step-in clauses can be provided in partnership contracts. For instance, the PPP Law grants to the lenders substitution rights notably in the event of a serious breach of contractual obligations. Such step-in rights are usually provided for under direct agreements.

**25. Is there a debt assumption whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Moroccan law does not have a debt assumption mechanism whereby the public authority undertakes to reimburse the debt of the project company to the lenders. However, pursuant to the freedom of contract principle, such a mechanism may be included in both partnership contracts and delegated management agreements in some circumstances.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

*In respect of partnership contracts:*

Pursuant to the PPP Law<sup>31</sup>, the project company can be indemnified only in case of force majeure or disruption of the financial balance of partnership contracts.

*In respect of delegated management agreements:*

The Delegated Management Law<sup>32</sup> specifies that delegated management agreements may provide for indemnification principles and terms of the private entity only in case of termination for contractual breach by the public entity.

Pursuant to the freedom of contract principle, the termination conditions are agreed by the parties.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Pursuant to the PPP Law<sup>33</sup> and the PPP Decree<sup>34</sup>, the assessment criteria of the bids include the measures taken for the preference for national companies and in particular, the share of the services the private entity undertakes to subcontract to Moroccan companies as well as the utilization of domestic inputs. Unlike the PPP Law, the

<sup>31</sup> Article 26 of the PPP Law.

<sup>32</sup> Article 32 of the Delegated Management Law.

<sup>33</sup> Article 8 of the PPP Law.

<sup>34</sup> Article 35 of the PPP Decree.

Delegated Management Law does not specifically include such provisions.

**28. Are there tax advantages available to PPP projects?**

There are no specific tax advantages to PPP projects except for, as the case may be, those referred to in Law No. 18-95 relating to the Investment Charter dated 3 October 1995. For instance, pursuant to this law<sup>35</sup>, advantageous customs duties can apply when equipment, materials and goods are imported for the needs of a project.

**29. What are the other incentives available to PPP projects?**

There are no other incentives available to PPP projects, except for, as the case may be, those referred to in Law No. 18-95 relating to the Investment Charter dated 3 October 1995. For example, under this law<sup>36</sup>, a private entity can

enter into a contract with the Kingdom of Morocco in order to obtain financial compensation for the acquisition of lands, for external infrastructure expenses or for professional training expenses.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

According to the World Bank, between 2014 and 2015, four PPP projects have reached financial closure and US\$ 6 billion were invested in PPP projects, mainly in the electricity and telecom sectors<sup>37</sup>. In the next years, according to the Ministry of Equipment and Transport, PPP agreements will be used to develop in priority transport infrastructures<sup>38</sup> (ports, airports, motorways etc.).

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<sup>35</sup> Article 3 of Law No. 18-95 relating to the Investment Charter dated 3 October 1995.

<sup>36</sup> Article 17 of Law No. 18-95 relating to the Investment Charter dated 3 October 1995.

<sup>37</sup> <http://ppi.worldbank.org/snapshots/country/morocco>.

<sup>38</sup> <http://www.equipement.gov.ma/Investisseurs/Documents/Projets%20PPP%20version%20anglaise.pdf>.

# LATVIA



Maris Brizgo

## ELLEX KLAVINS

### GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

The PPP model is not commonly used in Latvia for infrastructure projects; classic public tenders are still mainly applied. Concession dominates greatly among PPP projects applied.

According to public information of the Register of Enterprises, from 1 April 2003 up to the date of this publication, 61 concession contracts and 4 PPP contracts were registered, and 54 of these contracts are still valid on the date of this publication.

2. Which sectors apply a PPP model to develop infrastructure projects?

- Transport and communication sector;
- Public utilities sector (mainly heat supply);
- Education sector; and
- Healthcare sector.

3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?

The Latvian government is now working on two substantial PPP projects, which are now in the early development stage:

- By-pass road of Ķekava of highway E67 / A7;
- Acoustic concert hall in Riga.

The Riga city municipality is now evaluating the possibility to provide a service of management of household waste in Riga city through a PPP project.

### LEGISLATION & REGULATION

4. What are the principal laws and regulations? Is there a framework PPP Law?

The framework PPP law in Latvia is the Public and Private Partnership Law, which is effective since 1 October 2009.<sup>1</sup>

<sup>1</sup> Translation in English of the law is available in the following link:

Subordinated applicable governmental regulations are as follows (translations to English are not available):

- a. Cabinet of Ministers Regulations No. 1216 of 20 October 2009 “Regulations regarding Operations of Supervisory Authorities and Submission of a Report on Performance of the Contract of the Public Partner or its Representative”;
- b. Cabinet of Ministers Regulations No. 1184 of 13 October 2009 “Registration and Accounting Procedure for Public and Private Partnership Contracts”;
- c. Cabinet of Ministers Regulations No. 1152 of 6 October 2009 “Procedure for Performance of Financial and Economic Calculations, Determination of the Type of Public and Private Partnership Contract and Rendering of Opinion on Financial and Economic Calculations”;
- d. Cabinet of Ministers Regulation No. 105 of 28 February 2017 “Regulation on Cut-Off Values of Contract Prices for Public Procurements”;
- e. Cabinet of Ministers Regulation No. 108 of 28 March 2017 “Regulations of Public Electronic Procurement”;
- f. Cabinet of Ministers Regulation No. 102 of 28 February 2017 “Regulation on samples of forms of official statistics and procedure for submission and completion of the forms”;
- g. Cabinet of Ministers Regulation No. 244 of 3 May 2017 “Regulation on notices of concession procedure and on preparation hereof”; and

[http://www.vvc.gov.lv/advantagecms/LV/tulkojumi/meklet\\_dokumentus.html?query=%22publisk%C4%81s+un+priv%C4%81t%C4%81s+partner%C4%ABbas+likums%22&Submit=Mekl%C4%93t&resultsPerPage=10](http://www.vvc.gov.lv/advantagecms/LV/tulkojumi/meklet_dokumentus.html?query=%22publisk%C4%81s+un+priv%C4%81t%C4%81s+partner%C4%ABbas+likums%22&Submit=Mekl%C4%93t&resultsPerPage=10)

- h. Cabinet of Ministers Regulation No. 110 of 28 February 2017 “Regulation on payment of deposit”.

#### **5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The Ministry of Finance ([www.fm.gov.lv](http://www.fm.gov.lv)) is the main state authority responsible for PPP policy in Latvia. The Ministry of Finance shall evaluate the expected impact of the conditions referred to in the financial and economic calculations on the amount of the long-term liabilities of the state budget and the government debt and shall give an opinion thereof.

The Procurement Monitoring Bureau ([www.iub.gov.lv](http://www.iub.gov.lv)) is the responsible body for the review of applications regarding alleged violations in procedures applied under the Public and Private Partnership Law, and it acts as the body responsible for the application of administrative penalties.

The Central Finance and Contracting Agency ([www.cfla.gov.lv](http://www.cfla.gov.lv)) is the monitoring institution as determined by the Government of Latvia and acts within the authority specified by the Public and Private Partnership Law. The Central Finance and Contracting Agency could be regarded as the centralized PPP body in Latvia which also acts as a competence centre for PPP.

The Register of Enterprises ([www.ur.gov.lv](http://www.ur.gov.lv)) is the body responsible for the maintenance and administration of the registry of PPP contracts.

#### **6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

Neither the Public and Private Partnership Law nor any other law or regulations apply any restrictions for foreign investors/companies to have access to PPP projects.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

In general, both concession and PPP contracts are limited to a lifetime of 30 years. As an exception, it is permitted to have a contract duration exceeding 30 years if it is necessary for the purpose of the contract and the results to be achieved, which are substantiated by financial and economic calculations.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

The Public and Private Partnership Law prescribes that a PPP contract should have provisions on force majeure events and the rights and obligations of the parties in such events. It is permitted to terminate a PPP contract in force majeure events. It is specified that if PPP laws and regulations are adopted during the validity of the PPP contract, action by the public administration institutions and the documents adopted thereby should not be considered as force majeure events. According to the Civil Law, neither party shall compensate the other party for any losses caused due to a force majeure event.

Latvian law does not specify *express verbis* what is meant by a force majeure event. The content of this term is given by the court. According to court case-law, force majeure conditions are conditions:

- 1) which were unknown to the parties at the moment of execution of a contract;
- 2) which render the completion of the contract impossible;
- 3) which did not occur due to fault of either party; and
- 4) which are not possible to prevent with any efforts by either party.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The Public and Private Partnership Law does not prescribe how risks should be allocated between the public and private parties. Risks are allocated individually on a case-to-case basis. It is mandatory that risk allocation is explicitly specified in a PPP contract.

It is specified that the Central Finance and Contracting Agency should review the risk allocation between the parties and should provide its opinion thereon. In case of a construction concession, a risk of demand from end-users should be transferred to the private partner.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The Public and Private Partnership Law does not provide for such reinstatement test. However, it is permitted to specify such reinstatement test in a PPP contract.

**11. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The Public and Private Partnership Law does not provide for the concept of “uninsurability”.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The Public and Private Partnership Law entitles funders to step-in if a PPP contract is

unilaterally terminated by the public partner in any of the following cases:

- a) According to the PPP contract provisions;
- b) If the private partner had submitted an application on termination of its business activities; or
- c) A bankruptcy procedure of the private partner had been started.

In case of step-in, the funder is entitled to propose to the public partner a new private partner. The funder should notify its exercise of the step-in rights within 1 month of receipt of a notice from the public partner. The exercise of the step-in rights is limited to a time period of 6 months.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

According to the Law on Arbitration Courts, an arbitral institution does not have authority over disputes where one of the dispute parties is either a state or municipal body or if an arbitration award may have an impact on the rights of state or municipal bodies. Since public partners are state or municipal bodies, disputes may not be referred to arbitration.

According to the Civil Law, contracts entered into by state or municipal bodies shall be adjudged, in respect of their substance and consequences, in accordance with Latvian law, provided it is not otherwise stipulated in the contract itself. Provided that a contract in question is regarded as a private law contract, the parties are free to agree on a foreign law as the governing law of the contract.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Public and Private Partnership Law does not provide for such regular market testing on a mandatory basis. However, it is permitted to provide for a similar procedure in the PPP contract in order to reconsider payment amounts.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

After the completion of construction works, the building (object) shall be accepted for exploitation by commissioning. Commissioning is executed by the competent local government or state institution (depending on the type of the object and the construction works) by signing the statement on acceptance of the object for the exploitation. Before commissioning, the party who proposed construction shall have to submit to the competent institution all the necessary documents regarding the completion of the construction works, including cadastral survey documents and resolutions of the institutions which have issued technical and special construction regulations. After receipt of all necessary documents for acceptance of the object for exploitation, the competent institution shall inspect the object and verify whether the object is acceptable for exploitation within 14 days. In the commissioning process shall participate (i) the competent institution, (ii) the party who proposed construction, (iii) the performer of construction works, (iv) the building

supervisor and (v) the designer (author supervisor), if author supervision is not performed or resolution is not provided by him/her.

**16. Are there any expected changes or reform to the existing legislation?**

It is not envisaged to adopt any changes to the existing PPP legislation. However, substantial changes were introduced to the PPP legislation during 2017 to implement EU Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The Public and Private Partnership Law does not provide any detailed provisions on how the payment mechanism should be regulated for PPP projects. The law provides that payments could be received either from the public partner or from end-users. It is mandatory to specify payments in a PPP contract.

In general, a public partner is not restricted to specify what payment mechanism would be applied in a particular PPP project. However, the public partner should justify the proposed payment mechanism and it should be supported by the Ministry of Finance and the Central Finance and Contracting Agency in their opinions.

The Public and Private Partnership Law does not directly address such issues as inflation and/or foreign exchange protection and leaves these issues to be specified by the public partner in the PPP contract. It is mandatory to

cover the conditions for reassessment of payment in the PPP contract. Therefore, public partners are free to provide provisions addressing inflation and/or foreign exchange protection.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

Latvian law does not set any guaranteed rates and does not set any caps.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

According to the Law on Budget and Financial Management, the Latvian State may provide a payment guarantee for liabilities which are undertaken for the performance of investments by a capital company in which the State or local government share in the equity capital individually or in total exceeds 50%, and by a capital company established by several local governments, in which the local government share in the equity capital exceeds 65% and which is included in the sector of non-financial merchants according to the classification of institutional sectors.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

According to the State Administration Structure Law, the State of Latvia is liable for the actions of institutions of direct administration. Therefore, if a PPP contract is concluded with a state institution, then obligations under such contract are obligations of the state. In general, the state is not liable

for obligations undertaken by municipalities or state-owned companies. Guarantees are not provided automatically and it depends on each particular PPP project whether the state provides guarantees or not.

**21. Are deductions from the service and availability payments subject to a cap?**

Latvian law does not set any caps and it depends on each particular PPP project whether such caps are applied or not.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Latvian law does not set any caps and it depends on each particular PPP project whether such caps are applied or not.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

There is no such requirement provided under the Public and Private Partnership Law.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The Public and Private Partnership Law does not address such issue and it is left to the discretion of the public partners to decide whether lenders should sign a direct agreement with the public partner or not.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

The Public and Private Partnership Law does not specify a debt assumption mechanism or anything similar.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

According to the Public and Private Partnership Law, the private partner should receive, according to the conditions of the PPP contract, payment for investments made and payment for early termination of the PPP contract if the PPP contract is terminated by the public partner in the following cases:

- in cases provided for in the contract where termination is not related to the non-fulfilment of contractual obligations by the private partner;
- the termination is necessary for State security, environmental protection, or public health and security;
- if changes were introduced to the PPP contract which were not permitted under the Public and Private Partnership Law;
- if the PPP contract was not concluded according to the rules specified in the PPP tender documents, or substantial provisions of the draft PPP contract as attached to the PPP tender documents were changed;
- if the private partner should have been excluded during the PPP tender procedure; or
- if the PPP contract should not have been awarded to the private partner due to a

material violation of an obligation provided in the Treaty on the European Union, the Treaty of Functioning of the European Union or in the Public and Private Partnership Law and the violation is established by the European Union Court.

The private partner should receive compensation as provided by the conditions of the PPP contract if the PPP contract is terminated by the public partner in the following cases:

- in cases provided for in the contract where termination is related to the non-fulfilment of contractual obligations by the private partner;
- the private partner has submitted an application to a Commercial Register Office on termination of the activity thereof; or
- if a decision has been taken on the inception of bankruptcy proceedings of a private partner in accordance with the procedures laid down in the Insolvency Law.

The private partner should receive compensation as provided by the conditions of the PPP contract if the PPP contract is terminated by the private partner in the following cases:

- in cases of violations of the PPP contract, as provided for in the PPP contract;
- if all legal persons as public partners have submitted an application to a Commercial Register Office on termination of the activity thereof; or
- if a decision has been taken on the inception of bankruptcy proceedings against all legal persons as a public partner

in accordance with the procedures laid down in the Insolvency Law.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

It is prohibited under Latvian and EU law to discriminate regarding equipment or materials produced in other EU Member states and all equipment and materials should be treated equally.

**28. Are there tax advantages available to PPP projects?**

According to the Corporate Income Tax Law, the private partner may amortise long-term investments in assets of the public partner according to the PPP contract throughout the contractual term.

According to the Real Estate Tax Law, the real property created in a PPP project and used for the needs of a municipality is exempted from real estate tax.

According to the Value Added Tax Law, the value added tax for construction services provided to the public partner which is registered as a VAT payer is paid by the public partner (and not by the private partner).

**29. What are the other incentives available to PPP projects?**

Co-financing for the implementation of PPP projects from EU structural funds is available in some instances.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

During 2016 there were no PPP contracts concluded in Latvia.

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# LITHUANIA



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## ELLEX VALIUNAS

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Currently Lithuania has 24 on-going or completed PPP projects; however, only several of them are of high-value and should be considered as “real” PPPs. However, the PPP model is currently being promoted for the development of infrastructure projects and several high-value PPP projects are in the procurement phase or the final steps of their commencement. The most common method used in PPPs is Build-Lease-Operate-Transfer.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

Until now, the PPP model was mostly applied for road infrastructure and public buildings. Projects such as the construction and reconstruction of roads, development of sports and entertainment arenas, and the development of law enforcement infrastructure have been among the most popular PPP projects.

3. **Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

The government is planning to launch a new high-value PPP for the reconstruction of one of the main Lithuanian roads connecting Vilnius, the capital of Lithuania, and Utena city. It is anticipated that in the future, the PPP model will be applied to a significant number of energy efficiency projects (street lighting, etc.).

### LEGISLATION & REGULATION

4. **What are the principal laws and regulations? Is there a framework PPP Law?**

Lithuania does not have a framework PPP Law. Instead, PPPs are covered by several laws and regulations. The following acts adopted by the Parliament form the core legal background for PPP projects in Lithuania:

- The Law on Investments establishes the legal background for the implementation of the PPP projects. The Law introduced definitions of PPP and the general government and private entities’ partnership (similar to the Private Finance

Initiative (“PFI”) model used in the United Kingdom, the “GGPEP”). It sets out the concepts, principles and peculiarities of GGPEP project agreement, as well as its contents and defines who can be the general government entities. The Law also introduced that the GGPEP agreement shall be concluded in accordance with the Law on Public Procurement and the duration of the agreement shall be more than 3 but not more than 25 years. In addition, the Law on Investments sets the legal base to establish the Central PPP Unit, which is responsible for the methodological aid and consultations regarding preparation and implementation.

- The Law on Public Procurement sets out a legal framework for the selection of the private party in GGPEP projects.
- The Law on Concessions establishes the basic rules for the granting of concessions. The Law provides a list of activities that shall be carried out according to concession agreements. The list includes economic and commercial activities related to infrastructure and public services with operations in specified areas (in case a project includes operations in other areas, a specific Government resolution shall be adopted). The Law also specifies the main rules on the award and cancellation of the concession, which are mostly based on general public procurement rules. In 2017, the Law on Concession should be replaced by the new Law on Concessions which transposes Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts into the national law. The new Law on Concession ensures that the award of concession contracts will be based on the same principles as in the

entire European Union. Similar to the current Law on Concessions, the new Law regulates the subject matter of the concessions, award procedure, implementation of concession projects, dispute resolution, etc.

- Due to the project’s significance, the ongoing Lithuanian Airport Concession project is also regulated by the special law – Law on Concession of the Airports managed by the State Company Lithuanian Airports.
- The Law on Use, Ownership and Disposal of State and Municipalities’ Property sets a legal framework for institutional PPPs. It provides that a private investor to a legal entity co-owned by the state or by a municipality and entitled to perform a PPP project shall be selected by conducting a contest for granting a concession or conducting a public procurement for the implementation of a GGPEP project, and the requirement that the State would maintain the majority votes in such co-owned entity. Due to this requirement, this model in practice is essentially not employed.
- The Rules on Preparation and Implementation of the Public-Private Partnerships, adopted by Government resolution, set out the definition of partnership agreement and specify the process of preparation, approval and implementation of PPP projects. The Rules clarified which institutions are responsible for the preparation, approval, implementation and control of PPP projects, as well as the procedures thereof. Furthermore, the Rules defined the main risks of the PPP projects and principles of allocation of the risk between the public and private parties and its impact on the ratios of the public sector’s deficit and debt.

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

In Lithuania, there is no regulatory body devoted specifically for PPPs – the Parliament and the Government set the main laws and regulations applicable to PPPs. However, there are some bodies which play active roles in PPPs.

One of them, the Central Project Management Agency (“CPMA”), performs the functions of providing methodological aid to the public sector regarding PPPs and seeks to assist in creating the legal, administrative and institutional conditions in Lithuania necessary for the development of effective partnership. CPMA provides methodological support and consults regarding the preparation and implementation of partnership projects; organizes training in this field for public administration institutions initiating and implementing the PPP projects; and issues methodological guidance, etc.

Another body – the agency Invest Lithuania – seeks to develop the Lithuanian PPP market and make sure that it is attractive to foreign investors. To this aim, Invest Lithuania helps public institutions to prepare feasibility studies (investment projects) for PPP projects and tenders for selection of private partner; to find competent advisors; and to structure the PPP project, etc.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

Equality for tenderers is guaranteed by local and European Union legislation. However, the Law on Investments provides that foreign investments shall be prohibited in the activities guaranteeing state security and defence (except for investments by the economic entities meeting the criteria of European and

Transatlantic integration which Lithuania has opted for, provided that this is approved by the State Defence Council).

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The legislation does not envisage a long-stop date. However, it is possible to specify it in the project agreement.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

Force majeure events and their consequences are defined in standard PPP documents which are prepared with the assistance of the Ministry of Economy and Invest Lithuania, and are published by CPMA.

Force majeure circumstances shall be understood as the occurrence of any circumstances (e.g. war, riot, civil strike or unrest, embargo, fire, earthquake, hurricane, volcanic eruption and other natural disasters), which the party that has to perform a specific undertaking cannot reasonably control, which could not be foreseen or avoided, and which completely or partially prevents the party from the performance of the said undertaking.

If an event of force majeure occurs and further performance of the agreement is impossible thereof, it shall not be deemed to be a violation of the project agreement or a failure to perform the undertakings, and no sanctions shall be applied to the affected party.

Upon the expiration of the force majeure circumstances, the performance of contractual undertakings will be resumed as of the specified date. However, generally, there is a possibility to terminate the project agreement if force majeure takes longer than some pre-defined time (usually 180 consecutive days) stipulated in the project agreement.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Political and legal risks are usually assumed by the public party. However, the partnership agreement always includes a matrix of risk allocation between the parties, which can specify a different allocation or some variations thereof. Consequences of the occurrence of political and legal risk depend largely on a specific situation but generally it is treated as a Compensation Event.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

A reinstatement test is not envisaged under the legislation. But it is usually stipulated in the project agreement. Project agreements usually specify that in case of an insured event during which assets are damaged or lost, the funds received as insurance benefits for the loss or damage of assets shall be used for the reinstatement of such assets or their replacement with equivalent assets.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

The concept of “uninsurability” is generally recognized in the project agreements. Project agreements usually specify that the obligation to conclude insurance contracts will not apply only in case and only for the period when respective insurance contracts cannot be concluded as a result of the situation in the insurance market or if the costs of such insurance contract would exceed a certain threshold.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The legislation for concessions clearly allows such a provision to be stipulated in the project agreement (in case of funders – to award the current concession agreement for the new entity found by the funders without new tender procedures for completion of the same project). Furthermore, standard project agreements provide both for Authority Step-In (in limited cases and for limited duration) and Funders’ Step-In (allowing the replacement of the failing private partner with a new one).

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

It is possible to choose arbitration for dispute resolution; however, in practice, it is unusual. As for the foreign law, there are no legal acts that preclude choosing foreign law as the governing law; however, to our knowledge, it has never been selected.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The legislation and the standard project agreements do not envisage such market testing procedure. It is possible to include such procedures in project agreements. We are aware of only one such attempt – however, it was ceased during the tender procedures.

- 15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Generally, having completed all the works which are approved and accepted by the governmental construction completion commission (whether it complies with legal requirements, technical design, etc.) and being ready to transfer thereof to the public party under the transfer-acceptance act, the private party shall notify in writing the public party and the independent technical adviser thereabout. After having received the private party's notice about its preparation to transfer the facility and to conclude the transfer-acceptance act, the public party and/or the independent technical adviser shall, no later than within a certain time-limit of receipt of the notice, agree to accept or refuse to accept the facility. In case of refusal, the public party shall notify the private party in writing giving the reasons for the refusal.

- 16. Are there any expected changes or reform to the existing legislation?**

Yes. Until 18 April 2016 Lithuania had to transfer into national law the new directive 2014/23/EU on the award of concession contracts adopted by the European Union on 26 February 2014. Currently the draft of the new Law of Concessions transposing said directive is submitted for further legislative procedures in the Parliament of the Republic of Lithuania and it might be adopted in 2017. Furthermore, the new Public Procurement Directives shall also be transferred into the national law, thus changing some requirements and procedures applicable for the selection of private partners in GGPEP projects.

## FINANCING & INCENTIVES

- 17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The payment mechanism is not regulated by legislation. However, the mechanism is always stipulated in the project agreement. Generally, inflation is dealt with by stipulating an indexation mechanism for Annual Payment in accordance with some predefined indexes. Foreign exchange risk is generally assumed by the private partner by employing hedging.

- 18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

Project agreements generally guarantee sponsors a rate of return specified in the final and binding proposal of the selected private partner, if it successfully performs the project agreement (i.e. subject to fines, penalty mechanism, etc.).

- 19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Generally no such guarantees are provided by the relevant public authority for PPP projects due to the aim to off-balance PPP projects. However, under the current regulations, some payment guarantees may be provided in city street lightning modernization projects. These guarantees are financed by Energy Efficiency Fund ("ENEF"), which was established on 18<sup>th</sup> of February 2015 by the Ministry of Finance, the Ministry of Energy and the Public Investment Development Agency ("VIPA"). VIPA is acting as an ENEF manager and the

Fund is funded by European Regional Development Funds.

The VIPA guarantee covers the debtor's (municipality's) outstanding obligations to the creditor (private partner or funder, depending on the specific structure of the PPP project).

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The law does not directly provide that the obligations of the relevant public authority should qualify as direct State (Treasury) obligations. The Treasury generally does not provide any separate guarantees to the private partner or to the lenders.

**21. Are deductions from the service and availability payments subject to a cap?**

Due to the aim to off-balance projects, generally, deductions from the service and availability payments are not subject to a cap (the principle "no service-no payment" is sought to be complied with).

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Generally, such variations are subject to a cap (due to the general principles of equality and non-discrimination) and shall be paid by the public authority on top of the Annual Payments (either as a lump sum or by amending the Annual Payment accordingly).

**23. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

Usually, project agreements stipulate that the refinancing gains are shared on a 50/50 basis.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Generally, lenders do sign a direct agreement with the relevant public authority and the private partner. According to this agreement, lenders have the right to receive a notification from the public authority in case the public authority is considering a termination of the project agreement with the private partner, and execute their step-in rights (and the procedure thereof).

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

In accordance with the practice up to date, such debt assumption mechanism is not included in the project agreements. However, generally the public authority undertakes to repay at least the pre-defined percentage (usually – 90%) of the debt to the lender even in a case of early termination due to the fault of the private partner, and the full outstanding debt in case of termination due to other causes.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

Generally, in case of early termination on any ground, the public authority pays the project

company a compensation amount calculated in accordance with agreed formulas which are laid down in the project agreement. In case of early termination due to the private partner's fault, it is generally sought that the compensation amount would reflect the project value minus rectification costs (often including some fine). If early termination is due to the public authority's fault, it is sought that the compensation would be equal to what the private partner would have earned if it carried the project agreement up to its expiration. And in case of termination due to force majeure or without fault of the parties, it is sought to compensate the private partner's costs of implementation of the project up to date plus some reimbursement for lost opportunity to carry on the project agreement until its expiry.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

In accordance with practice up to date, such incentives are not employed.

**28. Are there tax advantages available to PPP projects?**

No. According to the Lithuanian legal framework, no specific tax advantages are available to PPP projects.

**29. What are the other incentives available to PPP projects?**

No other specific incentives are available to PPP projects.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

During 2016, the tender procedures of only 1 large PPP project were partially completed – the Santara Medical Campus Parking Project. The Project agreement was signed only in 2017. At the moment this project is in the financial close phase. The total value of this transport sector project is approximately 134 million EUR. In addition, several minor local tourism and public leisure concessions projects at the municipality level were completed. Also in 2016 were launched several minor street lightning projects. Moreover, in 2016 there was significant movement in other major infrastructure projects such as airport expansion (the drafting of tender documents was started) and the Vilnius multifunctional centre (completion of the tender conditions).

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# MACEDONIA



Dori Kimova

## KIMOVA LAW OFFICE

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP model to develop infrastructure projects in the Republic of Macedonia is still not commonly used, but is in the process of development. The Build-Operate-Transfer model is the most common.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

Infrastructure projects through public-private partnership are most frequently developed in the energy sector, where the PPP model is used mainly in the construction of hydroelectric power plants.

3. **Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

The most significant PPP project whose development is planned to start in the course

of this year is the construction of a secondary and tertiary gas pipeline which is supposed to connect all municipalities to the primary gas network, which is already under construction.

### LEGISLATION & REGULATION

4. **What are the principal laws and regulations? Is there a framework PPP Law?**

The principal law which regulates the issue of public-private partnership is the Law on concessions and public-private partnership. The Public Procurements Law and Law on obligations also apply.

5. **What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The Ministry for Economy is the competent body for public-private partnerships with the following competencies:

- developing and implementing measures and activities aimed at the achievement and maintenance of a completely transparent and efficient system for public-private partnership;
- keeping and maintaining the Register of Awarded Contracts for Establishment of a Public-Private Partnership,

- preparing and drafting amendments to the regulations in the field of public-private partnership and giving instructions for implementation of the Law;
- organizing and delivering education and training in the field of public-private partnership for all the participants in the process;
- to monitor, analyse and provide professional assistance and opinion with regard to conducting the procedures;
- to monitor, analyse and study the current European and world tendencies, know-how and experiences in the field of public-private partnership; and
- to carry out other activities and tasks related to the public-private partnership.

The Government of the Republic of Macedonia established also a Public Private Partnership Council which has an advisory role for the Government in the field of public-private partnership. It promotes the public-private partnership, proposes projects, and raises initiatives with draft amendments to the regulations in this field. There is also a Committee for granting concessions and PPPs.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no restrictions for foreign investors to develop/operate PPP projects.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The project agreements may contain a long-stop date for the completion of construction.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

Force majeure is defined as an extraordinary event which happened after the conclusion of the agreement, but before the obligation is due, and which could not be predicted, prevented or avoided by the contracting parties. In case of force majeure, the obligations of the parties cease to exist, and the contracting parties are not responsible for damages suffered by the other party.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

All risks are subject to regulation by the project agreement.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The legislation does not envisage a reinstatement test; it could be subject to the project agreement.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

The uninsurability clause could be included in the project agreements.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The public partner is authorized to unilaterally terminate the agreement in case the authorized

company is in breach of contract. Also, PPP projects could be transferred to the funders if that is stipulated in the project agreement.

- 13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Settling the disputes and governing law are subject to determination by the project agreement.

- 14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The legislation does not envisage a regular market testing procedure. Quality standards for public services are subject to determination by the project agreement.

- 15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The manner of the acceptance of the facilities is regulated by project agreement.

- 16. Are there any expected changes or reform to the existing legislation?**

The legislation in our country in general is subject to frequent changes, and the relevant Law is not an exception. It was enacted in 2012 and has been amended four times so far; once in 2014 and three times in 2015.

## FINANCING & INCENTIVES

- 17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The payment mechanism is subject to project agreements. The payment is always determined in foreign currency, most commonly in euros or US dollars.

- 18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return.

- 19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

There is no payment guarantee provided by the relevant public authority.

- 20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations are the responsibility of the public partner and are not guaranteed by the Treasury.

- 21. Are deductions from the service and availability payments subject to a cap?**

The deductions from the service and availability payments are not subject to a cap.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The variations that the public authority may request at the construction and operation stages may not exceed 50% of the value of the primary contract.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

There is no requirement to share the gains arising from refinancing of the PPP project with the public authority.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The lenders do not sign direct agreements with the relevant public authority.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

The debts of the project company to the lenders in the event of termination of the project agreement are subject to regulation by the project agreement.

**26. What are the payments to be made by the relevant public authority to the**

**sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The payments in case of termination of the project agreement are stipulated in the project agreements.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

The legislation does not provide an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects.

**28. Are there tax advantages available to PPP projects?**

The legislation does not prescribe tax advantages regarding PPP projects.

**29. What are the other incentives available to PPP projects?**

Other incentives for PPP projects could be stipulated in the project agreements.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

There is no complete data available regarding the number, investment amounts and sectors of the PPP projects developed in the Republic of Macedonia in 2016.

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# MONTENEGRO



Sasa Vujacic

## LAW OFFICE VUJACIC

### GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Yes, the PPP model (Build-Operate-Transfer) is commonly used to develop infrastructure projects in Montenegro.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

The sectors which apply a PPP model to develop infrastructure projects are the following: energy, highway, railway and ports.

- 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

In the pipeline of the government exist several new PPP projects in different industries.

There are the following upcoming projects in tourism:

- *Nautical Tourist Center Vip Marina – Kotor*

There is a planned investment and tender preparation in progress to realize this project, which will provide a high quality and modern network of marina and luka in nautical tourism. This tourist center will include a marina with the capacity of about 150 berths with facilities and infrastructure, an administrative building, commercial facilities, and a high category hotel complex with a function in nautical tourism (three hotels with a total gross area of 15,645m<sup>2</sup>).

- *Ada Bojana – Ulcinj*

Development of the western part of the island: an area of about 100 ha is planned to have a tourist complex (from about 520 ha total area of island), which includes at least one 4-5\* hotel, villas and other types of residential accommodation. In this project, the tender preparation is in progress.

- *Njivice – Herceg Novi*

The land of 30,597m<sup>2</sup> and aquatorium of 7,313m<sup>2</sup> is planned for a marina, a business or congress hotel, apartment facilities, and a 5,000m<sup>2</sup> beach. The tender is published.

- *Kolasin 1600 – Kolasin Ski Resort*

Access to the base settlements from the direction of existing ski resorts Kolašin 1450. The main ski lift of ski resort Kolašin 1600 is ski lift K8/D6C. In this project, the call for bid submission has been published.

- *Mediteran – Žabljak*

Construction of a new tourist resort. This is a former military complex in Žabljak with an area of 13,951m<sup>2</sup>, situated 1,456m above the sea level, in the most attractive area of the national park “Durmitor”. In this project, the call for bid submission has been published.

There are the following upcoming projects in energy:

- *II Block Tpp Pjevlja*

Planned construction of two thermal power plant blocks in Pljevlja, a town situated in the north of Montenegro.

- *Hydro Power Plant Moraca*

Planned construction of hydropower plants on the river Moraca.

- *Hydro Power Plant Komarnica*

Planned construction of hydropower plants on the river Komarnica.

- *Maoce Project*

Concession for the exploitation of coal from the basin of Maoče and the construction of a thermal power plant of the estimated capacity of 500MW (2k250MW), 45 years concession, with a possibility of extension up to 22.5 years.

- *Tap-Iap*

Construction of a gas pipeline from Albania to Croatia via Montenegro and Bosnia and Herzegovina.

There are the following upcoming projects in transport:

- *Construction of Highway Bar – Boljare*

The highway Bar–Boljare is included in the SEETO comprehensive regional transport network for the Western Balkan. As SEETO route 4, it will connect Montenegro with Europe, beginning from the Adriatic coast via the capital city Podgorica, to the border with Serbia. The first Section, Smokovac-Uvac-Mateševo, is currently under construction; the estimated costs of this section are 809 million Euros.

- *Railway Line Belgrade (Vrbnica) - Bar*

Reconstruction and modernization of the railway line in compliance with European and main international railway lines and achievement of interoperability of the railway lines along the Corridor X.

- *Development of Airport Podgorica*

The project includes the construction of a new terminal building in capacity of 12,500 m<sup>2</sup>, expansion and reconstruction of maneuvering areas and apron, new fuel depot and parking with ground support facilities (including shelter).

## LEGISLATION & REGULATION

### 4. What are the principal laws and regulations? Is there a framework PPP Law?

The principal laws are the following:

- Law on Concessions (“Official Gazette of Montenegro”, 08/09);
- Law on Private Sector Participation in Performance of Public Services (“Official Gazette of Montenegro”, No. 030/02 to 073/10);

- Public Procurement Law (“Official Gazette of Montenegro”, No. 42/11, 45/2014; 028/15);
- Law on Foreign Investments (“Official Gazette of Montenegro”, No. 8/11);
- Law on Spatial Development and Construction of Structures (“Official Gazette of Montenegro”, No. 051/08 to 033/14); and
- Law on State Administration (“Official Gazette of Montenegro”, No. 038/03 to 042/11; 054/16).

The existing Law on Concessions and Law on Private Sector Participation in Performance of Public Services, as well as several sectorial laws, currently make up the legal framework for the implementation of PPP projects.

As none of these laws are specific to PPPs, the PPP legal framework is generally considered to have gaps. To fill these gaps, Montenegro is in the process of preparing a law on PPPs.

This new law should replace the Law on Concessions as far as concessions of public services or works are concerned and a number of sectorial laws.

#### **5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The principal regulatory bodies for the PPP are the Parliament, the Government and the Municipalities.

The Concession Commission is in charge of monitoring the concession award process, dealing with bidders and keeping official records of all granted concessions and Concession Contracts.

#### **6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The law does not impose any restrictions for foreign investors to develop/operate PPP projects in Montenegro.

#### **7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

A long-stop date for the completion of construction should be determined by project agreements.

#### **8. How are force majeure events defined, and what are the consequences of their occurrence?**

Montenegrin law defines force majeure as: any material and adverse event occurring after the date of the contract that is not directly or indirectly imputable to a Party that invokes it, was unforeseen at the time of the execution of the Project Agreement and whose occurrence and effects are not controllable by such Party and are beyond its reasonable control, could not be avoided or prevented by the affected Party, and which prevents such Party from fulfilling its contractual obligations under the Project Agreement.

Force majeure events include, but are not limited to, the following: (i) earthquakes; (ii) volcanic eruptions; (iii) waterspouts; (iv) tornados; (v) acts of war; (vi) acts of terrorism; (vii) acts of sabotage; or (viii) national or local industrial labour strikes, each having a significant impact on the performance of one or more of the obligations set forth in the project agreement.

In principle, the consequences of the force majeure occurrence depend on the specific type of force majeure event. Therefore, the parties to the project agreement endeavour to foresee such situations and define their mutual obligations accordingly.

- 9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

In accordance with the Montenegrin Law on Foreign Investments, assets of foreign investors cannot be expropriated, except when the public interest is determined by law or on the basis of the law, with an adequate reimbursement in favour of foreign investors.

The existing Law on Private Sector Participation in Performance of Public Services stipulates that the rules and regulations adopted on the basis of this law, which may affect or harm the granted or acquired rights in accordance with the repealed legislation, shall have no retroactive effect.

- 10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

N/a.

- 11. Is the concept of ‘uninsurability’ recognized in the project agreements?**

N/a.

- 12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The possibility to take control of the PPP projects is usually envisaged in project agreements in accordance with the “call-option” principle.

- 13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

For all disputes in relation to foreign investments, dispute resolution can be referred to international arbitration under the UNCITRAL rules, but not to a foreign court. Moreover, if the Government of Montenegro is a contractual party, then only ICSID arbitration is permissible. Furthermore, for certain issues, Montenegrin laws provide for the exclusive competence of the Montenegrin courts and the applicability of Montenegrin laws (e.g. real estate).

- 14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

N/a.

- 15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The law prescribes that the investor and the project company which built the structure or performed specific works on it, must, within 60 days from the day of receipt of the usage permit, hand over the structure on a preliminary basis and make the final calculation of the value of performed works, unless otherwise provided in the project agreement.

The investor and project company shall perform the final handover of the structure within 30 days from the expiry of the

guarantee period, unless otherwise provided in the contract.

Before the handover and prior to starting to utilize the structure, the investor is obliged to submit the application for issuance of a usage permit. The usage permit for the structure is to be issued after the performance of a technical inspection by a competent business organization, a legal entity or an entrepreneur.

**16. Are there any expected changes or reform to the existing legislation?**

Development of the PPP Law has been initiated and is currently in a preparation phase.

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The relevant legislation does not expressly provide inflation and/or foreign exchange protection.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

The relevant legislation does not specifically stipulate it, but a guaranteed rate of return or a cap on the rate of return for the project company or sponsors may be defined under the terms and conditions of project agreements.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

N/a.

**20. Do the obligations of the relevant public authority qualify as State**

**(Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the administration are qualified as State obligations. Furthermore, the law cites that the “*state of Montenegro is liable for the damages caused by unlawful or irregular work of the state administration*”.

**21. Are deductions from the service and availability payments subject to a cap?**

In accordance with the law and the project agreements, deductions from the service and the availability payments are not subject to a cap.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

N/a.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

N/a.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Lenders sign a direct agreement with the State of Montenegro.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

N/a.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

N/a.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

The law does not prescribe such incentive for domestic (local) manufacturing of equipment or materials used in the construction of the PPP projects.

**28. Are there tax advantages available to PPP projects?**

In accordance with the Government's Incentive Program for Business Development, the following tax incentives have been provided for investments in underdeveloped parts of the country:

*Profit Tax Exemption*

Newly established legal entities in economically underdeveloped municipalities conducting a production activity shall have the assessed profit tax for the period of the first eight years reduced by 100%.

*Tax on Personal Income Exemption*

A taxpayer who commences production activities in economically underdeveloped municipalities shall have the assessed personal income tax for the period of the first eight years reduced by 100%.

The tax relief does not apply to a taxpayer operating in the sector of primary production

of agricultural products, transport or shipbuilding, fisheries and steel.

**29. What are the other incentives available to PPP projects?**

There are no other incentives available to PPP projects.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

The Montenegrin Law mandates for the Concession Commission to submit an Annual Report on its operations for the previous year, no later than 31 March of a current year. At this point of time, there is no official data on the number, investment amounts and sectors of the PPP projects developed in Montenegro during 2016.

In accordance with the official and public Concession Commission Report, there is official data on the number, investment amounts and sectors of the PPP projects developed in Montenegro, and from the report it appears that in the Registry of concession contracts in 2015 were registered 49 contracts.

The sectors of these PPP projects are the following:

- Exploitation of mineral water;
- Operation of gravel and sand;
- Exploitation of forests;
- Exploitation of technical construction stone;
- Construction of hydroelectric power plants;

- Preparation of the classic games of chance (lottery);
  - Organization of special games of chance; and
  - The performance of port activities, maintenance of infrastructure, provision of equipment and remediation of concession areas.
- There is a realized project “Submarine cable”, which is the construction of submarine cable with energy of 1,000MW capacity between Italy and Montenegro (415 km long, 390 km under sea and 25km of underground cable). This investment is worth more than 800 million Euros. This project was realized by TO and TERNA, Italy. This project will position Montenegro as a regional energy hub, giving an investment opportunity for the whole region.

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# PARAGUAY



Camila Colombo

## MERSAN LAW

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The main goal of PPPs, regardless of the type of contract, active or service, is to optimize the generated value of the activity, so that the population receives greater economic benefits.

PPP has the following contract categories:

- Management and lease contracts: in which the investor takes over the administration and management of a public enterprise for a certain period of time, while ownership and related decisions as the investment to be made, remain to the state.
- Concessions: a private company takes over the management of a state-owned company for a period of time and in turn makes investments at its own risk. These types of contracts are sub-divided into three categories: rehabilitate, operate and transfer (“**ROT**”); rehabilitate, lease and

transfer (“**RLT**”); and build, rehabilitate, operate and transfer (“**BROT**”).

- Greenfield Projects: a private company or a joint venture (state and private capital) builds and operates a new facility for a certain period of time. This category is sub-divided again into the following categories: build, lease and transfer (“**BLT**”); build, operate and transfer (“**BOT**”); build, acquire and operate (where the state provides no guarantee of future profits); and rental projects (the state rents a property from a private sponsor and private premises, and in turn operates at its own risk during the contract period).
- Divestitures: a private company buys a stake in the capital of a state-owned company through a sale of assets, a public offering or privatization programs.

Currently PPP is a new mechanism provided by the Paraguayan public policy. It has recently been developed to generate infrastructure and to enhance Paraguay’s social and inclusive economic growth and development.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

Regarding infrastructure, there is a deficit in

several sectors in terms of transportation, energy, health services and telecommunications, both nationally and regionally.

The PPP model can be used for a number of projects, and is mostly used for transportation (roads, ports, airports), adequate international connection and modern quality social infrastructure (hospitals, schools), and adequate services of water treatment and provision, among others.

**3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

The PPP model will allow working in the future on the following projects:

- a) provision of drinking water, sanitation services and treatment of effluents;
- b) generation, transmission, distribution and commercialization of electric power;
- c) infrastructure roads to the capital and the metropolitan area;
- d) airports infrastructure;
- e) social infrastructure: hospitals, health and educational centers, and penitentiaries;
- f) production and commercialization of cement;
- g) aqueducts, pipelines, also ducts, and gas pipelines;
- h) production of goods and provision of services that are specific to the areas of companies in which the state is involved;
- i) telecommunications services; and

- j) production, refinement and commercialization of hydrocarbons, fuels and lubricants.

## LEGISLATION & REGULATION

**4. What are the principal laws and regulations? Is there a framework PPP Law?**

Yes, there is Law No. 5567/16 that modifies Article 52 of Law No. 5102/13 “Promotion of investment in public infrastructure and expansion and improvement of goods and services in charge of the State.” And the Law No. 5102 on “Promotion and Investment in Public Infrastructure, Expansion and Improvement of Goods and Services by the State”, known as the Public Private Alliance Law. Additionally, the Regulatory Decree No. 1350/14 has been issued and complements both mentioned laws.

PPP regulation offers a tool to attract investments for the development of goods and services to be provided, with a scheme in which the state does not assume all the risk to carry out projects that the country requires. In this structure, there is a competent administration: a contracting institution that has competence in the subject matter of PPP.

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The entities that have an important role and activities to perform are:

- the Technical Secretariat for Planning-Unit PPPP (*Secretaría Técnica de Planificación* (“**STP-U PPPP**”)).
- The Ministry of Finance (*Ministerio de Hacienda* (“**MH**”)).

- The Contracting Authorities (*Autoridades Contratantes* (“AC”)), where the Ministry of Public Works and Communications (*Ministerio de Obras Públicas y Comunicaciones* (“MOPC”)) is the main contracting authority.

In the process are also involved entities such as the National Directorate of Public Contracts (*Dirección Nacional de Contrataciones Públicas* (“DNCP”)), the Attorney General's Office (*Procuraduría General de la República* (“PGR”)), the Central Bank of Paraguay (*Banco Central del Paraguay* (“BCP”)), the National Council of Public Enterprises (*Consejo Nacional de Empresas Públicas* (“CNEP”)), and the Development Finance Agency (*Agencia Financiera de Desarrollo* (“AFD”)).

The role of the private sector is also a key factor, and its participation in the process implies its qualification to present proposals of projects of private initiative to be developed like PPP, at the time of appearing in the bidding call, since all the public works to be executed under the PPP modality are previously tendered.

#### **6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The legislative framework for PPPs does not place any specific restrictions on foreign investors. The only limitation established by the Law No. 5102 in terms of the amount of investment is in Article 3. It states that projects can only be done if investment expenses exceed the equivalent of 12,500 minimum monthly wages. This is equivalent to approximately US\$ 4,000,000.

#### **7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The law does not impose a long-stop date for the completion of construction; the clauses

and period of time must be established in the contract by both parties.

According to Article 2, Section g) of Law No. 5102, a contract must include a maximum term, which, including its extensions, may not exceed 30 years, except for the exceptional extensions provided for in the cases established in Article 34. If the stipulation of the term is not in the contract, it will be understood that it is governed by this maximum term.

#### **8. How are force majeure events defined, and what are the consequences of their occurrence?**

The law contemplates the possibility of unforeseeable and extraordinary external events that may cause serious prejudice to the private participant, and substantially alter the economic and financial balance of the contract. If this occurs, the private participant is entitled to obtain compensation from the contracting authority.

According to Article 96 of the Regulatory Decree No. 1350/14 “...any act or event unforeseeable, irresistible and beyond the control of the parties shall be considered as cause of force majeure or fortuitous event. Situations that are considered as a cause of force majeure or fortuitous event may include, without being restricted to natural catastrophes, fires, explosions, war, insurrection, mobilization strikes, and governmental decisions... The Private Participant shall have the right to request the suspension of the contract and enjoy a period equal to a period of obstruction or paralysis, in accordance to the provisions of article 35 of the Law. It would only be entitled to compensation in the case that is expressly stipulated on the contract... In case of express contractual provision, the compensation would occur once verified the serious damages caused to the Private Participant that alter the financial economic balance of the PPP contract and after an opinion of the Ministry of Finance. It could be implemented through an extension of the term of the contract that cannot exceed 10 ten years, from the

*variation to the initially planned investment regime, modification of the tariff regime, payment of subsidies, among others, according to the scope, mechanisms and procedures provided for in the PPP contract...”*

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The law states that the contract must include the assumption of the parties of any legal or financial consequences of any contingencies that may arise or emerge in the process of execution of the contract.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

In terms of insurance, the legislation states that it must cover civil liability for damages to third parties and all risks in work areas or accidents at work that may occur during the period of validity of the PPP contract. The sums received out of catastrophe insurance shall be used for work reconstruction, unless the parties agree to use them for other purposes in relation to the PPP contract. The specifications should determine the terms, form, conditions, modalities and other clauses to such policies, as well as the procedure for their approval.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

In the Paraguayan legislation, the concept of “uninsurability” is not specifically defined or stated. However, the parties can freely stipulate in the contract potential risks of any kind to be covered, as long as it does not contradict the mandatory provisions of the law. According to Article 31 of Law No. 5102, the contract will specify the guarantees, insurance or bonds that

must be constituted by the private participant, in accordance with the regulations.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Our legislation does not expressly provide information about these mechanisms but there is no express prohibition that forbids their inclusion in the project agreement between parties.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Yes, it is available. Article 41 of Law No. 5102 states that arbitration is a possible method for dispute resolution. However, it is provided that the parties may rely on arbitration after trying to solve the controversy by negotiation.

There is no express provision related to foreign law as the governing law of the agreements. However, we believe that, as PPP projects are of public interest for the country, the governing law cannot be a foreign law.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The procedure is based on the Law No. 5102/14 and its Regulatory Decree. Prior to the procedures for tendering and contracting PPP projects, studies of proposals must be submitted, which involve technical, economic and legal analyses, and require evaluations and opinions of the Technical Secretariat for Planning (*Secretaría Técnica de Planificación*

(“STP”), the Ministry of Finance, and the Contracting Authorities.

The evaluation process involves a step-by-step analysis. The first evaluation is made with the proposal presented at the pre-feasibility level, as required by the regulations, and then advance to feasibility. If there is a positive assessment, it will be submitted to the Executive Power for its approval. In this case, the next step is the preparation of the specifications and bases to carry out the competitive procedure of contracting.

All initiatives, public or private, go through the evaluation process described. Once the evaluations have been completed and the bidding rules and conditions have been approved, a call is made for the presentation of private sector offers, which lasts at least 60 days. Once the term of the call has been fulfilled, the bids presented are evaluated, and the contracts are awarded and signed.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

It is carried out only by the public authority, which is in charge of a prior evaluation. According to Law No. 5102, Article 17, prior to the commencement of the procurement procedure, the contracting administration must have the corresponding technical, economic and legal analyses. Likewise, it must have the opinion issued by the Technical Secretariat of Planning and the favorable opinion of the Ministry of Finance.

**16. Are there any expected changes or reform to the existing legislation?**

The last change in the legislation was made on January 26, 2016 with Law No. 5567 amending Article 52 of Law No. 5102 on “Legislative

Authority”. Apart from that no other modifications are expected to the current legislation.

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

In the context of a PPP, it is the private company that, generally, is in charge of obtaining the financing to make the necessary investments for the project. Funding can also be shared; but a PPP cannot exist without the private party handling some of the project financing. Moreover, financing can even be done through the issuance of bonds or shares of an entity created specially to exploit the project.

With regard to the payment mechanism, the government settles into a long-term service contract with the private sector, specifying its payment obligations. These obligations may vary according to the type of PPP project. Generally, PPPs tend to connect payment methods directly to the performance of the contracted company.

There are several forms of payment mechanism for the private sector of a PPP contract. In case it falls on user’s service, the rates can be controlled according to a formula that must be established in the PPP contract, either by regulation or a combination of both regulation and the parties’ terms. The contract must contain regular reviews of the rate formula, which may consider other future factors that were not taken into account at the time of entering into the contract. It could also be that payments are made by the government itself, which may be based on the use of service, or the availability of it. For this, clear specification of results and performance

standards should be established, as well as establishing formulas for the eventual variation of the payment. It can also be done through a bonus formula or performance-based fines. Finally, a mechanism that combines two or three of the mechanisms described above can be provided.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

Under Paraguayan law there is no guaranteed rate of return or a cap on the rate of return for the Project Company or sponsors.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

There are. For example, one of the PPP projects consisted of the Extension and Duplication of the National Routes 2 and 7, and the following three modalities were established for payment:

*a. Deferred Payment for Investment (Pago Diferido por Inversión (“PDI”)):*

A flow rate dedicated to pay the investment financed with debt. It is established as a fixed amount, not updatable and guaranteed once the Specific Object Society (*Sociedad Objeto Especifico* (“SOE”)) finishes the construction of all the identified sections. The deferred payments for investment are articulated on a six-month basis.

*b. Payment for Availability (Pago por Disponibilidad (“PPD”)):*

Variable flow rate subject to deductions by level of service and quality. The PPD pays a portion of operating and maintenance costs, major maintenance, taxes and private capital

contributed. These payments are articulated on a quarterly basis.

*c. Payment related to traffic (Pago vinculado al tráfico (“PVT”)):*

Variable traffic subject to a traffic risk that complements the PPD. For its configuration, an updatable amount is determined which the SOE will receive by the type of vehicle posted at the toll points. This payment would be dimensioned in such a way that its relative weight with respect to the PPD would be in the order of 10%. The payments linked to traffic are articulated on a quarterly basis.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

No, the obligations do not qualify as State obligations (Article 14). However, the guarantees to the concessionaire are provided in Article 11 of Law No. 5102, which provides for a trust fund aimed to cover the government obligations in relation to the PPP projects. The resources for this trust fund are covered, partially, by annual Treasury resources.

**21. Are deductions from the service and availability payments subject to a cap?**

Article 14 of Law No. 5102 provides that payments and contingencies are subject to a cap of 2% of the total GDP of the Republic of Paraguay, calculated from the previous year’s GDP figure.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Since the PPP agreements are long-term contracts, they may include clauses in this regard. Article 34 of Law No. 5102 provides

that the contracting authority may unilaterally modify the PPP contract, for public interest reasons, duly endorsed by the corresponding opinions. The contracting authority shall be obliged to rebalance the economic-financial equation of the PPP contract, fully compensating the private participant for any damages that may result from such alteration. The regulation will establish the maximum amount of investment that the private participant may be required to perform under the contract, as well as the maximum period within which the contracting authority may order the modification of the project.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

The participation of the eventual profits, economic gain, rights and emoluments that the parties will obtain as a consequence of the project must be included in the PPP contracts.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

They directly sign a contract with the contracting administrations (bodies and state entities) to participate in an investment project. In the contract, they establish the distribution of commitments, risks and benefits between the parties.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

The Law No. 5102, Article 11, provides for the creation of a trust and liquidity trust fund for PPP contracts. It has the objective of complying with the government obligations arising from the contract, as well as the costs for potential dispute resolutions.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The private participant may finance the development of PPP projects, through national or international modalities, instruments and operations. For the benefit of its creditors and to ensure obligations that are directly related to the development of its PPP contract, there is a guarantee of the rights arising from the participation contract including the future flow of funds generated by the project. In case of default of the private participant to its creditors who are holders of such guarantees, they may execute those guarantees in a direct and out-of-court manner through mechanisms that are provided by regulation or contractually. Alternatively, creditors holding such special guarantees may request the contracting administration to proceed to the unilateral termination of the PPP contract for non-compliance of the private participant, in order to use their respective rights in the framework of the process of termination of that contract.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

There are no such incentives in the provisions of the PPP regulation.

**28. Are there tax advantages available to PPP projects?**

PPP regulation does not provide specific tax advantages. However, the Law No. 60/90 on “Fiscal Incentives for National and Foreign Investment” is aimed to promote and increase national and/or foreign capital investments, and it provides tax benefits to natural and legal persons whose investments are made in accordance with the economic policy and social development of the country.

**29. What are the other incentives available to PPP projects?**

The above-mentioned Law No. 60/90 on fiscal incentives also allows for an increase in the production of goods and services; the creation of permanent labor sources; export promotion and import substitution; the incorporation of technology that allows to increase productive efficiency and allows the greater and better use of raw materials, labor and national energy resources; and investment and reinvestment of profits in capital assets.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

According to the World Bank, as of July 2016, Paraguay had an ongoing airport and a road project, and two other projects were announced as potential PPP projects.<sup>1</sup>

At the moment, there are five private proposals under evaluation for roads, ports, rails, airports, and water and sanitation infrastructure.

Article 51 of Law No. 5102/14 establishes that the information regarding the private initiative presented must be confidential until the declaration of public interest or the rejection of the respective project. Therefore, further information about these projects is still confidential.

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<sup>1</sup> World Bank, PPP Knowledge Lab: <https://pppknowledgelab.org/countries/paraguay>

# POLAND



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## GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The market for PPP projects in Poland is an emerging market. Most investments are still developed in traditional procurement proceedings (contracts for construction or design and construction).

The PPPs developed in Poland so far have usually been based on the design-build-finance-operate (DBFO) model, where the private partner is responsible for arranging the financing of the project.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

The first sector in which the PPP model (concessions) was used was the motorway sector. The PPP model has since been used (or contemplated for use) to develop large infrastructure projects in the following sectors: waste treatment (incineration plants), public health (hospitals), social housing (student

housing), public administration buildings (court building), public roads (regional roads), and telecommunication (broadband networks). A number of pilot, or smaller, PPP projects have also been carried out in other sectors, such as: water and sewage management, sports and leisure, energy efficiency and public parking.

3. **Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

Although statistically a number of projects have appeared on the market, very few of them attract international infrastructure players, either because these projects do not appear feasible or because the capex is too small (or both).

## LEGISLATION & REGULATION

4. **What are the principal laws and regulations? Is there a framework PPP Law?**

PPP projects are governed by two regulatory acts: the PPP Act of 2008 (“**PPP Act**”) and the Civil Works and Services Concession Act of 2016 (“**Concession Act**”).

The Concession Act establishes its own procedure for the choice of a private partner, while the PPP Act states, in principle, that the choice of a private partner in PPP projects other than concession-type should be made pursuant to the general provisions of the Public Procurement Law (“PPL”).

Concessions under Polish law are PPP contracts in which the private partner bears the economic risk of carrying out the project and payments from the public authority to the private partner (if any) do not cover all the private partner’s expenditures under the project.

While the PPP Act has on several occasions been used to structure major PPP projects, the Concession Act has rarely been applied for major PPP projects (there are four motorway concession projects in Poland currently at the stage of operation, but they all were awarded before the Concession Act entered into force based on a special regime for motorway concessions which is no longer in force).

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There is no supervisory or overseeing body established especially for PPP projects in Poland. PPP projects may be carried out by different governmental units both at the central administration level and by regional authorities, as well as different public utilities.

In 2011, the “PPP Platform” was established to promote and support the development of the PPP market in Poland. The PPP Platform is not a government entity, but a cooperation platform for PPPs established on the initiative of the Ministry of Development. It is supposed to bridge a gap regarding assistance to government administration in PPP project preparation and implementation and to act as a forum for exchanging information, experience

and best practices between local governments through the implementation of specific projects.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

No. Private partners in all PPP projects (including concessions) have to be appointed in competitive and transparent proceedings. No discrimination of bidders established in the EU/EEE Member States is permitted.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

This issue is not regulated by law. Typically, the private partner assumes the construction risk in a PPP project to the extent a delay in construction does not result from certain exhaustively listed events which relieve the private partner from its obligations under the PPP agreement (including force majeure).

The PPP agreement should specify remedies which the public authority may exercise if the private partner is in delay in the completion of construction. The ultimate remedy in such case would be the right to terminate the agreement due to circumstances attributable to the private partner if the delay in construction exceeds a certain maximum period. The right to terminate the agreement in such case will be subject to the lenders’ application of the relevant remedy procedures established in an agreement between the public authority, the private partner and the lenders (“**Direct Agreement**”).

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

PPP agreements contain a fairly standard definition of force majeure events where a force majeure event is an external event which

is beyond the reasonable control of either of the parties to a PPP agreement, against which neither party could have protected itself before the execution of the PPP agreement and which neither party could have avoided or prevented.

Typically, a party affected by the occurrence of a force majeure event will be relieved from liability for the performance of its obligations under the PPP agreement to the extent such non-performance or improper performance was caused by such event. The parties' rights and obligations in connection with curing the consequences of force majeure events are regulated in different ways in different PPP agreements (there is no established standard).

Usually, if a force majeure event lasts for a significant amount of time (several months), either party can terminate the PPP agreement.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Typically, political and legal risks which are outside the private partner's reasonable control should be the public authority's risks. Usually, however, the PPP agreement exhaustively lists the risks to be borne by the public authority.

The occurrence of such risks should usually trigger a special compensation procedure (in which a third party, such as an independent expert/engineer, is often involved), in which the project schedule and/or the remuneration of the private partner can be adjusted in order to put the private partner in the economic position in which it would have been, had such risk not occurred.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to**

**reinstatement the facilities or to repay the debt to lenders?**

This issue is not regulated by law. Also, there is no established standard on how the matters connected with the reinstatement of assets should be regulated in PPP agreements. If PPP agreements do not provide detailed rules on utilization of insurance proceeds, the relevant provisions determining who can utilize insurance proceeds, as well as when and how, are likely to be included in Direct Agreements. Lenders are likely to insist it to be up to them how insurance proceeds are used.

**11. Is the concept of "uninsurability" recognized in the project agreements?**

Yes, although no standardized approach has been established. As it is the private partner who typically would be obligated to provide adequate insurance coverage, the concept of uninsurability is used to shift the insurance risk to the public authority. It usually encompasses both events where no insurance is available and where such insurance is not available on financially acceptable terms (the PPP agreement may specify a maximum insurance premium beyond which insuring a given risk may be deemed financially unacceptable). In certain projects, the uninsurability concept is limited to uninsurable force majeure events, while in other projects it has a broader, more general scope of application.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Under Polish law, the effectiveness of a classic step-in clause, whereby lenders appoint another entity to take over the private partner's rights and obligations under the PPP agreement, can be questioned given the

prevailing interpretation of Article 7.3 of the PPL, according to which it is not possible to transfer the private partner's rights and obligations under a PPP contract to another entity. That is why in most PPP agreements (or Direct Agreements accompanying them) under Polish law, lenders are entitled to appoint another entity to become jointly and severally responsible with the private partner for the performance of the PPP contract rather than to replace the private partner in the performance of the PPP contract.

No step-in or substitution rights are set forth for governmental entities.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Yes, international arbitration is available to settle disputes under PPP agreements and Direct Agreements and in most PPP agreements pertaining to large PPP projects, disputes are to be resolved by arbitration rather than in common court.

A PPP agreement for a project awarded by a Polish public authority will have to be governed by Polish law. A Direct Agreement would also be expected to be governed by Polish law, while facility agreements and other financial documentation may be governed by foreign laws (except for some security instruments, for example pledge, which must be governed by Polish law).

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

This issue is not regulated by law. A market testing procedure (or other types of feasibility studies) should normally be carried out by the public authority before the procurement process is launched.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

In certain PPP projects, there is an independent engineer appointed for such time as the project is supposed to last and whose role is to determine various technical matters connected with the performance of the PPP agreement, including the acceptance procedures, directly by virtue of the provisions of the PPP agreement.

In other projects, the acceptance procedure (and other technical matters) should first be resolved between the parties and only when the parties fail to agree on such matter should the matter be presented to an independent technical expert who is appointed on a case-by-case basis.

**16. Are there any expected changes or reform to the existing legislation?**

A draft amendment of the PPP Law is now being discussed. The most significant solutions in the draft are:

- 1) strengthening the competences of the Minister of Development regarding support for PPP projects;
- 2) introducing two procedures: (i) voluntary assessment of small projects and (ii) obligatory approval for execution of the projects (of value higher than 300 million PLN from the state budget) not involving PPP;

- 3) introducing an obligation to monitor and evaluate the effectiveness of implementation of the PPP contracts;
- 4) introducing regulations facilitating monitoring of the PPP market;
- 5) introducing the possibility to execute the PPP project on the basis of existing public companies;
- 6) introducing explicit conditions for concluding direct contracts; and
- 7) clarifying that lenders can exercise step-in rights.

The PPL was amended in 2016. The purpose of the amendment was to implement the new EU public procurement directives (Directive 2014/24 and Directive 2014/25).

The new Concession Act was introduced in 2016 as well. The purpose of its introduction was to implement the provisions of EU Directive 2014/23.

## FINANCING & INCENTIVES

### **17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

This issue is not regulated in detail in the law, although the remuneration mechanism is described in the PPP Act as one of key factors that distinguishes concessions from other PPP projects.

Namely, if the private partner is given an exclusive right to collect proceeds from the operation of an asset (or the private partner's remuneration is predominantly composed of such right), the agreement may be treated as a concession agreement and governed by the Concession Act.

In availability-based projects (where the remuneration of the private partner does not depend on the actual demand for the services provided with the use of the asset but on the availability of the asset), the private partner is usually remunerated periodically, from the completion of the construction phase, throughout the entire maintenance/operation phase.

Availability fees are usually indexed. PPP agreements may require that interest rates and/or foreign exchange risk are hedged.

### **18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

The assumed rate of return is usually specified in the financial model forming a part of the private partner's bid in the procurement proceedings. The general principle is that the private partner should both bear the risk of underestimating the costs (and expected proceeds) generated by the project and be entitled to benefit from the fact that the remuneration proposed in its bid permits a higher rate of return than assumed in the financial model.

However, if the project costs increase (or proceeds decrease) due to the occurrence of certain events outside the private partner's reasonable control and for which the public authority agreed to bear the risk under the PPP agreement, the private partner will usually be entitled to compensation aimed at restoring the rate of return to that assumed in the financial model provided in the bid.

### **19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Currently, securing the public authorities' (minimum) financial obligations with the issuance of guarantees is not a market practice. This is usually not considered as a bankability issue and is, to a certain extent, justified by the Eurostat requirements regarding on/off balance treatment of PPP projects.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

Obligations of public authorities in projects developed by central administration bodies which do not have a separate legal personality from the State will be considered as the State's obligations. Obligations of public authorities in PPP projects developed by other entities (such as public utility companies or local governments) are not State obligations and the State does not normally assume any liability connected with the performance of such PPP projects.

Currently, securing obligations of public authorities under PPP agreements with State guarantees issued for the benefit of the private partner or the lenders is not a market practice; this is, to a certain extent, justified by the Eurostat requirements regarding on/off balance treatment of PPP projects. Lenders (and sponsors) usually have to rely just on the long-term financial standing and credit rating of the public authority carrying out the PPP project.

**21. Are deductions from the service and availability payments subject to a cap?**

There is no established standard as to whether deductions from the private partner's remuneration should be capped. Public authorities often refuse to limit the amount of deductions in order to ensure that the private partner can be adequately penalized if it fails to

ensure the availability of the asset for a significant amount of time. This approach can be also justified by Eurostat guidelines on on/off balance treatment of PPPs. Reaching a certain level of deductions is usually a termination event.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The right of the public authority to initiate change order proceedings is usually not subject to a cap. Usually, the private partner will not be obligated to implement such change order unless the parties agree on terms and conditions (including additional remuneration and/or extension of the project schedule) under which such change order is to be performed.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

This issue is not regulated by law. PPP agreements often contain gain-sharing mechanisms.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Yes, public authorities are expected to sign a Direct Agreement with the lenders. The Direct Agreement usually includes the following elements: (i) the public authority's obligation to notify the lenders of any events constituting non-performance or improper performance of the PPP agreement; (ii) the public authority's obligation to refrain from terminating the PPP agreement or pursuing any legal remedies against the private partner prior to the end of the cure periods specified in the Direct Agreement; (iii) the lenders' right to cure any breach of the PPP agreement by the private

partner in the cure period specified in the Direct Agreement; (iv) the lenders' right to designate another entity to complete the project who may become a party to the PPP agreement jointly and severally with the private partner; (v) rules on the utilization of insurance proceeds; and (vi) acknowledgment of the public authority that the private partner's rights under the PPP agreement are assigned for the benefit of the lenders.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

If the PPP agreement is terminated due to reasons attributable to the public authority, or in the event of force majeure, the public authority assumes the responsibility to repay, as part of termination settlements, the senior debt financing arranged by the private partner for the project as well as the sponsor's equity contributions and/or financing (although in case of termination due to a force majeure, the repayment of the latter may be subject to certain limitations).

In case of the private partner's default, the public authority's payment upon the termination would normally be expected to cover the repayment of the senior debt financing, but not the equity. Furthermore, in line with the Eurostat guidelines on on/off balance treatment of PPPs, settlements upon termination due to the private partner's default may also refer just to the repayment of the market value of an asset at the time of termination, irrespective of whether such value

allows for the repayment of the outstanding senior debt.

The public authority's obligation to repay the outstanding senior debt is often accompanied by the private partner's commitment to ensure that such repayment can be made through the public authority's assumption of the private partner's obligations under the facilities agreement(s).

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

In addition to those mentioned in point 25 above, in case of termination due to reasons attributable to the public authority, the termination settlement amount paid by the public authority may also include employee lay-off costs and the cost of termination of subcontracts. Settlements upon termination due to force majeure may also encompass such payments, but they are likely to be subject to certain limitations.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No.

**28. Are there tax advantages available to PPP projects?**

No.

**29. What are the other incentives available to PPP projects?**

None.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

As per the report on the Polish PPP market in 2016 published by the Ministry of Development<sup>1</sup>, 60 proceedings for the award of PPP projects (including concessions) were launched in 2016 and 11 PPP agreements were signed. However, only two of the PPP agreements signed in 2016 pertained to projects with an estimated value exceeding PLN 50 million (approx. EUR 11.5 million). Most of the initiated proceedings and executed

contracts regarded relatively small pilot projects with an estimated value below PLN 20 million (approx. EUR 4.5 million). In 2016, most PPP projects were carried out in the sports and leisure, energy efficiency, water and sewage management and municipality infrastructure sectors.

No official information is available on how many projects actually reached financial close.

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<sup>1</sup> [https://www.ppp.gov.pl/Aktualnosci/Documents/Analiza\\_ryнку\\_PPP\\_31\\_12\\_2016.pdf](https://www.ppp.gov.pl/Aktualnosci/Documents/Analiza_ryнку_PPP_31_12_2016.pdf)

# ROMANIA



Adrian Roseti

## DRAKOPOULOS LAW FIRM

### GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The public-private partnerships have benefited from the framework legislation in Romania for years. However, due to several uncertainties existing in the previous frame regulation (Law no. 178/2010 on PPP), which could have triggered long-term risks for investors, the PPPs have not been very widespread in the recent past. The previous law has been revoked as of 2016 when a new legislative package has entered into force.

According to the implementation norms of the old law no. 178/2010, PPPs could have been implemented, depending on the level of involvement of the private investor, by one of the following contract models: design-construction-operation-transfer, construction-operation-development-transfer, construction-operation-transfer, development-maintenance-operation-transfer, and rehabilitation-operation-transfer.

Despite the fact that the existing legislation in force does not prescribe the above-mentioned models, the implementation norms of the new Law no. 233/2016 on PPP to be adopted within the next months, are expected to set out in detail the PPP implementation models.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

Although in the recent past not many PPP projects have been implemented in Romania, several targets in transport infrastructure (such as motorways), energy (modernization of hydroelectric and thermoelectric power plants), health (construction of regional emergency hospitals), as well as projects of local interest have been on the lists of potential PPPs of government and public authorities for many years.

- 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

As stated under question 2 above, many PPP projects have been pending in Romania in the last few years.

The current Government Program includes investment projects in the transport infrastructure of Romania for the road, rail, air,

sea and multimodal sector, health infrastructure (construction and modernization of hospitals), educational infrastructure, environmental infrastructure, etc.

## LEGISLATION & REGULATION

### 4. What are the principal laws and regulations? Is there a framework PPP Law?

As of 24.11.2016, Law no. 233 on Public-Private Partnership (“**PPP Law**”) has entered into force, aiming to implement a legislative framework capable of ensuring efficient cooperation between the public and the private sector regarding public investments. According to the PPP Law the object of the Public-Private Partnerships is to create, or as the case may be, to rehabilitate and/or extend goods intended for the supply and/or the operation of a public service. However, to date, the corresponding implementation norms of the PPP Law have failed to be adopted thus creating a series of uncertainties in relation to its practical operation.

Along with the above-mentioned law, the entire PPP legislation has been consolidated in 2016 as follows:

- Law no. 98/2016 on public procurement;
- Law no. 99/2016 on sectorial procurement;
- Law no. 100/2016 on work concessions and services concessions.

Moreover, Law no. 101/2016 on remedies and appeals concerning the award of public procurement contracts, sector contracts, works concession contracts and service concession contracts, and on the establishment and functioning of the Nation Council of Appeals Settlement has been enacted, establishing the

competence of solving any disputes arising from public-private partnerships.

### 5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

The Department for Foreign Investment and Public-Private Partnership (“Department”) is organized and operates as a specialized body of the central public administration, with legal personality, within the Government’s working apparatus. The Department is functioning in accordance with Government Decision no. 536/26.06.2014 with respect to the coordination, monitoring and implementation of the Government’s Policy at the national level in the field of promotion, marketing, stimulating and implementing foreign investment and public-private partnerships.

A dedicated unit for the public-private partnerships is functioning within the Department, namely the Central Unit for the Coordination of the Public-Private Partnership with the aspects set forth by the above-mentioned Government Decision and/or any other aspects set by the Government or by the Prime Minister, as provided by the legislation in force in its activity fields.

### 6. Are there any restrictions for foreign investors to develop/operate PPP projects?

The Romanian PPP legislation does not set any restriction for foreign investors. Moreover, according to the provisions of Law no. 98/2016 on public procurement, of Law no. 99/2016 on sectorial procurement and of Law no. 100/2016 on work concessions and services concessions, the awarding procedure should observe, among others, the principles of non-discrimination, equal treatment, mutual recognition and transparency.

The same principles are also set by EU 2014/25/EU Directive, which expressly forbids direct or indirect discrimination against economic operators from another Member State.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The Romanian PPP legislation does not provide for a specific long-stop date for the completion of the construction works. However, the PPP Law provides that the duration of the PPP agreement is mainly determined by taking into account the depreciation period of the investments to be made by the project company and depending on the financing method of such investments. The same law prescribes that the determination of the term has to be made in a manner that (i) avoids artificial restriction of competition; (ii) ensures a reasonable profit for the respective field, as a result of the exploitation of the good / goods that makes the object of the project; and (iii) ensures a reasonable and affordable price level.

In accordance with Law no. 100/2016 on work concessions and services concessions, the duration of concession agreements is limited in order to avoid the distortion of competition. The contracting entity estimates the duration of the concession on the basis of the requested works or services. For works and or services concessions with an estimated duration of more than 5 years, the maximum term of the concession may not exceed the reasonable estimated time necessary for the concessionaire in order to obtain a minimum income to recover the costs of the investments, the costs related to the exploitation of works or services as well as a reasonable profit.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

The PPP legislation does not provide a definition of the force majeure events. However, in accordance with the Romanian Civil Code, force majeure is defined as *any external, unpredictable, absolutely invincible and inevitable event*. In accordance with the same regulation, *unless the law provides otherwise or the parties do not agree otherwise the liability shall be waived when the damage is caused by a force majeure event*.

In practice, when a force majeure event is temporary, the Parties are exempted from liability with respect to the observance of their contractual obligations whilst in case of a force majeure lasting for a considerable period of time, any of the parties may request the termination of the agreement.

In accordance with Law no. 98/2016 on public procurement and the Law no. 99/2016 on sectorial procurement, as regards the award procedure for the public procurement agreements, in case the contracting authority is unable to conclude the contract with the tenderer whose tender has been established as successful due to the fact that the concerned tenderer is in a situation of force majeure, the contracting authority has the right to declare the second-ranked bid as the winner, provided that the latter is admissible. In case there is no tender placed in the 2nd admissible place, the contracting authority has the obligation of cancelling the award procedure of the public procurement contract.

As provided by Law no. 100/2016 on work concessions and services concessions, the contracting entity has the obligation of cancelling the award procedure of the concession contract in case the contract cannot be concluded with the tenderer whose bid has been established as a winner due to the fact that the tenderer is in a situation of force majeure and there is no suitable tender ranked in the second.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

As prescribed by the PPP Law, the public-private partnership mechanism is characterized by several elements, which are envisaged to be detailed in the implementation norms of such law, including the risk allocation between the public and the private partner depending on the ability of each contracting party to assess, manage and control a particular risk.

Moreover, as per the same regulation, the project's substantiation study should highlight several elements, which justify, from an economic point of view the implementation of the project, including the risk allocation structure for each alternative option of project implementation. The same study should include an identification of the risk categories related to the implementation of the project, their quantification and a presentation of risk allocation alternatives between the parties, depending on their ability to manage the undertaken risk.

In light of the legislative changes, as provided by art. 25 of the PPP Law, when it comes to the determination of the awarding procedure of a PPP project, according to the Laws nos. 98, 99 or 100/2016, the following criteria are taken into consideration: (i) the object of the contract; and (ii) the manner in which the substantiation study provides the transfer of a significant part of the operating risk of economic nature in connection with the operation of the concerned works and / or services.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to**

**reinstatement the facilities or to repay the debt to lenders?**

The Romanian PPP legislation does not envisage a reinstatement test in order to determine the use of the insurance proceeds. However, relevant provisions in this regard may be included in a PPP agreement considering the principle of parties' freedom to contract.

**11. Is the concept of "uninsurability" recognized in the project agreements?**

Under the Romanian PPP legislation, the concept of *uninsurability* is not specifically defined. However, considering the principle of parties' freedom to contract, a specific clause regulating the conditions under which a risk would no longer be insured could be inserted in a PPP agreement, provided that such clause is compliant with the applicable legislation in force.

Moreover, should a case of *uninsurability* with a material impact on the balance of the contract occur, such could be covered by the concept of *unforeseeability* (in Romanian: *impreviziune*) (cases where the performance of the contract has become excessively onerous due to an exceptional change in the circumstances that would make it manifestly unfair to oblige the debtor to observe its obligation) for which the private partner may be entitled to compensation, save for the case where such risk has been expressly undertaken by the latter.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

As prescribed by art. 32 (p) of the PPP Law, the PPP agreement shall regulate also the procedures for taking over the rights and

obligations of the private partner by the financier and / or a new private partner.

Moreover, art. 39 provides the possibility of the public partner (at its own initiative or based on the request of the financier) of replacing the private partner or the project company if they do not fulfill their obligations under the contract or towards the financier of the project (if the possibility of replacement was provided in the contract).

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

In accordance with art. 43 of the PPP Law, the PPP agreement shall be concluded in accordance with Romanian law, regardless of the nationality of the private partner.

The competence for the settlement of the disputes arising out of the conclusion and/or the performance of the PPP agreements is set forth by the Law no. 101/2016 on remedies and appeals concerning the award of public procurement contracts, the sector contracts, works concession contracts and service concession contracts, and on the establishment and functioning of the Nation Council of Appeals Settlement.

According to art. 57 of the above-mentioned law, the parties may agree for the dispute in relation to the interpretation, conclusion, performance, amendment and termination of the PPP contracts to be settled through arbitration.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Laws nos. 98/2016 on public procurement and 99/2016 on sectorial procurement are providing, as a legislative novelty, the possibility of the contracting authority to perform market consultations for the acquisition, and to inform operators about acquisition plans and requirements contemplated in connection therewith. Within such consultations the contracting authority has the right to invite independent experts, public authorities or economic operators, including their representative organizations.

The contracting authority has the right to use or implement the opinions, suggestions or recommendations received during the consultations for the preparation of the procurement and for the organization and the implementation of the award procedure, provided that the use or implementation of such opinions, suggestions or recommendations does not distort competition and / or violates the principles of non-discrimination and transparency.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The Romanian PPP legislation does not contain special provisions with respect to the acceptance procedure, therefore such is to be performed by the beneficiary (the public authority) in accordance with the general rules set forth by the Romanian Civil Code and the corresponding construction legislation. Therefore, according to art. 1878 of the Romanian Civil Code, after the completion of the construction works, the parties shall proceed, as provided by the law, with the execution of the preliminary handover at the completion of works, followed by the final handover; the risks are transferred to the

Client as of the preliminary handover at the completion of works.

In accordance with the provisions of the Regulation dated 14.06.1994 on the handover of building and corresponding installation works, the handover of the construction works of any category and of the corresponding installation works shall be executed for new works as well as for the periodic interventions to existing constructions (capital repairs, reinforcements, alterations, refurbishments, extensions etc.) and shall be executed in two phases: (i) handover at the completion of works; and (ii) final handover upon the expiry of the defect liability period.

For the construction and corresponding installation works, irrespective of the financing source, form of property or purpose, the handovers shall be organized by the credit coordinators or by the owners, who, for the purpose of the said regulation, hold the quality of investors.

The committees for the handover of constructions and corresponding installations shall be appointed by the investor and shall be formed of at least 5 members. One of the members shall compulsorily be an investor's representative, a representative of the local public administration in the territory of which the construction is located, and the other members shall be specialists in the field, out of which one member can be a representative of the State Inspectorate for Constructions - I.S.C.

For the constructions in the exceptional category of importance, with a high-risk level in terms of safety, purpose, type of use, complexity and volume of works that make the object of the handover, the handover committees shall include at least 7 members, the number of specialists being of minimum 5, out of which, one is a representative of the State Inspectorate for Constructions - I.S.C.

For some investment projects, partially or fully financed from the state budget sources, including external credits, and for which the responsibility of approving the technical-economic documentation belongs to the Government, the committees for the handover of construction and corresponding installation works shall compulsorily include a representative appointed by the main coordination of budgetary credits, who does not hold or does not subrogate to the investor quality.

The representatives of the contractor and of the designer cannot take part in the handover committee, these having only the quality of guests.

#### **16. Are there any expected changes or reform to the existing legislation?**

The entire PPP legislation has been amended and consolidated, thus no substantial changes or reforms are expected at the moment, save for the adoption of the implementation norms of the PPP Law, which are expected to be adopted within the following months.

### **FINANCING & INCENTIVES**

#### **17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

According to art. 2 of the PPP Law, such is to be applied by the public partner for the implementation of the project in case, among the essential elements set forth by the law, the substantiation study reveals the fact that the revenues following to be obtained by the project company from the use of the goods or from the operation of the public services making the object of the PPP project are generated (totally or in majority) by payments

made by the public partner or by other public entities in the benefit of the public partner.

As per art. 14, by virtue of the PPP agreement, the public partner will be able to transfer or establish, in favor of the project company, the right to collect and use for the implementation of the project tariffs from the users of the public goods or service making the object of the PPP, the types and the level of the tariffs being set by the law. The project revenues resulting from the collection of the tariffs by the project company are completed with the public partner's payment obligations towards the project company or the private partner, as the case may be, according to the provisions of the PPP agreement.

The unilateral amendment of the PPP agreement by the public partner is allowed under the PPP Law for exceptional cases related to the public interest, provided that the conditions set thereto are cumulatively met. In such cases, according to art. 35, the PPP agreement serves as an adjustment mechanism for the payments to the private partner and the project company, in case the unilateral amendment is favorable to the private partner, by reducing the works that have to be performed or in any other manner.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

The Romanian PPP legislation does not provide for a guaranteed rate of return or a cap on the rate of return neither for the project company nor for the sponsor.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Article 13 of the PPP law regulates the manner in which the public partner can contribute to the implementation of the PPP project, including by granting guarantees, in accordance with the law, in favor of the sponsors of the PPP project, who are credit or financial institutions.

However, the public partner's contribution to the PPP project has to be made according to the applicable regulations on state aid, the use of public funds and, respectively, in compliance with the limits set by the law as regards the public budget deficit and the public debt.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the involved public authority do not qualify as Treasury obligations. Moreover, according to the Romanian PPP laws, the Treasury does not provide for any separate guarantee to the concessionaire or the lenders.

In accordance with art. 13(3) of the PPP Law, if, under the public-private partnership agreement, payment obligations are set at the expense of the public partner involving the use of public funds, the necessary commitment credits and budgetary credits will be included in the corresponding public budgets, according to the law.

**21. Are deductions from the service and availability payments subject to a cap?**

Art. 32 of the PPP law sets also among the mandatory elements that have to be regulated by the PPP agreement the *“remuneration of the private partner, showing in detail the method of calculation and payment, including the possibility of offsets / deductions between the amounts due to the*

*private partner and any potential damages or other amounts owed by the private partner”.*

As per art. 14, by virtue of the PPP agreement, the public partner will be able to transfer or establish, in favor of the project company, the right to collect and use for the implementation of the project tariffs from the users of the public goods or service making the object of the PPP, the types and the level of the tariffs being set by the law. The project revenues resulting from the collection of the tariffs by the project company are completed with the public partner's payment obligations towards the project company or the private partner, as the case may be, according to the provisions of the PPP agreement. However, the PPP laws do not provide for a cap for the deduction from the service/availability payments.

## **22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

As stated in the answer to question 17, according to the PPP Law, the PPP agreement may be unilaterally amended or terminated by the public partner due to exceptional reasons related to the public interest, provided that the following conditions are met: (i) this possibility, including the categories of exceptional reasons relating to the public interest, is included in the awarding documentation in a clear, precise and unambiguous manner, as well as in the public partnership contract; (ii) the amendment of the agreement does not alter the generic nature of the initial contract; and (iii) with the prior notification of the private partner and of the project company.

For the purpose of the PPP Law, exceptional reasons related to the public interest may mean public health issues, environmental protection, safety and quality standards, availability of tariffs to service user or the need to ensure unobstructed access to a particular service.

The PPP law does not provide a specific cap to the variations. However, in case the amendment or the unilateral termination of the agreement causes a prejudice to the private partner, the latter is entitled to a fair compensation, determined in accordance with the provisions of the implementation norms of the PPP Law, the method of its determination being set by the PPP agreement.

According to art. 221 of the Law no. 98/2016 on public procurement, the agreement may be amended without the organisation of a new awarding procedure in several cases set by the law, provided that a series of conditions are cumulatively met, including the prohibition of the increase of the contract price representing the value of the additional products/services/works with more than 50% of the value of the original product (when additional products, services or works are necessary to be purchased from the original contractor, that were not included in the original contract) or the prohibition of the increase of the price with more than 50% of the value of the public procurement / initial framework agreement (for the case where the amendment became necessary following circumstances that a contracting authority acting with diligence could not have prevented).

According to art. 241 of the Law no. 99/2016 on sectorial procurement, the sectorial agreements and frame agreements may be amended without organisation of a new awarding procedure provided that the following conditions are cumulatively met: (i) the value of the amendment is less than the corresponding thresholds set by the law (the minimum value of the agreement); and (ii) the value of the amendment is less than 10% of the price of the initial sectorial/frame agreement, for the case of sectorial agreements for services and products or less than 15% of the price of the initial sectorial/frame

agreement, for the case of sectorial agreements for works.

As per art. 107 of the Law no. 100/2016 on work concessions and services concessions, the agreement may be amended without the organization of a new awarding procedure, provided that the following conditions are cumulatively met: (i) the value of the amendment is less than the corresponding thresholds set by the law (the minimum value of the agreement); and (ii) the value of the amendment is less than 10% of the value of the initial work or services concession.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

The Romanian PPP legislation in force does not provide for any requirement of sharing the possible gains arising out of the refinancing of the PPP project with the public authority. However, such requirement could be included in the implementation norms of the PPP Law to be adopted in the near future.

On the same note, there are no legal provisions prohibiting the inclusion of a clause regulating such mechanism within a PPP agreement.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

As prescribed by the PPP law, among others, the public partner may contribute to the implementation of the PPP project, by providing guarantees under the law in favor of the sponsors of the PPP project who are credit or financial institutions.

Art. 4 of the above-mentioned regulation sets that both in case of contractual or institutional PPP, in case another public entity intends to support the implementation of the project by

assuming towards the private partner declared as winner or towards the project company of payment/guarantee obligations in the benefit of the public partner, such can be made only after the designation by the public partner of the winner of the award procedure, but prior to the signing of the contract (a situation in which the public entity becomes part of the respective contract since its conclusion) or after the signing of the PPP contract, during its execution (in which case the public entity shall sign with the parties to the respective contract an addendum setting out the mutual rights and obligations; the public entity becoming a party to the contract in question at the moment of the conclusion of the said addendum).

Moreover, art. 39 provides for the possibility of the public partner (at its own initiative or based on the request of the financier) of replacing the private partner or the project company if they do not fulfill their obligations under the contract or towards the financier of the project (if the possibility of replacement was provided in the contract).

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

There is no debt assumption mechanism regulated under the PPP legislation. However, as stated in our answer to question 24 above, the public partner may contribute to the implementation of a PPP project including by providing guarantees in favor of the sponsors of the PPP project who are credit or financial institutions. Any type of contribution of the public partner shall be made in all cases according to the regulations on state aid, the

use of public funds and, respectively, in compliance with the limits set by the law as regards the public budget deficit and the public debt. Therefore, the covered amount is not set explicitly in the PPP laws.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

As per art. 35 of the PPP Law, for exceptional reasons related to the public interest, the public partner may unilaterally amend or, as the case may be, unilaterally terminate the PPP contract, subject to the following conditions: (i) such possibility, including the categories of exceptional reasons relating to the public interest, was included in the awarding documentation in a clear, precise and unambiguous way, as well as in the PPP contract; (ii) the amendment of the contract does not alter the generic nature of the initial contract; and (iii) with the prior notification of the private partner and the project company.

In accordance with the provisions of the same article, in case the amendment or unilateral termination of the contract causes any prejudice to the private partner, the latter has the right to a fair compensation, determined according to the PPP's Law implementation norms, the determination method being provided in the PPP contract.

Moreover, the PPP contract must contain a mechanism for adjusting payments to the private partner and the project company, where the unilateral change of the contract by the public partner is favoring the private partner by reducing the amount of work to be performed or in any other way. In case of disagreement on the amount of the indemnity/

adjustment, it shall be determined by the competent court. The disagreement will in no case allow the non-execution or improper performance of its obligations by the private partner or, as the case may be, by the project company.

Art. 38(3) of the same regulation prescribes that upon termination of the PPP contract for any reason, except for the expiry of its term, the goods made or acquired by the project company and representing the object of the project, as well as those necessary for the performance of the public service may be transferred to the public partner under the conditions stipulated in the PPP contract with the payment of compensation set in relation to the non-depreciated value of these goods. If the termination of the contract was caused by the fault of the private partner, from the amount of the above-mentioned compensation must be deducted any amount owed by the private partner as compensation under the public-private partnership contract.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

There is no incentive granted for domestic manufacturing of equipment or materials used in the construction of the PPP projects.

Moreover, according to art. 155 of the Law no. 98/2016 on public procurement, the technical specifications are set out in the awarding documentation and define the required characteristics of the work, service or products covered by the procurement. As per art. 156(2) of the same regulation, save for the case where it is deemed as justified by the subject-matter of the contract, the technical specifications shall not specify a particular producer, a specific origin or a particular process that characterizes the products or services provided by a particular economic

operator and shall not refer to trade marks, patents, types, to a specific origin or production, which would have the effect of favoring or eliminating certain economic operators or products. The same provision is set also by art. 166(2) of the Law no. 99/2016 on sectorial procurement.

The law no. 100/2016 on work concessions and services concessions, while regulating the technical and functional requirements, prescribes in art. 74 that the contracting entity may not by technical and functional requirements, refer to a particular producer, origin or process that characterizes the provided products or services.

**28. Are there tax advantages available to PPP projects?**

The Romanian PPP legislation does not provide for any specific tax advantages available to PPP projects.

**29. What are the other incentives available to PPP projects?**

There are no incentives available to PPP projects, according to the Romanian PPP legislation in force.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

Many PPP projects are included in the current Government Program and are expected to be implemented in the following period. Due to the legislative uncertainties that have affected PPP field until 2016 and the unfavorable economic climate and despite the fact that there are plenty of pending PPP projects, only a small percentage of such projects has been finalized during 2016.

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# RUSSIA



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### GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP model (in various forms) is quite often used to develop infrastructure projects of different scales in Russia.

The PPP projects can be implemented on the basis of the Concession Law and the Public-Private Partnership Law. The Concession Law limits the structuring of federal PPP projects to the Build-Operate-Transfer model. Under this scheme the right of ownership to the relevant project facility remains with the public authority. At the same time, a number of constituent entities (regions) of the Russian Federation set forth their own legal framework that envisages other PPP models, including those that are based on the principle of transferring the ownership title to the created facility to an investor (e.g., Build-Own-Operate).

Under the PPP Law projects may be structured using a variety of internationally recognised

models for implementing PPP projects, including Build-Own-Operate, Design-Build-Own-Operate, Build-Own-Operate-Transfer and Design-Build-Own-Operate-Transfer.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

Russian PPP legislation applies to all forms of public sector PPP arrangements setting forth a broad but exhaustive list of property that may be considered a PPP facility, including in particular: highways/railways and related infrastructure facilities, pipelines, ports, airports, public utilities and social infrastructure facilities.

As a matter of practice, PPP projects are so far mainly implemented in the transportation sector (road construction, public transport, toll systems, airport construction and operation), public utilities sector (water supply/disposal, waste disposal) and social infrastructure sector.

- 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

The number of PPP projects being implemented on the federal and municipal levels continues to increase. The current pipeline includes projects in the renewables

sector, development of several airports, construction of suspension bridges, toll roads, health care facilities, water supply and wastewater facilities, heat-supply facilities, etc.

There has been a recent initiative from the State Space Corporation “Roscosmos” to attract private investments to the space sector. Possible PPP projects in the space sector may include: development of satellite navigation systems, satellite communication, spacecraft manufacturing, manned cosmonautics, commercial usage of spacecraft, space tourism, etc.

## LEGISLATION & REGULATION

### 4. What are the principal laws and regulations? Is there a framework PPP Law?

There are two principal federal legislative acts regulating the implementation of PPP projects:

- Federal Law No. 115-FZ “On Concession Agreements”, dated 21 July 2005 (“**Concession Law**”) is the principal federal legislative act in Russia governing the procedure for the implementation of concession-based PPP projects; and
- Federal Law No. 224-FZ “On Public – Private Partnership, Municipal – Private Partnership in the Russian Federation and Amending Certain Legislative Acts of the Russian Federation”, dated 13 July 2015 (“**PPP Law**”) and entered into force on 1 January 2016.

A number of Russian regions have also adopted regional PPP laws that provided for greater flexibility for investors and lenders in developing PPP projects (e.g., by allowing transferring the ownership over a created facility to an investor). A well-known example (and one of the actively used) is Law of St.

Petersburg No. 627-100 “On Participation of St. Petersburg in Public-Private Partnerships”, dated 25 December 2006.

More detailed procedural rules addressed in the Concession Law and the PPP Law are contained in resolutions of the Russian Government and the Ministry of Economic Development and Trade.

Apart from this specific legislation, there are other principal laws and regulations concerning PPP projects, including: (i) the Civil Code of the Russian Federation; (ii) the Budgetary Code of the Russian Federation; (iii) the Urban-Planning Code of the Russian Federation; (iv) Federal Law No. 223-FZ “On Procurement of Goods, Works, Services by Certain Types of the Legal Entities”, dated 18 July 2011; (v) Federal Law No. 225-FZ “On Production Sharing Agreements”, dated 30 December 1995; and (vi) Federal Law No. 39-FZ “On Capital Investments in the Russian Federation”, dated 25 February 1999.

### 5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

There is no single designated PPP authority. At the federal level, the Ministry of Economic Development of the Russian Federation is the key federal authority involved in the development of PPP and investment policy and legislation. The Ministry also maintains a register of PPP projects in Russia. Certain other sector-specific ministries also play an important role (e.g., the Ministry of Transportation of the Russian Federation, the Ministry of Construction and Housing of the Russian Federation). At the regional level, the relevant regional governments are authorized to develop national policy and the regulatory framework for PPP.

In addition, a group of expertise centers and organizations (e.g., a PPP Development

Center) was established in Russia to, among other things, provide essential support to regulatory authorities in improving the existing regulatory framework on PPP.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The Concession Law explicitly provides that a foreign legal entity may be an investor in a PPP project (with some exceptions in respect of certain types of facilities, which are the subject matter of a PPP project).

Unlike the Concession Law, the PPP Law establishes more stringent requirements in relation to participants of PPP projects. Under the PPP Law, an investor must be a Russian legal entity only. However, foreign legal entities may participate in PPP projects indirectly (e.g., as part of a consortium with Russian companies or through Russian legal entities).

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The Russian PPP legislation does not envisage a long-stop date for the completion of construction. Such term is to be agreed by the parties and fixed in the relevant project agreements.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

Russian legislation does not contain a definition of force majeure, referring instead to “circumstances having an extraordinary nature, i.e. extraordinary and inevitable circumstances”. While the Civil Code precisely specifies the type of circumstances that may be deemed to be extraordinary and inevitable, it does enumerate circumstances that are expressly excluded from this clause. These circumstances

include: (i) failure to perform on the part of a defaulting party’s counterparty; (ii) absence of goods required for performing obligations in the market; and (iii) lack of monetary funds. The list is apparently non-exhaustive and is subject to court interpretation.

The Regulation on Certification of Force Majeure Events approved by Resolution No. 173-14 of the Chamber of Commerce and Industry of Russia dated 23 December 2015 refers to such force majeure events as fire, flood, earthquake, hurricane, epidemics, military acts, strikes, prohibition of export and import of goods, and other events. It should be noted that Russian courts have a degree of discretion as to whether to recognize a particular event as constituting force majeure.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Generally, Russian PPP legislation is fairly flexible in terms of risk allocation between the parties to a PPP project. The parties usually allocate risks among themselves in the concession or partnership agreement.

However, some of the risks are allocated by imperative legal provisions. For example, both the PPP Law and the Concession Law provide for guarantees to be granted to the project company in the event of an adverse change of law directly affecting a PPP project or overall change of macroeconomic conditions. In addition, the public authority must consider the project company’s requests to amend the key terms of the agreement if, under court or federal antimonopoly authority decisions in force, the project company is not able to perform obligations under the agreement as a result of decisions, actions (omissions) of the state or local authorities and (or) their officials.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The PPP legislation does not specifically regulate the procedure for conducting a reinstatement test (or cases when it must be performed). Both the Concession Law and the PPP Law provide that the concession or partnership agreement may regulate the project company's obligation to insure the PPP facility from the risk of loss or damage and risk of liability of the project company for a breach of its obligations under the agreement.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

As mentioned above, the project company would typically be required to provide necessary insurance coverage against certain risks. There is little specific regulatory guidance (in the context of PPP transactions) with respect to the concept of “uninsurability”. Most likely, these aspects would need to be addressed in the concession or partnership agreement subject to certain conditions.

If the risk insured is rendered as an uninsurable risk and such risk is not caused by any actions or omissions by the project company, the parties would usually discuss ways of managing or transferring the risk. For example, some agreements provide that the project company shall take reasonable measures to insure relevant risks. However, if obtaining of insurance is impossible in relation to such risks, the public authority shall compensate the project company for additional expenses incurred due to the occurrence of such uninsured risks.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Under the PPP legislation, the project company that has been awarded the right to implement the PPP project may be replaced in case of non-performance or improper performance of its obligations towards the public partner or the lender. A new tender would typically be required to substitute the project company, unless otherwise is provided for in the concession/partnership agreement or the relevant direct agreement.

The project company may be replaced without a tender in the event of a material breach of the concession or partnership agreement and/or harm (or threat to cause harm) to human life or health and/or the initiation of bankruptcy proceedings with respect to the project company. Such cases require a decision of the public authority that awarded the project, taking into account the opinion of the lender.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The Concession Law provides that all disputes between the investor and the public authority should be resolved by state courts, state commercial courts or arbitration tribunals of the Russian Federation. With respect to “arbitration tribunals of the Russian Federation” – the Commercial Court of the North-West Circuit in its Resolution in case No. A56-9227/2015 dated 17 February 2016

(which was subsequently upheld by the Supreme Court of Russia) held that disputes under the concession agreements may not be submitted to ad hoc arbitration under the UNCITRAL Rules with a foreign authority appointing arbitrators even if the arbitration is conducted in Russia.

Unlike the Concession Law, the PPP Law does not contain any special provisions in relation to dispute resolution. However, in light of the Federal Law No. 382-FZ “On Arbitration (Arbitration Tribunals) in the Russian Federation”, dated 29 December 2015 and the position of the Courts on interpretation of “arbitration tribunals”, Russian courts may potentially narrowly interpret the notion of a “court” applied by the PPP Law as a “state court”. Russian courts also sometimes tend to consider the disputes involving public authorities as non-arbitrable.

As a general rule, a foreign governing law may be chosen by the parties, provided that the agreement involves a “foreign element” (e.g., a foreign party). In some cases the choice of foreign law is not allowed. In particular, the concession or partnership agreement in relation to a PPP facility located in Russia is to be governed by Russian law only. A foreign law may potentially be considered in relation to direct agreements, although certain mandatory rules of Russian law would apply irrespective of a choice of foreign law.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

No regular market testing procedure is envisaged under the Russian PPP legislation. The public authority might in certain cases carry out market testing to use the assembled data for bids evaluation at the stage of the PPP tender. Once the concession or partnership

agreement is signed, the Concession Law and the PPP Law set forth an exhaustive list of grounds when the project company may be replaced, such as undue performance by the project company of its obligations, bankruptcy proceedings, etc.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Acceptance is carried out in accordance with the procedure specified by relevant legislation (i.e., the Russian Urban Planning Code) and as further detailed in the concession or partnership agreement. By way of example, some agreements provide for the establishment of the relevant acceptance commission comprised of representatives from the public authority and the project company to verify the completed construction works and accept the PPP facility. The parties may also engage an independent engineer (technical expert) to monitor the compliance of the PPP project with the approved technical parameters, participate in acceptance of the construction works and perform other functions as agreed by the parties.

After the act of acceptance is signed, the project company must undertake certain measures to ensure that the PPP facility is commissioned.

**16. Are there any expected changes or reform to the existing legislation?**

Russian PPP legislation has been continuously evolving. Most of the amendments are aimed to bring PPP structures into better consistency with the internationally recognized approaches. As mentioned above, the new PPP Law was adopted and the concession legislation was significantly amended to remove some of the

legal obstacles affecting, among other things, the bankability of PPP projects.

Further legislative changes have been made just recently to meet the current needs of the PPP projects. In particular, on 3 July 2016 the President signed Federal Law No. 360-FZ amending, among other laws, the PPP Law (in effect from 15 July 2016 save for certain provisions). In particular, the adopted changes: (i) expand the list of PPP facilities; (ii) liberalize special requirements applicable to the private partner in relation to possession of certain licenses/permits for implementing the PPP project; (iii) specify the procedure for granting land plots to the project company for implementing a PPP project; and (iv) allow concluding a direct agreement with a number of lenders.

Due to the adoption of the PPP Law, all regional PPP laws originally were supposed to be brought into compliance with the provisions of the PPP Law by 1 July 2016, which would unify the terminology and establish uniform rules for implementing PPP projects in Russia. Though we note that these July 2016 legislative changes extended this term until 1 January 2025.

In addition, legislative changes have been made recently in relation to concession agreements. In particular, on 3 July 2016 the President signed Federal Law No. 275-FZ amending the Concession Law to specify the procedure for entering into and terminating concession agreements in relation to the public utilities sector. The changes entered into force on 1 January 2017.

Discussions are also on-going with respect to the possibility of further amending the Concession Law to specify more precisely the cases and conditions in which the concessionaire may receive reimbursement of its project expenses from the grantor (the discussions were triggered by court proceedings involving antimonopoly

authorities expressing the view that full compensation of the concessionaire's costs at the expense of budgetary funds should not be used in the concession-type structures).

## FINANCING & INCENTIVES

### 17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?

The payment mechanism will depend on the sector and the way the project company receives revenue. For example, in relation to transport infrastructure projects in Russia, there are two types of payment mechanisms that are mainly used: (i) toll payment with minimum revenue guarantee and (ii) availability payment (when a project company receives fixed periodic payments from the public authority as long as a PPP facility (e.g., a road) is available for use). Even if the availability payment scheme applies the project company may be allowed to charge third parties for using the PPP facility.

Federal PPP legislation does not directly address inflation and/or foreign exchange protection. Such risk mitigating mechanisms are either provided by the relevant subordinated regulations or regulated through a concession or partnership agreement. For example, in relation to toll road concession projects, the Government determines the maximum amount of payment the concessionaire may charge the users of the toll road whereas such payment is subject to annual inflation adjustment.

### 18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?

Depending on the structure of the PPP project, there will generally be mechanisms regulating the project company's rate of return

on the project, however, there is usually no set cap on return.

In addition, the public authority must in certain cases (e.g., adverse change of law) take measures to guarantee a return on the project company's investment and to enable the project company to obtain gross earnings at least in the amount not less than initially provided in the agreement. Such measures may include, for example: (i) an increase of the financial security for the obligations of the public authority; (ii) an increase of the expenses assumed by the public authority in order to create and/or provide technical maintenance and/or operate the PPP facility under the agreement; or (iii) an extension of the term of the agreement.

In addition, the project company may request changes to the project agreement if, during the term of the agreement under which the project company sells its products to customers, performs work or renders services at regulated prices (tariffs) or prices subject to regulated increases, such regulated prices or rates were revised and, therefore, failed to conform to the parameters initially provided for under the agreement.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

There is a number of ways in which the public authority may provide payment assurance in the context of a PPP project. For example, this may be provided in the form of state or municipal guarantees to the lenders as security for the obligations of the project company to repay the attracted financing.

Parties also often discuss the possibility of entry in to a direct agreement (between the

grantor(s), the project company and the lenders) that would regulate, among other things, certain arrangements with respect to the method of calculation and making payment of the termination amount.

In relation to road infrastructure projects, the public authority may also guarantee that the project company receives a certain minimum level of revenue from the project regardless of the road traffic. If collected toll payments during a particular period are below a certain minimum level, the public authority will provide compensation to the project company so that it receives the minimum guaranteed amount from operation of the road.

Availability payment may apply in relation to concession-based PPP projects if this is determined among the tender criteria.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

In PPP relations, the state is represented by governmental or municipal bodies which act on behalf of the Russian Federation, the constituent entities of the Russian Federation or the municipal units respectively. Accordingly, their obligations qualify as the obligations of the Russian Federation, constituent or municipal entity, respectively.

In case the relevant public authority is not a governmental or municipal body, then the relevant governmental body may provide a separate guarantee to the concessionaire or the lenders under the project.

**21. Are deductions from the service and availability payments subject to a cap?**

The size of availability payment may be reduced for the amount of penalties imposed on the project company. For example, in road

projects, such penalties may be imposed for non-compliance with the requirements established by the public authority in relation to road accessibility parameters for vehicles, transport and operating indicators of the road or its maintenance and operation requirements. The maximum deduction is to be determined in the concession agreement.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

As a general rule, variations of the agreed terms of the relevant concession or partnership agreement are allowed on the basis of mutual consent of the parties or if there is a material change of circumstances on the basis of which the parties have entered into the relevant agreement. Accordingly, there are no legislative requirements as to a cap for the variations of the projects. However, the parties may potentially agree on the procedure for variation of the PPP project and the applicable cap in the relevant agreement.

If a project agreement was executed upon results of a tender envisaged by the Concession Law, the following project agreement's terms cannot deviate from those which were adopted as tender conditions: (i) obligations of the concessionaire relating to construction and operation of the facility; (ii) the concession's period, purpose and payment conditions; and (iii) other conditions which are envisaged by other federal laws. The PPP Law allows changes to the partnership agreements executed as the result of a tender procedure on the basis of the parties' mutual consent and the decision of the public authority that initiated the tender.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

There is no statutory requirement that refinancing savings are to be shared with the

public authority. However, as a matter of practice, the parties have sometimes contractually agreed on the procedure for sharing the gains that result from refinancing.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The concept of a “direct agreement” is fairly novel in the context of Russian federal PPP legislation.

While direct agreements have been long used in practice for implementing PPP projects under regional legislation (mostly under the St. Petersburg PPP Law), the Concession Law does not envisage the term “direct agreements” as such, although it provides for a possibility to sign an agreement between the public authority, the project company and the lender, which regulates the parties' rights and obligations (including the project company's liability towards the public authority and the lenders). The PPP Law defines a “direct agreement” as a civil law contract among the public authority, the project company and the lender governing the manner of the parties' interaction during the term of the partnership agreement and in the event of modification or termination of the agreement.

Generally, a direct agreement specifies the scope of the lender's rights to influence the implementation of the PPP project in the event of default by the project company under the financing documents. In particular, a direct agreement may address the procedure for replacement of the project company (“right of transfer”) or introduction of an additional obligor to perform the obligations under the concession or partnership agreement (“step-in right”), including without holding a tender.

Lenders also often seek to negotiate that a direct agreement provides for a cure period during which the public authority may not

terminate the agreement without giving the lender a prior notice, the calculation of the amount of termination payment and the conditions for making such payment (e.g. without prior release of security created in favour of the lenders), as well as making such payment directly to the lender instead of the project company, or provisions concerning pledge of the PPP facility or shares in the project company.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Under the federal PPP legislation, the public authority does not assume the debts of the project company to the lender in the event of termination of the project agreement. However, there is a number of ways in which the public authority may provide the lender with certain comfort in respect of the availability of funds to ensure the debt service by the project company (e.g., state or municipal guarantees, minimum revenue guarantees, availability payment).

Moreover, under the PPP Law the lender may enforce the pledge over the PPP facility. Although, a pledge of the PPP facility can only be enforced if, for at least 180 days from the date on which grounds for enforcement occurred, the project company has not been replaced or if the partnership agreement has not been terminated early under a court ruling. The state has a preemptive right to purchase the pledged facility at a price equal to the indebtedness owed to the lender. If the PPP facility hasn't been sold, it should be transferred to the public authority with

compensation of costs to the project company and (or) the lender minus the expenses the public partner suffered in connection with the project company's failure to perform its obligations.

At the same time, such debt assumption mechanism may be envisaged in direct agreements with the lenders. There is a number of precedents of direct agreements in relation to PPP projects implemented on the basis of the regional PPP legislation (e.g. the St. Petersburg PPP Law), that envisage provisions on payment by the public authority of the termination payment in the amount covering the principal amount of debt of the project company to the lenders upon termination of the agreement.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The Concession Law provides that in the event of early termination of the concession agreement, the project company may claim compensation for the expenses incurred by it in respect of (re)construction of the PPP facility in accordance with the terms of the agreement. Based on a number of precedents of concession agreements such compensation should typically be paid in all termination scenarios. However, the amount of such compensation would differ depending on whether the agreement is terminated as the result of the project company's default or the public side's default.

The PPP Law provides that the procedure for compensation of parties' expenses as a result of early termination of the partnership agreement is to be detailed in the partnership

agreement. In addition, under the PPP Law (e.g., when the partnership agreement envisages either “BOO” or “DBOO” models), in case of early termination of the partnership agreement requiring the project company to return the PPP facility to the public authority, the project company should receive compensation from the public authority for the amount of the project company’s expenses reduced by the amount of losses caused to the public partner and third parties by the early termination. In the event of early termination of the partnership agreement based on a court decision due to the project company’s breach of its obligations, the PPP facility should be transferred to the public authority without compensation.

Losses may typically be claimed in the event of material violation by one of the parties of the concession or partnership agreement’s provisions.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Although there is no domestic equipment incentive addressed in PPP legislation, some precedent agreements explicitly provide for construction of facilities giving priority, where appropriate, to Russian components.

Projects related to construction of power plants based on renewable energy resources should meet certain requirements regarding localization of production of generation equipment in Russia.

In addition, if a project company is subject to procurement law and meets certain criteria in relation to its annual revenue, special requirements for procurement of domestic materials and services from small and medium enterprises may apply.

**28. Are there tax advantages available to PPP projects?**

The PPP projects and concession projects (those based on the PPP Law and the Concession Law) are subject to the general taxation regime, with a few special rules set forth for concession agreements.

The special taxation rules for concession agreements focus on the Build-Operate-Transfer model (that is the only PPP model under the Concession Law), as follows:

- with regard to transfer of property and property rights between the grantor (that is, under the Concession Law, a public authority) and the concessionaire – the transfer of property and property rights under the concession agreement is generally defined as not constituting a “disposal” (in Russian terminology: “realization”) for tax purposes. Therefore, it is tax-neutral; it does not give rise to VAT and profit tax obligation for the respective transferor and the transferee;
- with regard to the concessionaire’s holding the property received from the grantor and/or newly built (the “concession property”) – the concessionaire is treated with regard to the concession property in the same way as if it owns such property. In particular, the concessionaire is
  - o obliged to record the concession property on its balance sheet (though separate from its own property);
  - o allowed, over the concession term, to depreciate the concession property for profit tax purposes; and
  - o liable for property tax with regard to the concession property;

- with regard to the concessionaire's operating the concession property within its business activities – the concessionaire is subject to general taxation rules applicable to the respective type of business operations. In addition, the Tax Code provides that the concessionaire
  - o shall act as a VAT-payer with regard to realization of goods or provision of services as envisaged by the concession agreement and, insofar as the respective realization of goods/provision of services is subject to VAT, is eligible to input VAT offset with regard to goods or services acquired (as well as with regard to property (fixed assets) acquired/built);<sup>1</sup> and
  - o is allowed to deduct concession fees payable to the grantor.

The federal tax laws (the Tax Code) do not provide for tax incentives for PPP projects; however, at the level of regional legislators, tax incentives may be granted for investments in particular sectors.

The federal legislation (the PPP Law and the Concession Law) guarantees the stability of the legal and tax regime for the term of the PPP/concession agreement and puts the obligation on the public partner (grantor), in the circumstances when the legislative changes cause an increased tax burden or otherwise deteriorated economics for the private investor

<sup>1</sup> The Tax Code is however silent on whether the VAT-neutrality of the concession property transfer to the grantor may impact the concessionaire's entitlement to set-off the input VAT incurred upon acquisition of the concession property. Such negative impact is usual in normal circumstances (through the obligation "to restore" and repay back to the state budget the input VAT that was claimed for offset (the repayment amount is calculated in proportion to the book value of the transferred property)).

(concessionaire), to take measures to ensure the pay-back period and the return on investments such as have been initially defined in the respective PPP/concession agreement.<sup>2</sup>

## 29. What are the other incentives available to PPP projects?

Certain incentives and state support measures are envisaged by a number of various regulations and legislative acts. While they may not necessarily directly apply to PPP transactions only, they may still be relevant for implementation of project financing and infrastructure sector transactions.

One of such support measures is the support program for investment projects implemented on the basis of the project finance in priority sectors of Russian economy introduced in 2014 by the Russian government introduced support measures. Under this support program, selected projects were able to obtain loans in Russian rubles (with additional mechanisms put in place to allow more attractive interest rate) together with the state guarantees to secure a part of the loan amount. However, the implementation of this support program is currently suspended.

In addition, Russian legislation provides for various incentives through the establishment of special economic zones, priority development areas and "free port" regimes. The residents of such zones, provided that they are incorporated in the zone and have obtained the resident status, are entitled to tax benefits, free customs zone, access to infrastructure, special procedure for acquisition of land plots and simplified conditions in

<sup>2</sup> The stability guarantee applies with regard to the federal, regional and municipal laws. Among the measures to be taken by the public party (grantor) are the following: increased financial guarantees to be provided by the public party, increased financial obligations of the public party, extended term of the agreement (with the private investor's consent).

attracting the labor force and limitation on the amount and duration of state inspections conducted with respect to activities of residents.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

The number of PPP and infrastructure projects continues to increase. According to the Report prepared by the Association “Public-Private Partnership Development Center” (“**PPP Center**”) on the Public Private

Partnership in Russia for 2016-2017, 2,183 PPP projects passed the stage of commercial closing during 2016 – early 2017. As reported by the PPP Center, the estimated total private investment amount for the 2016 year was RUB 1,336 bln (approx. USD 22.48 bln).

The largest number of projects was in the public utility infrastructure sector (e.g., water supply and disposal and waste processing) – 84%, social infrastructure sector (e.g., hospitals and schools) – 11%, and the transportation sector (e.g., road construction, toll systems) – 3%.<sup>3</sup>

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<sup>3</sup> [http://pppcenter.ru/assets/docs/raytingREG2017\\_B5\\_Block\\_31-03-2017-web.pdf](http://pppcenter.ru/assets/docs/raytingREG2017_B5_Block_31-03-2017-web.pdf)

# SENEGAL<sup>1</sup>



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## GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP model has a long history of use in Senegal as the first concession agreement in the country was entered into on 21 May 1888 for a boat transport service<sup>2</sup>. PPP models are now commonly used in order to develop major infrastructure projects.

From 2004 to 2014, a specific legal framework was implemented for build-operate-transfer contracts (*contrat de construction-exploitation-transfert d'infrastructures*), an arrangement

whereby a public entity would pay rents to a private sector entity for building and operating infrastructure.

The adoption of a new law pertaining to partnership agreements and the repeal of the law relating to build-operate-transfer contracts has meant that since 2014 Senegalese law only recognises two categories of contracts for the financing, construction, operation, servicing and maintenance of infrastructure and public assets. These are: (i) concession agreements where the contract holder generates revenue through the commercial operation of a project (in particular the fees paid by users); and (ii) partnership agreements where the contract holder is paid by public entities from when the project is commissioned until the end of the relevant agreement.

As such, the grantor has to determine the exact nature of the contract to be agreed, taking into account the services to be performed and the payment conditions of the private entity.

In both concession agreements and partnership agreements, the grantor can assign the design, build and operation of a project to a private entity (i.e. Build-Operate-Transfer or Build-Operate-Own-Transfer agreements). However, under a particular type of contract known as *contrat d'affermage*, the grantor can only assign rights to the management of a

<sup>1</sup> The authors are French lawyers registered at the Paris bar. The answers to the questionnaires relating to Senegal, Morocco, Guinea and Ivory Coast are based on their knowledge of the applicable regulations and on their experience of PPP projects implemented in these countries. The accuracy of these answers remains however subject to the confirmation by lawyers duly registered in the said countries.

<sup>2</sup> <http://terangaweb.com/cadre-juridique-des-partenariats-public-privé-au-senegal-une-reforme-incomplete>.

public project that has already been built (i.e. Transfer of Operation Rights contracts).

It is envisaged that PPPs will play an important role for the implementation of the “*Plan Sénégal Emergent*” (Emerging Senegal Plan), the country’s long-term strategic plan for development and economic growth over the next decade<sup>3</sup>.

## 2. Which sectors apply a PPP model to develop infrastructure projects?

The PPP model is used in all economic sectors for the development of infrastructure and the management of public services.

Since 1990, fourteen PPP projects totalling US\$ 1,219 million have reached financial close mainly in the transport sector. This includes the Dakar-Diamniado motorway project (the first Greenfield road PPP project in sub-Saharan Africa)<sup>4</sup> and the Blaise Diagne international airport. PPP models have also been used in other sectors such as water. For example, an affermage contract (*contrat d'affermage*) for the production and the distribution of drinking water was entered into between a Senegalese water company - *Sénégalaise des Eaux* - and the Senegalese state in 1996.<sup>5</sup>

The Emerging Senegal Plan also sees PPP projects as playing a key role in reinforcing the position of Senegal as an economic and infrastructure hub for West Africa in sectors as diverse as agro-industry, construction, logistics, road and rail-road transportation and tourism.<sup>6</sup>

<sup>3</sup> <https://pppknowledgelab.org/countries/senegal>.

<sup>4</sup> <http://blogs.worldbank.org/ppps/taxonomy/term/11800>.

<sup>5</sup> <http://blogs.worldbank.org/ppps/senegal-shifts-its-thinking-rural-water-delivery-moves-private-operators>.

<sup>6</sup> <http://www.iflr1000.com/NewsAndAnalysis/10-Things-to-know-about-PPPs-in-Senegal/Index/2563>.

## 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?

Since the launch by the Senegalese government of the Priority Action Plan (*Plan d'actions prioritaires*), a five-year plan implemented to achieve the long-term Emerging Senegal Plan, from 2014 to 2018<sup>7</sup>, the implementation of many PPP projects became a priority. For instance, under the Priority Action Plan, the following PPP projects have become priorities: the re-building of the “Aristide le Dantec” Hospital, the building of a new dry port in Kaolack, the implementation of a tramway and the building of a new railway between Dakar and Bamako.<sup>8</sup>

## LEGISLATION & REGULATION

### 4. What are the principal laws and regulations? Is there a framework PPP Law?

In order to facilitate the development of infrastructure projects, Senegal recently created a new category of contracts called partnership agreements and implemented this through the enactment of the Law No. 2014-09 dated 20 February 2014<sup>9</sup> (“**PPP Law**”) and of the decree No. 2015-386 dated 20 March 2015 (“**PPP Decree**”).

The PPP Law also repealed Law No. 2004-13 dated 1 March 2004 pertaining to build operate transfer agreements (“**BOT Law**”).

<sup>7</sup> [www.initiative-ppp-afrique.com](http://www.initiative-ppp-afrique.com).

<sup>8</sup> <http://www.dasp.gouv.sn/?q=content/propos-des-ppp>.

<sup>9</sup> The PPP Law was modified by Law No. 2015-03 dated 12 February 2015 (only Article 31 of the PPP Law has been modified).

The PPP Law was aimed at consolidating existing laws on PPPs and providing a framework conducive to the development of infrastructure in Senegal. It is hoped that the new law will act to stimulate foreign and domestic investment in sectors such as agriculture, education and health.

In accordance with Article 2 of the PPP Law, the partnership agreements could be implemented in all economic sectors, with the exception of the sectors governed by a specific legislation, among which the energy, mining and telecoms sectors.

The concessions agreements are regulated by the new Senegalese public procurement code enacted in 2012 through Decree No. 2014-1212 dated 22 September 2014 (“**Senegalese Procurement Code**”).

##### **5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

At present, there are two bodies which regulate partnership agreements in Senegal.

A dedicated unit within the Ministry of Finance known as the PPP Committee (*Comité national d’Appui aux Partenariats Public-Privé*) (“**PPP Committee**”) validates partnership agreements drafted by potential grantors and assists grantors to implement agreements. The committee also promotes the standardisation of PPP agreements through periodic controls and assessments.<sup>10</sup>

The Infrastructure Council (*Conseil des Infrastructures*) composed of twelve members comprising three magistrates, three private sector representatives, three civil society and consumer associations’ representatives, and three members of Parliament<sup>11</sup> also acts as a regulatory body for PPPs.

<sup>10</sup> Articles 3 and 38 of the PPP Law.

<sup>11</sup> Articles 1, 10 and 39 of the PPP Law.

The Infrastructure Council is responsible for dispute resolution, procedure, and auditing of all partnership agreements. This regulatory body must issue a favourable opinion regarding a draft partnership agreement before a partnership agreement is concluded (note: a favourable opinion must also be issued by the Minister of Finance).

The Infrastructure Council opinion must also specify if the project complies with the Senegalese infrastructure development strategy and environmental standards.

As regards concession agreements, none of the regulatory bodies detailed above is involved in their implementation and performance. The specific entities tasked with public procurement procedures are responsible for concession agreements.

##### **6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The legislative framework for PPPs does not place any restrictions on foreign investors.

Nevertheless, it should be noted that the PPP Law<sup>12</sup> specifies that in any awarding procedure, a criteria of national preference can be taken into account in the selection of the tenders in order to support the domestic Senegalese economy.

During the bids evaluation phase, the grantor applies a margin of preference (*marge de préférence*) from 5% to 10% to the tenders of bidders from the Economic Community of West African States (“**ECOWAS**”), to the tenders of a consortium of bidders including at least one company from ECOWAS or to bidders who promise to subcontract at least 30% of the global value of the supply and works agreement necessary to perform the PPP agreement to companies from ECOWAS.

<sup>12</sup> Article 13 of the PPP Law.

A preference margin (of 2%) also applies to bidders who promise to enter into contracts with small and medium-sized companies from ECOWAS<sup>13</sup>.

In addition, if the estimated global cost of the project is under 5 billion FCFA, the tendering can only be opened to bidders from ECOWAS<sup>14</sup>.

In relation to concession agreements, preference principles can apply to offers from bidders from Senegal and ECOWAS or to offers involving products originating in Senegal and ECOWAS<sup>15</sup>.

#### **7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Senegalese PPP legislation does not impose a long-stop date for the completion of construction in PPP agreements.

However, the PPP Law does provide that PPP agreements are entered into for a period determined by the depreciation period of the selected investments, financing terms and the type of construction and services to be performed<sup>16</sup>.

In respect of concession agreements, the Senegalese Procurement Code does not provide a long-stop date for the completion of construction. It only imposes that the duration of the concession and the starting date of the concession agreement have to be defined under the contract<sup>17</sup>.

It is common practice that the parties would determine specific clauses pertaining to a maximum duration for the construction in the contracts.

<sup>13</sup> Article 21 of the PPP Law.

<sup>14</sup> Article 5 of the PPP Decree.

<sup>15</sup> Article 50 of the Senegalese Procurement Code.

<sup>16</sup> Article 1 of the PPP Law.

<sup>17</sup> Article 13 of the Senegalese Procurement Code.

#### **8. How are force majeure events defined, and what are the consequences of their occurrence?**

As in other civil law countries, force majeure events are described in the Senegalese case law as an “*unforeseeable and irresistible event, including external causes*”. Therefore, force majeure is defined as an event beyond a party's control which the party could not reasonably have provided against before entering into the contract or which the party could not reasonably have avoided or overcome provided that the event is not substantially attributable to the other party.

The events that could be defined as force majeure events in the context of PPPs include natural disasters, war, hostilities (whether war be declared or not), invasion, act of foreign enemies, rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, riot, commotion, disorder, strike or lockout by persons other than the parties' personnel.

The PPP Law only provides that parties can agree on the possibility to terminate the contract in case of a force majeure event. In this case, the PPP Law provides that the contractual provisions can set the possibility for all parties to initiate the termination procedure when a force majeure event occurs<sup>18</sup>.

#### **9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The PPP Law provides<sup>19</sup> that partnership agreements have to include a specific clause pertaining to the allocation of risks between the parties. This is modelled on the contractual practice of optimal risk sharing.

<sup>18</sup> Article 35 of the PPP Law.

<sup>19</sup> Article 7 of the PPP Law.

The PPP Law also specifies that the risks linked to the different phases of the project must be identified and set out in detail.

It should be noted that during its preliminary assessments, the PPP Committee has to analyse the risk allocation set out in any draft PPP agreement<sup>20</sup>.

In general, the risks linked to expropriation and changes in law are assumed by the public entity. In relation to adverse court decisions pertaining to the validity of the agreement, the allocation of risks is often provided for in direct agreements.

It is common practice that for court decisions pertaining to the early cancellation of the PPP, the risk is borne by the public entity. However, a private entity would bear such risk in case of breach of its contractual obligations.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Under Senegalese law, no reinstatement test is provided. Pursuant to the freedom of contract principle, such a test may be included in partnership agreements.

However, based on our experience of PPP projects in Senegal, public entities are keen to reinstate the facilities rather than repay debt to the lenders.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

The concept of “uninsurability” is not specifically defined or provided for under Senegalese legislation. However, the parties can freely stipulate that risk above a certain threshold will no longer be insured provided

that such article does not conflict with any mandatory provisions under Senegalese law.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The PPP Law provides that the public entity can establish direct contractual relationships with the lenders that financed, in full or in part, a project. This empowers a contracting public authority to enter into direct agreements (i.e. a tripartite agreement or letter of intent) with the lenders of a project<sup>21</sup>. This implicit reference to direct agreements is welcome; however, it would have been preferable if the PPP Law had explicitly acknowledged the independence between such agreements and the relevant partnership agreement.

The PPP Law provides for the transfer of partnership agreements during their performance. An authorized company can transfer the PPP agreement to a third party with the prior approval of the grantor and according to the terms and conditions set out in the relevant agreement. The PPP agreement can also be directly transferred to the lenders or someone appointed by them<sup>22</sup>.

In such cases, the new party will need to provide sufficient financial, technical and legal guarantees and be able to ensure public service continuity.

In relation to concession agreements, a substitution mechanism can be used by the grantor if a breach of contract by the private partner threatens public service continuity.

<sup>20</sup> Article 8 of the PPP Law.

<sup>21</sup> Article 33 of the PPP Law.

<sup>22</sup> Article 34 of the PPP Law.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The PPP Law allows partnership agreements to state that disputes would be settled through an international arbitration procedure<sup>23</sup>. Arbitration clauses in partnership agreements will need to set out this procedure (e.g. seat of arbitration, language of the arbitration, procedural law applicable).

However, even if arbitration procedures are chosen to settle disputes, the PPP Law provides that only the Senegalese Law can be applied during arbitration<sup>24</sup>.

Concession agreements can also be settled through an arbitration procedure<sup>25</sup>.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Senegalese PPP legal framework does not provide for a regular market testing procedure to procure the services to be provided by the authorized company.

Such a test is also not provided for in concession or partnership agreements.

However, in accordance with the freedom of contract principle, such a test may be included in the contracts entered into between the private entity and its subcontractors (i.e. with the contractor and/or the operator).

<sup>23</sup> Articles 7 and 37 of the PPP Law.

<sup>24</sup> Article 7.14 of the PPP Law.

<sup>25</sup> Article 139 of the Senegalese Procurement Code refers to the arbitration procedure defined in the OHADA's Uniform Act on Arbitration dated 11 March 1999.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The Senegalese Construction Code<sup>26</sup> sets the rules pertaining to the acceptance process for the work performed (*réception de l'ouvrage*).

Prior to the acceptance of the work, a technical assessment has to be performed for all construction works which are open to the public or which could threaten the safety of persons because of the size or nature of the building<sup>27</sup>.

This technical assessment in relation to the feasibility, design, performance and maintenance of the infrastructure is to be performed only by an authorized and independent technical controller.

Once acceptance of the work is pronounced by the owner, the work is deemed suitable for its intended purpose, the private partner is bound to repair any defects at its own cost pursuant to a "guarantee of perfect completion" for a period of one year following the acceptance of the facilities.

In addition, during a ten-year period, the private partner will be presumed liable to the grantor (or to the person acquiring the facilities) for any latent defects and damage, including damages resulting from sub-soil conditions which impair the strength of the facilities<sup>28</sup>.

The acceptance by the owner of the work (i.e. the grantor, the public entity) is a crucial event as upon acceptance the owner takes control and ownership of the project and the risk of

<sup>26</sup> As enacted by Law No. 2009-23 dated 8 July 2009.

<sup>27</sup> Article 27 of the Senegalese Construction Code.

<sup>28</sup> Article 19 of the Senegalese Construction Code.

loss passes from the private entity to the owner.

**16. Are there any expected changes or reform to the existing legislation?**

As the Senegalese legislation has been recently modified by the PPP Law, no deep changes or landmark reforms are expected from now.

Indeed, the existing legislation already provides a clarified and unified legal framework conducive to the development of infrastructures in Senegal and to the increase of visibility for foreign and local investors.

Indeed, as the existing legislation takes into consideration standard market practices which are implemented in international project finance, investors should be able to avoid the main pitfalls observed in countries with similar frameworks.

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

Under the PPP Law<sup>29</sup>, payment of the private entity is provided by the public authority for the duration of the agreement. It should be noted that the private entity's payment is linked to performance objectives (e.g. those relating to sustainable development) and service availability. The partnership agreement may also allow the authorized company to receive additional revenues for related activities.

Furthermore, the public authority may empower the authorized company to collect on its behalf the service payments of the users due to the public authority.

In respect of concession agreements, the Senegalese Procurement Code provides that the concessionaire's compensation is mainly derived from service users and such payment is substantially linked to service operation outcomes.

Finally, the PPP Law does not specifically provide for inflation and/or foreign exchange protection for PPP projects except for the protection provided for in Law No. 2004-06 dated 6 February 2004 on the Senegalese Investment Code.<sup>30</sup>

The "Franc Zone" is an economic and monetary union whose members include France, Senegal and fourteen other African states. Its core principles are laid down in the Monetary Cooperation Agreement of 1972 between the Bank of Central African States ("BCAS") and France, and the Cooperation Agreement of 1973 between the West African Monetary Union ("WAMU") and France. These principles revolve around an unlimited convertibility guarantee whereby the French Treasury guarantees without any limits the conversion of CFA francs to euros, and a fixed exchange rate between the CFA franc and the euro. In exchange for pegging the CFA franc to the euro and for the unlimited convertibility guarantee, BCAS and WAMU undertake to deposit some of their foreign exchange reserve with the French Treasury in an operational account whose mechanism is governed by the aforementioned cooperation agreements.

In Senegal and more generally in the entire Franc Zone, key hedging related issues are quite typical for this type of transaction. These include in respect of the borrower, establishing capacity and authority, and in respect of the jurisdiction, confirming enforceability of the hedging documentation and foreign judgments, as well as determining whether any licensing and/or consent requirements exist. ISDA

<sup>29</sup> Article 6 of the PPP Law.

<sup>30</sup> Articles 5 to 7 of Law No. 2004-06 dated 6 February 2004 on the Senegalese Investment Code.

Master Agreements have been used in the past by Senegalese borrowers with foreign entities.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return for the project company or the sponsors under Senegalese law. However, pursuant to the freedom of contract principle, such a mechanism may be included in partnership agreements.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Neither the PPP Law nor the Senegalese Procurement Code provide for a specific payment guarantee provided by the relevant public authority for PPP projects. However, pursuant to the freedom of contract principle, such a mechanism may be included in both partnership agreements and concession agreements.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the administration are not qualified as Treasury obligations. Furthermore, Senegalese law does not provide for separate guarantees to be granted by the Treasury to the concessionaire or the lenders. It should be noted that such guarantees are not usually provided in partnership or concession agreements. The guarantees issued to the benefit of the private partner are most of the time issued by financial institutions.

**21. Are deductions from the service and availability payments subject to a cap?**

As the compensation of the private partner is linked to performance targets set out in partnership agreements, penalties (e.g., in case of a delay in completion or contractual breach) may reduce the amount of rent paid by the grantor.

In respect of concession agreements, financial penalties could be deducted from payments due to the concessionaire in cases of contractual breach. However, under Senegalese law such deductions are not subject to a cap but the parties are free to agree such a cap.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The PPP Law<sup>31</sup> provides that partnership agreements must set out the conditions in which the partnership agreement may vary at the request of the public authority. The PPP law does not, however, refer to a specific cap.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

There is no requirement to share any gains arising from refinancing of the PPP project with the public authority under Senegalese law.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

As outlined in question 11, under the PPP Law<sup>32</sup>, the public authority may enter into direct agreements with the private entity and its lenders to cover specific issues (i.e. contractual breach) and protect the lenders. Under direct agreements, the lenders will be entitled to intervene or “step-in” the shoes of the project company or the contractors in respect of the key project agreements. The

<sup>31</sup> Paragraph 10 of Article 7 of the PPP Law.

<sup>32</sup> Article 33 of the PPP Law.

step-in rights are usually triggered when either the project company or the contractors have defaulted or there is reasonable belief that they will default in the near future. Step-in-clauses allow the lenders to take over the project company, the project itself or to obtain control rights to make decisions on behalf of the project company. Thereafter, the lenders may take over the project or appoint a professional third party to take over the project.

The PPP Law<sup>33</sup> also provides that partnership agreements can be transferred to the lenders or to any third party chosen by the lenders.

In respect of concession agreements, a substitution mechanism could also be provided in direct agreements where the grantor substitutes the private entity with a third party in case of serious breach of contract by the private partner which threatens public service continuity. Consequently, entry into direct agreements is common practice in international project finance.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Senegalese law does not provide for a debt assumption mechanism, whereby the public authority undertakes to reimburse the debt of the project company to the lenders. It should be noted that the PPP Law<sup>34</sup> contemplates that, in cases of termination due to a reason of public interest, compensation is to be paid by the public authority to cover expenses incurred by the project company and for lost earnings.

<sup>33</sup> Article 34 of the PPP Law.

<sup>34</sup> Article 35 of the PPP Law.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

In relation to partnership agreements, the PPP Law<sup>35</sup> provides for payments to be made by the public authority to the project company if a partnership agreement is terminated except when such termination is due to a force majeure event. The PPP Law also provides that the project company can claim damages in case of (i) material breach by the public authority; or (ii) adverse financial changes due to the actions of the public authority.

Furthermore, as mentioned above, in cases of termination due to a reason of public interest, the project company is entitled to seek compensation for the expenses incurred by it and for lost earnings.

Finally, in cases of project company default termination, financial compensation may be provided by the public authority if it is specifically provided for in the partnership agreement.

In relation to concession agreements, the Senegalese Procurement Code<sup>36</sup> sets out the termination provisions for concession agreements and also provisions relating to the possible deferment (*ajournement*) of the concession agreement's performance.

For example, the project company can seek compensation when the deferment period is less than three months. In such cases, the indemnity cannot exceed the amount of expenses incurred by such deferment.

<sup>35</sup> Article 35 of the PPP Law.

<sup>36</sup> Article 128 of the Senegalese Procurement Code.

In case of termination for contractual breach by the public authority, the authorized company may, in addition to the repayments of expenses incurred by a possible prior deferment, request the payment of an indemnity corresponding to the damage suffered. However, such indemnity shall not exceed the profit loss of the authorized company whose contract is terminated.

To conclude, payments to be made by the administration to the concessionaire are not payable in all termination scenarios. On the contrary, in the event of termination for material contractual breach of the project company, the latter shall bear the costs arising from the termination<sup>37</sup>.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

As outlined in the PPP Law<sup>38</sup>, there is a clear incentive for local manufacturing of equipment or materials used in the construction of PPP projects. For example, the assessment criteria of the bids take account of (i) the portion of the agreement performance that the candidate undertakes to entrust to local companies; (ii) the level of use of locally produced materials; and (iii) the level of employment of the local workforce.

In addition, the PPP Law<sup>39</sup> provides that the bidder must undertake to reserve a significant part in local workforce employment, promote technology transfer and subcontract to domestic economic operators.

**28. Are there tax advantages available to PPP projects?**

There are no specific tax advantages to PPP

<sup>37</sup> Article 88 of the Administration Contract Code (*Code des obligations de l'administration*).

<sup>38</sup> Article 20 of the PPP Law.

<sup>39</sup> Article 25 of the PPP Law.

projects except for, as the case may be, those granted under Law No. 2004-06 dated 6 February 2004 in the Senegalese Investment Code. For example, under this law<sup>40</sup>, customs advantages can be available for a three-year period when specific materials are imported.

**29. What are the other incentives available to PPP projects?**

There are no other advantages to PPP projects except for, as the case may be, those granted under Law No. 2004-06 dated 6 February 2004 in the Senegalese Investment Code. For example, pursuant to this law<sup>41</sup>, during the operation phase, advantageous employment rules can apply to the additional workers employed by the private entity.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

To the best of our knowledge, the only PPP project developed in Senegal since 2015 was the International Airport of Diass<sup>42</sup>. Furthermore, under the Priority Action Plan (*Plan d'actions prioritaires*), a five-year plan implemented to achieve the long-term plan Emerging Senegal Plan, from 2014 to 2018<sup>43</sup>, more than 18 key PPP projects will be developed in sectors such as agriculture, health, education, mining and tourism with investments ranging between US\$ 16 million and US\$ 734 million.<sup>44</sup>

<sup>40</sup> Article 18 of Law No. 2004-06 dated 6 February 2004 on the Senegalese Investment Code.

<sup>41</sup> Article 19 of Law No. 2004-06 dated 6 February 2004 on the Senegalese Investment Code.

<sup>42</sup> [www.initiative-ppp-afrique.com](http://www.initiative-ppp-afrique.com).

<sup>43</sup> [www.initiative-ppp-afrique.com](http://www.initiative-ppp-afrique.com).

<sup>44</sup> [http://www.finances.gouv.sn/en/Docpdf/PAP\\_2014-2018\\_of%20PSE.pdf](http://www.finances.gouv.sn/en/Docpdf/PAP_2014-2018_of%20PSE.pdf)

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# SOUTH AFRICA



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### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The National Treasury's 2017 Budget Review ("**Budget Review**") identifies 31 PPP projects concluded since their introduction in South Africa in 1998, of which:

- 23 projects apply the design, finance, build, operate and transfer model;
- 3 projects apply the design, finance and operate model;
- 3 projects apply the design, build, operate and transfer model;
- 1 is an equity partnership project; and
- 1 is a facilities management project.

Concession arrangements have also been applied to PPP projects. Such arrangements are usually long-term arrangements in terms of which the public authority transfers to the

project company the right to provide services to the public through the use of an asset and the project company assumes the obligation of providing the services required. Well-known examples of concession arrangements include the Bombela Concession Company in respect of the Gautrain and the South African National Roads Agency SOC Limited (SANRAL) in respect of toll roads.

According to the Department of Trade and Industry ("DTI"), the Special Economic Zones Act, 2014 ("**SEZ Act**") (as discussed under Question 28 below) envisages the use of PPPs in the development and operation of special economic zones (being geographically designated areas set aside for specifically targeted economic activities), which could potentially apply any of a number of models, including:

- land parcels with secure title and development rights by the government for lease to private zone development groups;
- build-operate-transfer approaches to onsite zone infrastructure and facilities with government guarantees and/or financial support; and
- contracting private management for government-owned zones or lease of

government-owned assets by a private operator.

## 2. Which sectors apply a PPP model to develop infrastructure projects?

Currently, PPP projects have either been concluded or are in progress in the following sectors:

- transport;
- water and sanitation;
- correctional services;
- health;
- tourism;
- information technology;
- office accommodation;
- education;
- energy, including independent power producers (“IPPs”);
- fleet;
- housing; and
- rail.

## 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?

The Budget Review notes that the number of new project transactions has declined over the past five years from an estimated R10.7 billion in 2011/12 to R4.8 billion in 2016/17, mainly as a result of delayed and cancelled projects in the health and security sectors. However, PPP

projects are expected to increase from R4.8 billion in 2016/17 to R5.9 billion in 2019/20.

Save as set out above, there are currently no new sectors in respect of which PPP projects are considered. At the date of the Budget Review, the following projects were under review and required approval for implementation:

- 3 projects in the solid waste sector;
- 7 projects in the transport sector;
- 8 projects in respect of office accommodation;
- 2 projects in the health sector;
- 1 project in the energy sector; and
- 1 project in the education sector.

## LEGISLATION & REGULATION

### 4. What are the principal laws and regulations? Is there a framework PPP Law?

A firm regulatory framework has been established in South Africa allowing provincial and national government institutions, including government departments, constitutional institutions and specified public entities as well as municipalities (“public authorities”) to enter into PPP projects (“project agreements”) with private parties (usually special purpose vehicles) (“project companies”) that generally require the project companies to provide public infrastructure and related services.

The principal legislation and policy documents regulating PPPs in South Africa (regulatory framework) are:

- in respect of provincial and national public authorities:
  - the Public Finance Management Act, 1999 (“**PFMA**”);
  - regulation 16 of the Amendment of Treasury Regulations in terms of Section 76 promulgated in 2005 (“**Treasury Regulations**”);
  - the PPP Practice Notes, comprising each module of the Public Private Partnership Manual together with the Standardised PPP Provisions (“**Standardised Provisions**”), issued by the National Treasury in terms of section 76 of the PFMA, which constitute instructions aimed at facilitating the application of the PFMA and its regulations;
- in respect of municipalities:
  - the Local Government: Municipal Finance Management Act, 2003 (“**MFMA**”);
  - the Municipal Public Private Partnership Regulations promulgated in 2005; and
  - the Municipal Service Delivery and PPP Guidelines issued by the National Treasury, which constitute guidance in terms of section 168 of the MFMA.

The rules under the Constitution of the Republic of South Africa, 1996 (“**Constitution**”) and the Preferential Procurement Policy Framework Act, 2000 (“**PPPFA**”) regulating public procurement in general are also applicable to PPPs.

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

PPP’s are regulated generally by the National Treasury or, as applicable, the provincial treasuries in circumstances where the National Treasury delegates this responsibility (i) in terms of the PFMA in relation to a provincial department or provincial public entity or (ii) in terms of the MFMA in the case of a municipality.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

While the regulatory framework does not exclude, or restrict, the participation of foreign investors in PPP projects, preferential public procurement legislation and policies and/or the requirements of any particular tender may limit the extent of equity in a project company that is available to foreign investors.

In particular, the objectives of the Code of Good Practice for Black Economic Empowerment in Public Private Partnerships, 2004 (issued under the Broad-based Black Economic Empowerment Act, 2003) and the Preferential Procurement Regulations, 2017 (promulgated under the PPPFA) require public authorities to allocate a minimum percentage of voting equity in the project company for direct beneficial ownership by certain South African citizens. Compliance by the project company with these requirements is taken into account in the evaluation of PPP bids and failure to meet and maintain its commitments in this regard will result in penalties under the payment mechanism and/or termination of the project agreement.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The Standardised Provisions include a long stop date, which if not achieved provides the public authority with the right to terminate the project agreement. Appropriate use of the

long stop date depends on the sector and the specific requirements of a project.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

The scope of force majeure events is limited only to uninsurable events, whether natural or man-made, that are beyond the control of the parties to the project agreement and affect the construction or operation of the project. Force majeure events include only those events that directly cause either party to be unable to comply with all or a material part of its obligations under the project agreement.

The standard definition of force majeure events under the Standardised Provisions includes (i) war, civil war, armed conflicts or terrorism, (ii) nuclear contamination not caused by the project company and/or any subcontractor, or (iii) chemical or biological contamination of the works and/or the facilities and/or project site from any such event.

A party is excused from performance under the project agreement pursuant to an event of force majeure only to the extent that it is unable to comply with all or a material portion of its obligations. The public authority is only liable to pay the project company for services actually made available during the force majeure event and payment should take into account any reduction in operating costs attributable to limited performance.

In terms of the Standardised Provisions, either party is entitled to terminate the project agreement as a result of an event of force majeure which subsists for an extended period of time if the parties are unable to agree on a mutually acceptable solution to continue the project, such as (i) reinstating the facilities (namely, the buildings and supporting infrastructure), (ii) adjusting the requirements

under the services and output specifications, (iii) amending the payment mechanism and/or (iv) extending the term of the project. The Standardised Provisions suggest that it is generally agreed that a party may terminate the project agreement if the force majeure event continues for a period of six months, but this will depend on the project.

The project company is entitled to limited compensation in the event of force majeure on the basis that the consequences of an event of force majeure are shared between the parties.

**9. How are the political and legal risks (e.g., expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Unforeseeable government conduct is broadly described in the Standardised Provisions as (i) changes in law and (ii) acts or omissions by the public authority or any other government authority, the effect of which is borne by the project company.

Such unforeseeable conduct is treated as being at the risk of the project company in projects where the costs of unforeseeable conduct can be passed on to the users of the project. However, where the risks cannot be quantified or it is not possible for users to assume the increase in costs, the risk may be shared by the public authority. The regulatory framework contemplates in this regard that the public authority will generally bear the risk of unforeseeable conduct that materially and adversely affects the general economic position of the project company directly or as a member of a group of entities and the project company bears the risk in other instances. If unforeseeable conduct financially and materially serves to the benefit of the project company, the project company is required to pay the value of such benefit to the public authority.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The project company will be obliged under the project agreement to reinstate project assets damaged by an insured event. However, the lenders may require an economic test (comparing the amount of the debt with the amount of project revenues forecast to be earned following reinstatement) to be imposed to determine whether the reinstatement will enable them to recover the debt in full. The approach prescribed by the Standardised Provisions is that the economic test should only be applicable in the event of a high risk of total destruction of the project assets and a lengthy reinstatement period.

In the event that the economic test determines that the full debt will not be recoverable after reinstatement and the lenders require the insurance proceeds to be applied to repay the debt, the project company will remain obliged to reinstate the project assets. The parties will in practice negotiate whether and how to reinstate the project assets following the occurrence of an insured event.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

Yes, project agreements are required to address the scenario where risk that is required to be insured against, subsequently becomes uninsurable.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The prescribed approach under the regulatory framework allows both the lenders and the public authority to step-in. As more fully described below, the step-in rights afforded to lenders apply in circumstances where the public authority wishes to terminate the project agreement and the lenders are also allowed to substitute the project company pursuant to exercising their rights. More limited step-in rights are available to the public authority. It is envisaged that public authorities may step-in only for a short period of time to resolve an urgent problem. Indefinite step-in rights are not granted to public authorities for the reason that termination will be a more appropriate remedy in instances where this may be required. The regulatory framework suggests that step-in rights of public authorities are only appropriate in projects relating to core public services and should be limited to the extent that a failure to step-in may threaten an essential public concern. The prescribed approach also requires public authorities to exercise step-in rights in their sole and absolute discretion.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The prescribed approach under the regulatory framework is for the disputes arising in connection with the project agreement to be settled through the courts, except in limited instances where expert adjudication is required to resolve matters without delay, in which case fast-track dispute resolution by independent experts is the recommended method. However, the parties are not prohibited from agreeing on arbitration as the method of dispute resolution. The Standardised Provisions also contemplate that the agreement itself may apply some or all of the provisions of the Arbitration Act, 1965 – this

would suggest, then, that at least in principle, international arbitration would be possible. However, PPP agreements in the last few years almost always provide for resolution of disputes in accordance with the guidelines in the Standardised Provisions (i.e. by way of domestic courts with fast-track expert dispute resolution in limited circumstances).

On the question of choice of law, the regulatory framework does not prohibit the parties from choosing foreign law to govern the terms of the project agreement. However, the Standardised Provisions, which constitute instructions from the National Treasury to the institutions to which the PFMA applies, provide for South African law to govern PPP agreements.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

If it is considered appropriate for a proposed project, an expression of interest may be conducted as a form of market testing to establish the level and type of interest in the project of the relevant market sector. Since an expression of interest inevitably creates an expectation of the proposed project in the market, the regulatory framework contemplates that it should be used restrictively on particular projects. An expression of interest is most often used in revenue-generating projects (such as developing tourism in a conservation area). If it is required, the expression of interest may be performed before or as part of the analysis of potential options to meet the public authority's need to deliver a service, which is undertaken as part of a feasibility study. The expression of interest requires an advertisement together with a document setting out, among others, (i)

the background and aims of the public authority and the project, (ii) a brief summary of similar South African PPPs and (iii) the expertise sought from the private sector.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

For purposes of acceptance of the facilities by the public authority, the project company is required to demonstrate that the facilities (including, as far as possible, existing infrastructure) will meet required output specifications. This requires performance tests such as inspections, demonstrations and acceptance or commissioning trials to be conducted to the satisfaction of an independent certifier. The independent certifier is appointed by the project company, subject to the prior approval of the public authority, to inspect and monitor the works and to assess the success or failure of the performance tests. The independent certifier has a duty of care to both parties. If it considers the results of the performance tests to be satisfactory, the independent certifier will issue a completion certificate declaring that the design, construction, fitting, installation and/or commissioning of the works undertaken by the project company have been completed in accordance with the project agreement. Once the completion certificate has been issued, the public authority may accept the commencement of services and the project company will issue the availability certificate.

**16. Are there any expected changes or reform to the existing legislation?**

There were no expected changes to, or reform of, the existing legislation at the date of writing this chapter.

**FINANCING & INCENTIVES****17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

The definition of “public-private partnership” in the Treasury Regulations distinguishes between PPPs that involve the project company (i) performing an institutional function or (ii) using state property for its own commercial purposes. Depending on the PPP model used in the project agreement, the payment mechanism will generally involve the public authority paying the project company for the delivery of the service, or the project company collecting fees or charges from users of the service. Therefore, a variety of payment mechanism structures, including availability-based, service-based and usage-based mechanisms, have been used across sectors and project types.

In service delivery projects, the public authority sets service delivery objectives and the project company is either paid by (i) the public authority for the service (for example, for serviced office accommodation), or (ii) the users (such as for use of a toll road). Under the Standardised Provisions, the prescribed approach in the former instance is that the project company will receive a unitary payment for delivering in full to the public authority the public infrastructure and related services procured through the tender, as opposed to payment of separate amounts for each project deliverable. Accordingly, payment is payable only when services are deemed to be available, which occurs when the availability certificate is issued by the project company. Please refer to Question 14 above.

In PPPs involving the use of state property, assets of the public authority are used to generate revenue for the public authority in

return for a share of the revenues (such as in the case of land concessions granted to private eco-tourism operators).

The project company is only entitled to payment to the extent that it has satisfied the objective, measurable and reasonable conditions set out in the project agreement to make the procured services available. The prescribed approach to payment under the regulatory framework is for the payment mechanism to reflect, as penalty deductions, any losses that the public authority will incur as a result of poor or non-performance of the services.

While payment is fixed over the lifetime of the project, it is subject to permitted inflationary increases. The inflation risk is considered on a project-by-project basis in accordance with the following general principles:

- the risk is shared between the public authority and the project company;
- an inflation-indexation mechanism will avoid the possibility of a contingency being incorporated in the price and, therefore, give the public authority value for money; and
- CPIX, as the mechanism on which the annual increases in the budgetary allocations for governmental institutions are based, is recommended, although other indices may be agreed provided they are easy to calculate and published in South Africa.

The prescribed position under the regulatory framework is that all interest rate or currency risk is borne by the project company. In particular, provincial authorities are prohibited under the PFMA from assuming hedging liabilities during the term of the project or in the event of early termination of the project agreement, and national authorities require the

permission of the Minister of Finance to incur such financial commitments. However, (i) the public authority is required to compensate the project company for costs and penalties associated with terminating hedging arrangements if the project agreement is terminated as a result of default by the public authority and (ii) under the IPP procurement programme, public authorities may provide limited exchange rate protection in respect of the period between bid submission and achievement of financial close of the project in question.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return. Rates of return are not capped (although success/development fees are typically capped).

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Under the PFMA, certain public authorities (including national or provincial departments and public entities), may issue guarantees, indemnities or security, while others (such as constitutional institutions) may not bind themselves to such future financial commitments. Under the MFMA, municipalities may provide security for any of their debt or contractual obligations.

The approach prescribed by the Standardised Provisions is that the public authority or any other organ of state should not give any security (whether over the assets of the public authority made available for use by the project company or in the form of a guarantee or suretyship) in respect of any payment obligations under a project agreement,

including in respect of payment on availability of the services, indemnified claims or termination compensation.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of any department in the national, provincial, or local sphere of government are treasury obligations. However, public entities are state-owned profit companies and accordingly, their obligations are not assumed by the State.

The government will typically guarantee a minimum revenue stream in respect of projects where the private sector collects user charges from the public. This requires appropriate budget allocations to be made of public funds. Projects requiring a unitary payment from the public authority create contingent obligations to compensate the private sector only if the contract is terminated before its expiry date. The extent of the liability depends on the reason for termination of the PPP contract, whether it is as a result of private-sector default, government default or force majeure.

**21. Are deductions from the service and availability payments subject to a cap?**

Payment is subject to penalty deductions in respect of unavailability of specified critical aspects of the services and other smaller failures in the performance of the project company. Such penalty deductions are not required to be capped under the regulatory framework.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Variations proposed by the public authority which impact on affordability or result in an

increase in the payment, require written approval from the relevant treasury. The regulatory framework also contemplates that the project company should be granted the right to veto a variation proposed by the public authority that would adversely affect its risk profile or be fully protected against the consequences of, and payment for, a variation proposed by the public authority. A cap on variations proposed by the public authority is not expressly required.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

The approach to refinancing prescribed by the Standardised Provisions is underlined by the following principles:

- the benefit of refinancing should be shared between the public authority and the project company;
- the public authority should have the right to be informed of, and pre-approve, proposed refinancing;
- increases in returns derived from changes in the nature of or the terms governing the funding structure of the project should be shared between the public authority and the project company, although increased returns due to improved performance should benefit the investors;
- better funding terms arising from the PPP market in South Africa maturing and stabilizing should be for the benefit of both the public authority and the project company; and
- a 50:50 sharing of the refinancing gains between the public authority and the project company provides a fair balance.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Generally, the lenders sign a direct agreement with the public authority. Under the direct agreement, the lenders are granted a voluntary right to step-in and assume the project company's rights to perform the project deliverables in the event that the public authority wishes to terminate the project agreement as a result of a default by the project company. The lenders are informed before electing to step-in of the outstanding liabilities due and payable by the project company to the public authority which they are required to assume. During the step-in period, the lenders incur no liability and the public authority may not terminate the project agreement on the grounds that, among others, the lenders have enforced the security granted to them by the project company. If the default that triggered the step-in is remedied within the agreed timeline, the lenders have the option either (i) to step-out and allow the project company to resume full performance of the project deliverables, or (ii) to substitute the project company with another entity that is approved by the public authority.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default termination?**

The public authority is not required to assume the debts of the project company to the lenders on termination of the project agreement and would not typically cover project company debt in full on termination in

the event of the project company's default. The debt owed to the lenders would typically be settled in other default scenarios. Please refer to Question 26 below.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The project company is entitled to compensation from the public authority in any instance of early termination of the project agreement, but the value of the compensation payable will differ depending on the reason for the termination. The amount of compensation will be higher in the event of termination as a result of default by the public authority or force majeure than in the event of default by the project company.

In the event of termination as a result of default by the public authority, the amount of compensation will include:

- the total amount outstanding in respect of the debt to the lenders, including any breakage costs and penalties;
- all amounts due by the project company to third parties in relation to the project, such as subcontractor costs, which may include limited compensation for loss of profit; and
- shareholder loans and return on equity.

In the event of termination as a result of default by the project company, the current position under the regulatory framework is that failure to pay compensation to the project company could unfairly serve to the benefit of the public authority. The amount of

compensation is prescribed as the greater of the pre-agreed percentage of the debt due to the lenders and either (i) the highest tender price that is received pursuant to the project being re-tendered, or (ii) an adjusted estimated project value in the case where the project is not re-tendered. Simply put, the compensation amount will be based on the market value of the unexpired portion of the term of the project or the agreed percentage of the debt owed to the lenders.

The approach prescribed by the Standardised Provisions is that the amount of compensation in the event of termination as a result of force majeure should be determined on the basis of the no-fault principle and should reflect a value somewhere between the amounts that would be payable in the case of each party's default.

In terms of the Standardised Provisions, the public authority is required to pay compensation in the amount of the debt owing to the lenders if the public authority exercises its right to terminate the project agreement as a result of the project company or a subcontractor, or a shareholder or director of either of them, committing a corrupted act, including bribery, corruption and fraud against it in connection with the procurement of the tender or ongoing performance under the project agreement.

However, under the IPP procurement programme, the public authority is generally not liable to pay compensation in the event of default by the project company or corrupt acts.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

The regulatory framework specific to PPPs does not require or incentivise the use of locally manufactured materials in the project. However, the Preferential Procurement

Regulations, 2017 (promulgated in terms of the PPPFA) generally require public authorities in certain sectors (such as Eskom when procuring transformers) designated by the Department of Trade and Industry, and allow public authorities in other sectors, to advertise, as a condition of a tender in which local production and content is of critical importance, that only a stipulated minimum threshold for locally produced goods, services or works or locally manufactured goods will be considered in the award. According to the DTI, the following industries, sectors and sub-sectors have been designated for local production with minimum local content thresholds:

- buses (bus body) - 80%
- textile, clothing, leather and footwear - 100%
- steel power pylons, monopole pylons, steel substation structures, powerline hardware, street light steel poles, steel lattice towers - 100%
- canned/processed vegetables - 80%
- pharmaceutical products:
  - OSD tender - 70% (volumes)
  - family planning tender - 50% value
- rail rolling stock - 65%
- set top boxes - 30%
- furniture products:
  - office furniture - 85%
  - school furniture - 100%
  - base and mattress - 90%
- solar water heater components - 70%
- electrical and telecom cables - 90%
- valves products and actuators - 70%
- residential electricity meter:
  - prepaid electricity meters - 70%
  - post-paid electricity meters - 70%
  - SMART meters - 50%
- working vessels/boats (all types) - 60%
  - components - 10% - 100%
- conveyance pipes - 80% - 100%
- transformers and shunt reactors:
  - class 0 - 90%
  - class 1 - 70%
  - class 4 - 10%
  - components and conversion activities - 50% - 100%
- solar PV components:
  - laminated PV modules - 15%
  - module frame - 65%
  - DC combiner boxes - 65%
  - mounting structure - 90%
  - inverter - 40%
- two-way radio terminals and associated equipment:
  - portable radio - 60%
  - mobile radio - 60%
  - repeater - 60%
  - components - 20% - 100%
- rail signalling - 65%
  - components - 40% - 100%
- wheely bins - 100%
- fire fighting vehicle - 30%
  - crew cabin - 100%

- super structure - 100%
- assembly - 100%
- steel products and components for construction:
  - steel value-added products:
    - fabricated structural steel - 100%
    - joining/connecting components - 100%
    - frames - 100%
    - roof and cladding - 100%
    - fasteners - 100%
    - wire products - 100%
    - ducting and structural pipework - 100%
    - gutters, downpipes & lauders - 100%
  - steel value-added products:
    - plates - 100%
    - sheets - 100%
    - galvanised and colour coated coils - 100%
    - wire rod and drawn wire - 100%
    - sections - 100%
    - reinforcing bars - 100%

It is possible in terms of the PPPFA for public authorities to apply to the Minister of Finance for an exemption from the application of the PPPFA or the regulations.

## 28. Are there tax advantages available to PPP projects?

In addition to the general tax benefits and/or deductions permitted under the Income Tax Act, 1962 (“ITA”) and other tax incentives

that may be permitted by the DTI from time to time (including those described in question 29 below), the ITA provides for certain tax benefits and/or deductions that are particular to PPPs.

Section 12N and section 12NA of the ITA allow project companies in a PPP to claim a capital allowance in respect of improvements effected on land or to a building provided by the public authority, in terms of an obligation under a PPP to effect those improvements. Section 12N grants the capital allowance to a project company when it holds the right of use or occupation of the land or building and section 12NA grants the allowance to a project company in the circumstance where the public authority holds the right of use or occupation of the land or building.

In projects that require the construction of infrastructure, the public authority will generally make immovable property available to the project company for the operation and maintenance of the project asset for the term of the project. The project company is entitled to claim a capital allowance in respect of expenditure it has incurred to effect improvements on such immovable property.

Section 12P(2A) of the ITA also exempts any amount granted to a public authority in respect of improvements required in terms of a PPP on government immovable property. Under section 12P(2A), amounts received by or accrued to any person from the government in the national, provincial or local sphere are exempt from income tax where such amounts are granted for the performance of that person’s obligations pursuant to a PPP to the extent that such person is required to spend an amount at least equal to that amount in respect of any improvements on land or to buildings owned by any sphere of government or over which any sphere of government holds a servitude.

**29. What are the other incentives available to PPP projects?**

The regulatory framework contemplates that the payment mechanism can incentivize the project company in certain ways. Under the Standardised Provisions, a public authority is not obliged to accept early commencement of service. Accordingly, making it possible for the project company to receive payment early under the project agreement may encourage efficiency. Similarly, payment of a fixed payment can also incentivise the project company to increase profit by improving efficiency.

Under the SEZ Act, PPPs may apply to the Minister of Trade and Industry for a specified geographical area to be designated a special economic zone set aside for targeted economic activities and supported through special arrangements. As holder of a permit in respect of a special economic zone, a PPP may be entitled to support measures, including:

- tax relief applicable to a business in terms of the Value-Added Tax Act, 1991, Customs and Excise Act, 1964 and the Customs Duty Act, 2014;
- employment tax incentives subject to the requirements under the Employment Tax Incentive Act, 2013; and
- tax allowance incentives in terms of section 12I of the ITA to support greenfield investments and brownfield

investments in manufacturing assets. This incentive offers support for capital investment and training.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

While it appears from the annual report 2015/2016 of the Government Technical Advisory Centre and National Treasury Programme 8: Technical Support and Development Finance that no PPP projects have been completed in 2015/2016, the report identifies 14 new projects that were being assessed or in the procurement phase. Our answer to question 3 provides a breakdown of the projects currently in the pipeline.

By the end of December 2016:

- 6,422 MW of electricity had been procured from 112 renewable energy IPPs in seven bidding rounds; and
- 2,902 MW of electricity generation capacity from 54 IPP projects has been connected to the national grid.

The projects attracted investment to the value of ZAR201.8 billion in total.

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# SOUTH KOREA



Steve Sunghwa Song



Geon Ho Kim

## KIM & CHANG

### GENERAL

**1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Yes. Under the Act on Public-Private Partnerships in Infrastructure (“PPI Act”), there are two procedures for implementing infrastructure projects: solicited (i.e., government initiated) projects and unsolicited (i.e., sponsor initiated) projects. Infrastructure projects may be implemented in the forms below or such other forms as designated by the competent authority or proposed by the private sector (and accepted by the competent authority).

- BTO (Build-Transfer-Operate)
- BTL (Build-Transfer-Lease)
- BOT (Build-Operate-Transfer)
- BOO (Build-Own-Operate)
- BLT (Build-Lease-Transfer)
- ROT (Rehabilitate-Operate-Transfer)

- ROO (Rehabilitate-Own-Operate)
- RTL (Rehabilitate-Transfer-Lease)

The BTL method is permitted for solicited projects only. Additionally, the PPI Act permits the government and sponsors to adopt certain other project structures. Among the foregoing, BTO and BTL are the two most common forms of PPP projects used in Korea.

**2. Which sectors apply a PPP model to develop infrastructure projects?**

Applicable infrastructure facilities under the PPI Act include various infrastructure facilities, such as roads, railroads, urban railroads, harbours, airports, multi-purpose dams, sewage treatment facilities, schools, etc.

**3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

There is no new sector to which the PPP model is planned to be applied in the near future. For your information, either a request for proposal has been released or a proposal initiated from the private sector has been submitted for the following projects, but they have not yet entered into any definitive project agreements.

Busan Metropolitan City ( <i>Jeonpo·Beomcheon·Moonbun</i> district) Sewage pipeline maintenance project (BTL)	RFP issued March 13, 2017.
Light Rail Transit project ( <i>Wirae – Shinsa</i> )	Project proposal (GS E&C) on Jan. 25, 2017.
Busan Metropolitan City ( <i>Jungang, Choryang, Beomcheon</i> district) Sewage pipeline maintenance project (BTL)	RFP issued Dec. 30, 2016.
New Ansan line dual track railway project (BTO-rs)	RFP issued Dec. 23, 2016.
Army barracks construction projects ( <i>paju, yeonchoen, dongduchoen, yanggu, injae, yeonchoen, chulwon, wonju, bongcheon</i> district)	RFP issued Dec. 27, 2016.
Domestic waste incineration facility ( <i>Taean</i> district)	Announcement for third party proposal (June 23, 2017).

## LEGISLATION & REGULATION

### 4. What are the principal laws and regulations? Is there a framework PPP Law?

The PPI Act is the principal component of the legal framework for PPP. In addition, separate laws may regulate the development of certain infrastructure. For example, the Road Traffic Act will regulate road development projects, while the Port Act will regulate the harbour development projects.

### 5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

The Ministry of Strategy and Finance is the government department which is responsible for the policy making and coordination among the infrastructure sector. The Public and Private Infrastructure Investment Management Centre (“**PIMAC**”) under the umbrella of the

Ministry of Strategy and Finance is the organization coordinating domestic infrastructure projects. Local governments also have certain authority over the projects which are implemented within their jurisdiction. Also, other departments within the central government have certain regulatory powers including the designation of project concessionaires within the relevant sector as shown below:

**Power:** Ministry of Trade, Industry and Energy

**Transport:** Ministry of Land, Infrastructure and Transport

**Harbours:** Ministry of Oceans and Fisheries

**Telecommunications:** Ministry of Science, ICT and Future Planning; Korea Communications Commission

**Oil and gas and minerals extraction:** Ministry of Trade, Industry and Energy

### 6. Are there any restrictions for foreign investors to develop/operate PPP projects?

There are generally no restrictions on foreign ownership of a Korean company, except in the case of certain “strategic” industries, such as broadcasting, telecommunications, and defence. Although there are no restrictions on foreign ownership, a foreign investor investing in a Korean company will need to comply with certain reporting requirements on an ongoing basis as provided under the Foreign Investment Promotion Law (“**FIPL**”).

### 7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?

According to the PPI Act, if a concessionaire fails to commence construction work within the period determined by the implementation

plan without any justifiable ground, or it is deemed that the project cannot be properly carried out due to the concessionaire delaying or avoiding project implementation after the commencement of construction, then the concessionaire may be subject to certain measures, including revocation or change to certain dispositions made pursuant to the PPI Act (including revoking concessionaire designation), suspension of or change to the construction of infrastructure facilities, etc.

In addition, generally, a project agreement includes a provision under which the competent authority may terminate the project agreement and revoke concessionaire designation under the PPI Act if the concessionaire fails to commence the construction work without any justifiable ground after a certain period has lapsed from the date the project agreement was executed.

#### **8. How are force majeure events defined, and what are the consequences of their occurrence?**

Under the standard project agreement form provided by PIMAC, a force majeure event is an event or circumstance (or a combination thereof) which renders it impossible for a party to the project agreement to perform its obligation under the project agreement, or adversely affects the performance of such obligation but is not attributable to either party's fault, and is impossible for the parties to foresee. Force majeure events are categorized into non-political force majeure events and political force majeure events. A non-political force majeure event refers to a national disaster, including any earthquake, flood, tidal wave and fire, or a drastic change in economic environment, including any change in national credit rating, interest rate and foreign exchange, or any other event equivalent thereto, and a political force majeure event refers to any war, riot, terrorist act, nationwide strike or site contamination

caused by nuclear waste or chemical or radioactive materials, or control of foreign exchange and overseas wire transfers or any other event equivalent thereto.

Under the Basic Plan for PPI, any of the following measures may be taken upon the occurrence of a force majeure event:

- The construction commencement date may be postponed or the construction period may be extended.
- Any increase in the total private investment costs due to a force majeure event shall initially be covered by the relevant insurance, and in case the insurance is insufficient to cover such cost increase, the competent authority shall compensate for 80% of the outstanding cost increase due to a non-political force majeure event, and 90% of the outstanding cost increase due to a political force majeure event.
- If the repayment due date of the principal amount of loans and interest thereon occurs while there is a delay in the project due to a force majeure event, the competent authority may provide public financing or cooperate with the concessionaire to obtain a short-term loan.
- If the concessionaire and the competent authority fail to agree on how to address the force majeure event within a certain period of time after the occurrence thereof, the project agreement may be terminated, in which case the competent authority shall make a termination payment to the concessionaire.
- If it is impossible to construct or operate the contemplated project facility due to a force majeure event, the concessionaire may request the competent authority to purchase the project.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

**Expropriation:** Under the PPI Act, the competent authority may take certain actions, including revocation of or change to the disposition regarding the concessionaire under the PPI Act or suspension of or change to the construction of infrastructure facilities, etc., if such action is necessary from the perspective of public interest such as changes in circumstances involving infrastructure facilities or the efficient operation of such facilities. If the concessionaire suffers any loss arising from the competent authority's action as set forth above, the competent authority shall provide just compensation for the loss. In such case, the compensation for such loss shall be discussed between the competent authority and the concessionaire, and if the parties fail to reach an agreement or it becomes impossible to reach an agreement, an application for reconsideration may be filed with the competent land expropriation committee.

**Change of law:** The project agreement provides that if the total project costs increase due to the enactment/amendment of any relevant law which directly affects the construction costs, the total project costs may be adjusted. In addition, if any law or system relating to PPP projects is amended and the amendment is to facilitate the operation of the project or improve its profitability, etc., the project agreement may be adjusted or changed through consultation between the parties.

**Political force majeure:** As discussed above, any war, riot, terrorist act, nationwide strike or site contamination caused by nuclear waste or chemical or radioactive materials, or control of foreign exchange and overseas wire transfers or any other event equivalent thereto is deemed to be a political force majeure event,

and a variety of measures can be taken upon the occurrence of such event.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

A reinstatement test is not envisaged separately under the legislation or the project agreement.

**11. Is the concept of "insurability" recognized in the project agreements?**

Under the Basic Plan for PPI, any predictable and insurable risk should be covered by insurance to the fullest extent possible, and any loss or additional costs which are not covered by insurance should be allocated between the parties to the project agreement.

In principle, in the case of a project under which the ownership of facilities is held by the central government or local government, any risk which occurs due to a cause attributable to the government or the concessionaire during the project period should be borne by the responsible party. However, for any risk caused by a force majeure event, the competent authority should, in principle, pay 80% of any cost increase caused by a non-political force majeure event and 90% of any cost increase caused by a political force majeure event.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Under the PPI Act, where the concessionaire fails to commence construction work within the period determined by the implementation plan without any justifiable ground, or where it

is deemed that the project cannot be properly carried out due to the concessionaire delaying or avoiding project implementation after the commencement of construction,<sup>1</sup> the competent authority may order the construction to be suspended or amended, or the facilities or objects to be re-constructed, changed, transferred, removed or restored to their original state, or render any other measure.

Project agreements also provide that in case a fault attributable to the concessionaire occurs, the project agreement shall be terminated and necessary measures, including revocation of concessionaire designation or cancellation of the concessionaire's management and operation right, may be rendered.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Korean law does not expressly prohibit dispute resolution through international arbitration regarding PPP projects. For projects with a high proportion of foreign investment, the Basic Plan for PPI states that the competent authority should respect the foreign investors' position regarding provisions on dispute resolution, etc. Therefore, a project agreement may include provisions under which the parties agree to settle any dispute relating to the relevant project by international arbitration.

Korean law generally respects the parties' agreement on a foreign law as the governing law, except in certain limited circumstances. More specifically, the choice of a foreign law to govern an agreement would be recognized by the Korean courts insofar as the choice of law provisions thereof are valid under such

foreign law; *provided* that in the event of any legal proceeding brought in a Korean court, the Korean court would apply: (i) the mandatory laws of Korea which should be applied by their nature irrespective of the governing law; (ii) the laws of the jurisdiction of a party's incorporation bearing upon the capacity of such party to enter into contracts; and (iii) if all elements of the case relate to a jurisdiction (related jurisdiction) other than the relevant jurisdiction, the mandatory laws of the related jurisdiction.

Further, although the formation and the substantial validity of such agreement are in principle to be governed by foreign law, the Korean courts would allow a party to establish that it did not consent to enter into the contract (including the agreement on the choice of law) or to challenge the validity of the agreement on the choice of law. The lack of consent or challenge to validity would be decided in reliance of the laws of the jurisdiction of residency of such party if it is manifestly unfair under the relevant circumstances to apply the foreign law to determine the effect of such party's conduct.

Specifically, with respect to the law governing security interests, the Korean Private International Law provides (i) that *in rem* or other registrable rights (such as the title to or mortgage over real estate) should be governed by the law of the location of the relevant property and (ii) that security interest in claims and receivables should be governed by the law governing the relevant claims and receivables.

Also, according to the PPI Act, a concessionaire's right to operate and manage its project pursuant to the project agreement is a registrable property right, which is registered with the registry maintained and administered by the competent authority and over which a mortgage may be established. Accordingly, collateral over a concessionaire's right to

<sup>1</sup> Article 46, Item 3 of the PPI Act.

operate and manage its project is governed by Korean law.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

For BTL projects, performance is evaluated according to the performance requirements prepared at the time the project agreement was executed, and lease payments, etc. shall be made based on performance evaluation.

For BTO projects, evaluation is based on any performance requirements, but if the concessionaire is deemed to be negligent in maintaining project facilities in a way that may seriously undermine user convenience, then certain measures, including revocation of concessionaire designation, may be rendered.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Upon completion of the project, the project company should file a construction completion report, along with the completion inspection report prepared by the construction supervisor, with the competent authority for confirmation of construction completion.

The competent authority which receives an application for confirmation of construction completion should conduct a completion inspection and then issue a certificate of completion to the applicant. When the certificate of completion is issued, the

completion of the relevant project should be deemed to have been inspected or approved<sup>2</sup>.

**16. Are there any expected changes or reform of the existing legislation?**

The PPI Act has recently been amended so that the construction of the central administration building or complex can be carried out as a PPP project.

In the past, the PPP project model did not allow private companies to make a project proposal to the government based on a BTL model. However, an amendment to the PPI Act allows private companies to make a project proposal under the BTL model.

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

Under a PPP project, the concessionaire collects its investment principal plus an amount reflecting a pre-determined rate of return agreed upon with the competent authority through toll fees (in case of BTO projects) or facility lease (in case of BTL projects). The toll fees and facility lease are indexed to a pre-determined annual consumer price inflation rate.

Meanwhile, if the concessionaire raises foreign currency funding, the concessionaire should include foreign exchange hedging costs in the total project costs when submitting the project proposal. Meanwhile, any substantial change in foreign exchange rates having a material adverse effect on the concessionaire's

<sup>2</sup> See Article 22, Paragraphs 1 through 3 of the PPI Act.

profitability may constitute a non-political force majeure event.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

Although the rate of return is not guaranteed, the project company's expected rate of return is reflected into the facility lease (in case of a BTL project) or toll fees (in case of a BTO project).

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Until recently, a substantial number of the concession companies under the PPI Act benefited from some form of revenue guarantee from the competent authority under their respective project agreements. These revenue guarantees have effectively ensured that the concessionaires receive a minimum level of revenue for an agreed period of time. However, this minimum revenue guarantee was abolished in 2006 (for unsolicited projects) and 2009 (for solicited projects), although the minimum revenue guarantee for the PPP projects that existed before such abolition are still valid and effective.

To facilitate PPP projects, the BTO-risk sharing ("BTO-rs") model and the BTO-adjusted ("BTO-a") model have been introduced since 2015. Under the BTO-rs model, the competent authority and the concessionaire share operating profits and losses, and under the BTO-a model, if the operating profits fall below a certain threshold, the competent authority will partially bear the losses but will also share the excess profits.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

If the competent authority is the head of the central administration, its obligations are acknowledged as State obligations, and if the competent authority is the head of any local government, the obligations are acknowledged as obligations of the relevant local government.

**21. Are deductions from the service and availability payments subject to a cap?**

The government payments may be reduced depending on the concessionaire's performance. However, the concessionaire will receive some amount depending on the performance rating, so it appears that a cap exists.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Variations that the competent authority may request at the construction and operation stages are not subject to a cap, but if such variation causes an increase in construction costs or operating costs, the total project costs or construction subsidies, toll fees, period of the management and operation right, etc. shall be adjusted.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

Under the Basic Plan for PPI, any additional benefit gained by the concessionaire as a result of refinancing of the project or change in its shareholder (e.g., increase in net income due to lower interest rate after refinancing, etc.) must be shared with the relevant competent authority. However, if there is no minimum revenue guarantee provided by the competent

authority, then the concessionaire is not required to share with the competent authority any benefit resulting from a change in its shareholder. For any existing project with a minimum revenue guarantee, the relevant concessionaire must report to the competent authority on a quarterly basis whether any circumstance warranting refinancing has occurred. Subsequently, if the competent authority determines that it is possible to refinance the project at the terms and conditions that are more favourable than those of the original financing, then the competent authority may request the concessionaire to refinance the project. Further, the competent authority may conduct a feasibility study to determine the appropriate level of minimum revenue guarantee and a reduction in the relevant tariffs, as the case may be.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

In conducting the PPI project, the lenders do not enter into a direct agreement with the competent authority.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Upon termination of the project agreement, the competent authority is only obligated to make termination payments to the concessionaire, and does not assume the concessionaire's debt obligations against the lenders. The termination payment amount varies depending on whether the termination is

attributable to either party. The termination payment is based on the existing private investment amount during the construction period (interests payable during the construction period are deducted from the total private investment costs), and the level of compensation for opportunity costs regarding the investment amounts differs based on whether termination is attributable to either party. During the operation period, the termination payment is based on the amortized investment amount already made and the present value of expected revenues, but the payment amount shall vary depending on whether termination is attributable to either party. In other words, if the project agreement is terminated due to a cause attributable to the concessionaire, the termination payment shall be insufficient to recover the investors' equity investment.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

Generally, under the project agreement for a PPP project, if the project agreement is terminated early, the competent authority shall make termination payments to the concessionaire pursuant to the project agreement. In addition, if the concessionaire owes any debt to lenders, the project agreement allows the competent authority to directly pay the termination payment to the lenders. In addition, the lenders shall have separately established security interest over the concessionaire's right to claim termination payments.

The basic principles of calculating termination payments are as follows:

- During the construction period, the termination payment shall be based on the private investment amount (total private investment costs – interest payable during the construction period), but the level of compensation for opportunity costs of the investment amount differs based on whether termination is attributable to either party.
- During the operation period, the termination payment shall be based on the amortized investment amount already made and the present value of the expected revenues, but the payment amount shall vary depending on whether termination is attributable to either party. Therefore, upon termination of the project agreement due to a cause attributable to the concessionaire, the termination payment shall be insufficient to recover the investors' equity investment.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Under the Basic Plan for PPI, the competent authority may grant the following preferential measures when evaluating the project plan for designating the concessionaire.

- For a project where a local government becomes the competent authority, preferential treatment may be given based on the investment proportion of the regional companies, the number of investors, and the participation ratio of local small-and-medium sized companies during the construction stage, etc.
- Hiring local residents, use of technological products developed by small-and-medium

sized companies, etc. are evaluated in a preferential manner to support the local economy and participation of small-and-medium sized companies, etc.

**28. Are there tax advantages available to PPP projects?**

The Korean government provides various tax benefits to the concessionaire. For BOT projects, acquisition of real estate is exempt from acquisition tax and registration tax. For BTO and BOT projects, the zero-rate VAT will apply to transfer of the project facilities to the competent authority. Also, under the PPI Act, many government clearance and approval procedures are either simplified or exempted and the concessionaire is permitted to use certain public lands for construction of project facilities. The concessionaire has the right to expropriate land under the PPI Act, and alternatively, the concessionaire may request the government to expropriate land on behalf of the concessionaire.

**29. What are the other incentives available to PPP projects?**

Large conglomerates that acquire at least a 30% shareholding in a project company carrying out a PPP project may enjoy a certain grace period with respect to recognizing the project company as its affiliate if certain requirements are satisfied. Because the project company will not be recognized as an affiliate, a large conglomerate may not be subject to certain regulations under Korea's Monopoly Regulation and Fair Trade Act even if it invests in the project company.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

Materials regarding the status of the PPP projects (including number of projects and

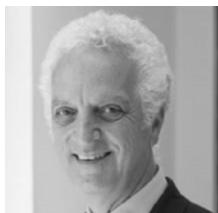
investment amounts) implemented in 2016 are not yet available.

Under the 2016 Basic Plan for PPI, PPP projects worth a total of 5.8 trillion Korean Won (approximately 5.1 billion US Dollars, based on private investment cost, 92 projects in total) are scheduled for implementation. More specifically, road projects worth 3.4 trillion Korean Won (24 projects), railroad

projects worth 1.1 trillion Korean Won (8 projects), a harbour project worth 0.07 trillion Korean Won (1 project), environmental projects worth 0.5 trillion Korean Won (24 projects), education-related projects worth 0.3 trillion Korean Won (13 projects), national defence related projects worth 0.3 trillion Korean Won (10 projects), and social welfare related projects worth 0.2 trillion Korean Won (12 projects) are scheduled for implementation.

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# TANZANIA



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## VELMA LAW

### GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

The legal framework in Tanzania comprises statutes, rules and regulations enacted by Parliament as well as those formulated by other statutory and professional bodies. The Constitution is the fundamental law prevailing over all other legislation and includes a Bill of Rights.

The government of Tanzania published a National PPP Policy in 2009 that recognises the role of the private sector to bring about socio-economic development through investments and to ensure efficiency, effectiveness, accountability, quality and outreach of services.

The “partnership model” in Tanzania may include among others the form of:<sup>1</sup>

<sup>1</sup> Reg 3 PPP Regulations 2015.

- (a) service and management contracts;
- (b) design, build and transfer;
- (c) design, build, operate;
- (d) design, build, operate and maintain;
- (e) build, operate, transfer;
- (f) design, build, finance, operate;
- (g) design, build, finance, maintain;
- (h) build, own, operate, transfer;
- (i) build, lease and transfer;
- (j) build, transfer and operate;
- (k) operation and maintenance;
- (l) operation, maintenance and management; and
- (m) lease-develop-operate.

2. Which sectors apply a PPP model to develop infrastructure projects?

The PPP framework in Tanzania covers all areas of investment, and projects relevant for

PPPs are in “productive and social sectors” and include:<sup>2</sup>

- (a) agriculture;
- (b) infrastructure (key important ones at the moment being Road, Rail, Port, and Airport);
- (c) industry and manufacturing;
- (d) exploration and mining;
- (e) education;
- (f) health;
- (g) environment and waste management;
- (h) information and communication technology (ICT);
- (i) trade and marketing;
- (j) sports, entertainment and recreation;
- (k) natural resources and tourism; and
- (l) energy.

**3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

New and current PPP projects include the upgrade of the 970 kilometer rail line connecting Dodoma, Tabora, and Isaka to Dar es Salaam, the 300 MW Kikonge hydroelectric facility on the river Ruhuhu, the expansion of the Dar es Salaam to Chalinze expressway, the 422 km road from Usagara – Geita – Kyamyorwa, the Dar es Salaam port container terminal and the bus rapid transport system in Dar es Salaam.

<sup>2</sup> Section 4(4) PPP Act 2010.

## LEGISLATION & REGULATION

**4. What are the principal laws and regulations? Is there a framework PPP Law?**

The PPP Act came into effect in 2010 with PPP Regulations in 2011.

There have been various subsequent amendments to the PPP Act, the latest in 2014, and the PPP Regulations were revised in 2015.

The PPP Act and Regulations provide for the institutional framework for the implementation of public private partnership agreements between the public sector and private sector entities and set rules, guidelines and procedures governing public private partnership procurement, development and implementation of public private partnerships and provides for other related matters.

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

The **PPP Centre** is constituted within the office of the Prime Minister and shall administer PPPs and acts as the general overseer of the PPP projects.<sup>3</sup>

The PPP Centre is intended to be a One Stop Center, and in so being, it shall, for the effective discharge of its functions, seek recommendations from the Ministries responsible for investment, finance, planning or any other ministry, department or agency.

A contracting authority, after selection of a project (solicited or unsolicited), shall consult the relevant regulatory authority under which the selected project is regulated, seeking recommendations (furnishing a copy of a

<sup>3</sup> Section 5 PPP Act.

feasibility study report and recommendations of a transactional advisor).<sup>4</sup> The contracting authority, upon working on the recommendations submitted by the regulatory authority under which the selected project is regulated, must submit to the PPP Centre a list of potential PPP projects at least 2 months before the beginning of the budget cycle.<sup>5</sup>

The PPP Centre shall analyse projects submitted by contracting authorities within 30 working days from the date of receipt and forward projects to the **Ministry of Finance**.

The Ministry of Finance undertakes an analysis of fiscal risks, affordability and other financial matters and submits the projects to the PPP Centre within 15 working days from the date of receiving such projects.

The **PPP Facilitation Fund** finances feasibility studies and assists PPP Projects with limited financial viability and high economic benefit. It is administered by the PPP Centre and the executive director of the PPP Centre shall be the Accounting Officer of the Facilitation Fund.

The **PPP Technical Committee** shall consider and approve PPP projects and agreements.

The PPP Centre shall, after receiving recommendation from the Ministry of Finance, within 7 working days, submit the projects to the PPP Technical Committee.<sup>6</sup>

Projects submitted to the PPP Technical Committee shall be dealt with and approved within 15 working days from the date of receipt.<sup>7</sup>

Subject to the recommendation made by the PPP Centre, the PPP Technical Committee is mandated to approve feasibility studies, selection of preferred bidder agreements and amendment to agreements.

The PPP Technical Committee then submits approved projects to the **National Investment Steering Committee** which shall scrutinise all PPP projects within 15 days from the date of submission.<sup>8</sup>

Where a project to be undertaken requires public financing, the National Investment Steering Committee will direct the Minister of Finance to initiate the funding process.<sup>9</sup>

The Minister of Finance will monitor and manage fiscal risks and other financial matters related to the implementation of PPP projects in accordance with the agreement.

The Minister responsible for investment will then notify the general public of approved projects in the official government *Gazette*.<sup>10</sup>

Every agreement intended to be entered into under the PPP arrangement shall be submitted to the Office of the **Attorney General** for a legal opinion.<sup>11</sup>

The agreements entered into under the PPP Act shall be signed by the **accounting officer** of the relevant contracting authority after it has been considered and approved by the PPP Technical Committee and vetted by the Office of the Attorney General.<sup>12</sup>

<sup>4</sup> Reg 14(1) PPP Regulations.

<sup>5</sup> Reg 15(1) PPP Regulations.

<sup>6</sup> Reg 15 (8) PPP Regulations.

<sup>7</sup> Reg 15 (9) PPP Regulations.

<sup>8</sup> Reg 15 (11) PPP Regulations.

<sup>9</sup> Reg 15 (12) PPP Regulations.

<sup>10</sup> Reg 15 (13) PPP Regulations.

<sup>11</sup> Reg 67(3) PPP Regulations.

<sup>12</sup> Reg 73(1) PPP Regulations.

## 6. Are there any restrictions for foreign investors to develop/operate PPP projects?

Generally, there are no restrictions on foreign investors to participate in PPP projects, though depending on the sector there may be minimum local shareholder or participation requirements.

PPPs must endeavour to provide opportunity for empowerment of the citizens of Tanzania. The government has resolved to take measures designed to promote and facilitate economic initiatives aimed at empowering Tanzanians; and has agreed in terms of the National Economic Empowerment Act 2004 that natural resources, trade, agriculture, industry and other economic opportunities must generate wealth, and boost the small and medium enterprise sector, in order to bring about a sustainable affirmative action and facilitate genuine and positive economic empowerment to the population of Tanzania. Also, that economic empowerment is a central means for bringing about economic growth and social justice among Tanzanians that is necessary for the promotion of peace, tranquillity and social stability.<sup>13</sup>

### Bidding and Award Procedure

All public PPP projects (whether solicited or unsolicited) shall be procured through an open and competitive bidding process and in a manner prescribed in the PPP regulations.<sup>14</sup>

For **solicited projects**, at least 2 months before the beginning of the budget cycle, each contracting authority will submit to the PPP Centre, a list of potential projects to be undertaken in partnership with the private

sector.<sup>15</sup> Based on the recommendation of the PPP Centre, the contracting authority may then proceed to conduct a full feasibility study of the project.

For **unsolicited projects**, the private party is required to put forward a project concept to the proposed contracting authority, which may then be forwarded to the PPP Centre for review. If the original proponent does not win, then the winning bidder shall reimburse the original proponent any reasonable and verifiable costs incurred in undertaking the feasibility study within 30 days after signing the PPP agreement.<sup>16</sup>

There are specific regulations for the **local government authorities' small-scale PPPs**, whose total project value does not exceed USD 70 million and which entail an agreement not exceeding a maximum duration of 15 years.<sup>17</sup>

There are additional requirements in respect of PPPs in the **energy sector**, which include:

- (a) the electricity utility, TANESCO, must obtain approval first of the relevant regulator, the Energy and Water Utilities Regulatory Authority (“**EWURA**”), before initiation of procurement of any power project;
- (b) the application to EWURA must be made for solicited proposals, before releasing the tender and for unsolicited proposals, after TANESCO has accepted the proposer's project concept but before commencing any formal negotiations for a power purchase agreement;

<sup>13</sup> Regs 12(1), 33(1)(h), 46 (2)(j), and 61(3)(c) PPP Regulations.

<sup>14</sup> Section 15 (2) PPP Act.

<sup>15</sup> Reg 3(1) PPP Project.

<sup>16</sup> Regs 8, 9 and 57(4) PPP Regulations.

<sup>17</sup> Reg 76(2) PPP Regulations.

- (c) EWURA will evaluate compliance with all required legislation, including the PPP legislation; and
- (d) EWURA may nominate a representative to observe the procurement process to be followed by TANESCO.
- (a) there is a delay in completion or interruption of operations due to circumstances beyond any party's control;
- (b) there was an increase in costs arising from requirements of the PPP Centre or the contracting authority which were not foreseen or included in the agreement;

There are special regulations and a standard power purchase agreement (“SPPA”) for energy projects of less than 10MW under the Electricity (Development of Small Power Projects) Rules 2016.

Wind and solar projects must be solicited proposals (i.e. competitively bid) approved by EWURA. Hydro and biomass projects shall be procured through a letter of intent with an SPPA power buyer.

There are further special rules for mini projects of less than 1MW (called very small power projects / VSPP), such as no requirement for EWURA approval of the retail tariff but EWURA may review the tariff if petitioned to do so by 15 per cent of affected households.

#### **7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The legislation does not include long stop completion dates, which are subject to the terms of each PPP agreement.

As regards the general term of the PPP agreement, the private party undertakes to perform a contracting authority's function on behalf of the contracting authority for a specified period<sup>18</sup> and the overall duration shall be provided for in the agreement and shall not be extended unless:<sup>19</sup>

- (c) the service is required and the contracting authority has no capacity or immediate intention to take over and run the project; or
- (d) the project is suspended for reasons not caused by the private party.

Any extension of an agreement shall not exceed 5 years.

#### **8. How are force majeure events defined, and what are the consequences of their occurrence?**

Force majeure events are not defined in the PPP legislation but shall be defined in the PPP Agreement and the consequences of their occurrence be provided for as agreed by the parties.

The parties have a right to terminate the project if the project fails to fulfil its commitment set under the agreement and this shall include the occurrence of force majeure events.<sup>20</sup>

In cases of interruption of operations due to circumstances beyond any party's control or delay in completion, the PPP law allows extension of the PPP agreement.<sup>21</sup>

<sup>18</sup> Section 11(4) PPP Act.

<sup>19</sup> Section 13 PPP Act.

<sup>20</sup> Section 13(1)(a) PPP Act.

<sup>21</sup> Section 13(1)(a) PPP Act.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The PPP law does not specify any particular allocation, or consequence, of political and legal risks.

Generally, the law provides that the PPP agreement shall ensure that:<sup>22</sup>

- (a) the private party undertakes to perform a contracting authority's function on behalf of the contracting authority for a specified period;
- (b) the private party is liable for the risks arising from the performance of its functions;
- (c) the environmental impact assessment certificate has been issued in respect of the project;
- (d) government facilities, equipment or other state resources which are necessary for the project are transferred or made available to the private party on a timely basis; and
- (e) the public and private assets are clearly specified.

Also, the feasibility study shall demonstrate that the PPP agreement is capable to transfer appropriate technical, operational or financial risks to the private party.<sup>23</sup>

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

A reinstatement test as such is not envisaged under the legislation though it may be included in the PPP agreement in the normal way.

The PPP agreement must include provisions for hand-over of the assets to the contracting authority to include:<sup>24</sup>

- (a) provisions for knowledge transfer;
- (b) clear description of the asset to be handed over including its scope and estimated value;
- (c) maintenance requirements on hand-back; and
- (d) the right of the contracting authority to inspect the assets sometime before hand-back and to remedy any defects at the private party's expense.

The private party shall ensure that the project is free from any financial liabilities before handing over to the contracting authority as provided for under the agreement.<sup>25</sup>

**11. Is the concept of "insurability" recognized in the project agreements?**

The concept of "uninsurability" is not mentioned in the legislation though it may be included in the PPP agreement in the normal way.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

There are no specific step-in arrangements in the legislation though it may be included in the PPP agreement in the normal way.

<sup>22</sup> Section 11(4) PPP Act.

<sup>23</sup> Section 11(2)(f)(ii) PPP Act.

<sup>24</sup> Reg 97 PPP Regulations.

<sup>25</sup> Reg 97(3) PPP Regulations.

The legislation specifies that upon termination of the agreement, the contracting authority may, in accordance with the provisions of the PPP Act and Regulations, engage another private partner to implement the project.<sup>26</sup>

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Any dispute arising during the course of the PPP agreement shall be resolved through negotiation, mediation or arbitration.<sup>27</sup> It is not restricted to local arbitration even though the PPP agreement will be governed by the laws of mainland Tanzania.

The PPP agreement shall be governed and construed in accordance with the laws of mainland Tanzania.<sup>28</sup> But other project agreements, including lenders' agreements, can be governed by other laws, subject to agreement with the counterparties, such as the contracting authorities.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The specific concept of regular market testing is not mentioned in the legislation though it may be included in the PPP agreement in the normal way.

During implementation, there is a requirement for the accounting office of the contracting

authority to review the costings and tariffs in view of the long lifetime of the project.<sup>29</sup>

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The specific concept of acceptance of the facilities, or the process of acceptance, is not mentioned in the legislation though it may be included in the PPP agreement in the normal way.

**16. Are there any expected changes or reform of the existing legislation?**

Revised PPP Regulations were expected in 2016 but have not been published to date (October 2017).

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

There are no specific payment mechanism arrangements in the legislation though they may be included in the PPP agreement in the normal way.

It is specified that a PPP agreement enables the private party to receive a benefit for performing on behalf of the contracting authority a function or from utilising the public property, either by way of:

- (a) consideration to be paid by the contracting authority which derives from a revenue fund or where the contracting authority is a central government or local

<sup>26</sup> Reg 75(5) PPP Regulations.

<sup>27</sup> Section 22 PPP Act.

<sup>28</sup> Section 11(5) PPP Act.

<sup>29</sup> Reg 71(2)(f) PPP Regulations.

government authority, from the revenues of such authority;

- (b) charges or fees to be collected by the private party or an agent from users or customers; or
- (c) a combination of consideration and charges or fees.<sup>30</sup>

For the purpose of protecting users' interest, the imposition of fees and tariffs, and alterations from time to time, is regulated by the relevant regulatory authority which has a mandate on the service to be provided.<sup>31</sup>

There is no specified inflation and/or foreign exchange protection.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no specified guaranteed rate of return or a cap on the rate of return.

It is required that projects will represent value for money, be cost-effective and support national development plans.<sup>32</sup>

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

There are no specific payment guarantees provided, and for an unsolicited project a contracting authority is prohibited to conduct a procurement process that requires Government financial support such as guarantee (see paragraph 20 below).

The PPP agreement will provide for:<sup>33</sup>

- (a) payment to the private party, by way of compensation from a revenue fund, charges or fees, collected by the private party from users or customers of the service provided by it;
- (b) payment of the private party to the contracting authority; and
- (c) revenues to be collected from user charges or tariffs by the public.

Any guarantee or fiscal obligations for PPP projects shall be subject to the relevant laws relating to loans, guarantees and grants.<sup>34</sup>

To facilitate PPP projects, the BTO-risk sharing (“**BTO-rs**”) model and the BTO-adjusted (“**BTO-a**”) model have been introduced since 2015. Under the BTO-rs model, the competent authority and the concessionaire share operating profits and losses, and under the BTO-a model, if the operating profits fall below a certain threshold, the competent authority will partially bear the losses but will also share the excess profits.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations under the PPP Agreement remain those of the contracting authority and do not automatically qualify as State obligations.

As mentioned in paragraph 19 above, any guarantee or fiscal obligations for PPP projects

<sup>30</sup> Reg 2 PPP Regulations.

<sup>31</sup> Reg 70(6) PPP Regulations.

<sup>32</sup> Regs 3(6), 3(7) and 56(3) PPP Regulations.

<sup>33</sup> Section 11(3) PPP Act.

<sup>34</sup> Reg 98 PPP Regulations.

shall be subject to the relevant laws relating to loans, guarantees and grants.<sup>35</sup>

For an unsolicited project, the contracting authority is prohibited to conduct a procurement process that requires:<sup>36</sup>

- (a) Government financial support such as guarantee; and/or
- (b) any form of government financial support at any stage of the project conception, procurement or pre-development.

**21. Are deductions from the service and availability payments subject to a cap?**

There is no specified cap on deductions from the service and availability payments.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

There is no specified cap on variations that the public authority may request at the construction and operation stages.

Any variations to the agreement shall be agreed and amended by the parties provided that such variations are approved by the technical committee in consultation with the Ministry of Finance and relevant stakeholders and shall be vetted by the Office of Attorney General. All amendments to the agreement shall not affect the value for money, affordability, agreed technical, operational and financial risk transfer to the private party. Any variations shall ensure that the costs associated with such variations are fairly compensated amongst the parties in accordance with the standard commercial terms.<sup>37</sup>

<sup>35</sup> Reg 98 PPP Regulations.

<sup>36</sup> Reg 56(3) PPP Regulations.

<sup>37</sup> Reg 73 PPP Regulations.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

There are no specific requirements to share any gains arising from refinancing.

However, any proposed refinancing of debt that affects the scope of the project, value for money and end user cost extended by lenders to the private party shall be done subject to the contracting authority's consent and approved by the Ministry of Finance. The Ministry of Finance shall develop guidelines and regulations for monitoring, evaluating and managing all fiscal risks, debts, contingent liabilities and other financial matters.<sup>38</sup>

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

There are no specific requirements or permissions to sign a direct agreement with the lenders though they may be included in the PPP agreement in the normal way.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

There is no specific debt assumption mechanism provided for in the legislation.

The parties have a right to terminate the project if the project fails to fulfil its commitment set under the PPP agreement.

<sup>38</sup> Reg 74 PPP Regulations.

The reasons and compensation for termination shall be as set out in the PPP agreement.<sup>39</sup>

Where the PPP agreement is terminated for the failure of the private party to meet its obligations set under the PPP agreement, such private party shall, within the time stipulated in the PPP agreement, compensate the other party for damages or losses suffered.<sup>40</sup>

Upon termination of the agreement, the contracting authority may engage another private partner to implement the project.<sup>41</sup>

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

There are no specified payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the PPP agreement provided for in the legislation.

The project officer shall prepare an exit strategy based on the provisions contained in the PPP agreement in relation to termination and expiry of the project and such exit strategy shall be approved by the contracting authority.

As mentioned in paragraph 25 above, where the PPP agreement is terminated for the failure of the private party to meet its obligations set under the agreement, such private party shall, within the time stipulated in the agreement,

compensate the other party for damages or losses suffered.<sup>42</sup>

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

In the pre-qualification and evaluation stages the private party is required to submit a local content plan including empowerment of Tanzanians.<sup>43</sup>

Tenderers who are citizens of Tanzania or associations between local and foreign firms, are eligible to be granted a margin of preference of up to 10% only if they meet the criteria provided in PPP Regulations, and are registered by the Tanzania Investment Centre (“TIC”).<sup>44</sup>

TIC has a number of incentives from the establishment of the entities, obtaining licenses and permits and some limited tax exemptions.<sup>45</sup>

One of the criteria for selection of the preferred bidder/best proposal will be the one that provides for a well articulated local content and empowerment plan. The private party may include local manufacturing of equipment or materials used in the construction of PPP projects to have an added advantage in selection when partnering with local firms.

**28. Are there tax advantages available to PPP projects?**

All PPP projects are monitored and regulated by the Ministry, Sector Ministries, Government

<sup>39</sup> Reg 75 PPP Regulations.

<sup>40</sup> Reg 75(4) PPP Regulations.

<sup>41</sup> Reg 75(5).

<sup>42</sup> Reg 75(4) PPP Regulations.

<sup>43</sup> Regs 33(1)(h), 34(5), 34(6), 46(2)(j) and 61(3)(c) PPP Regulations.

<sup>44</sup> Reg 34(5) and (6) PPP Regulations.

<sup>45</sup> Section 18 Tanzania Investment Act 1997.

Departments, Agencies, regulatory bodies or local government authorities when they are carried out, and will involve other relevant stakeholders for better implementation and conduct of monitoring and evaluation.

Tax incentives available for PPP projects are similar to those registered under the TIC or any other relevant arrangement in place including tax advantages.<sup>46</sup> Also, upon approval by the Cabinet, an exemption can be provided from tax imposed by the Income Tax Act, by an agreement on strategic project or public interest.<sup>47</sup>

Also for larger projects, they can benefit from advantages as a "strategic investor" determined as such under the Tanzania Investment Act.<sup>48</sup>

Also, for the purposes of promoting identified strategic or major investments, the Minister responsible for investment matters, may, by order published in the Gazette, and after consultation with appropriate government authorities and after consultation with the Minister of Finance, specify specific benefits in addition to the benefits provided under section 19 of the Tanzania Investment Act for any period which the Board may specify.<sup>49</sup>

Withholding tax does not apply to interest payable to a non-resident bank by a strategic investor except for interest payable on any loan taken by a strategic investor from an associated or related company.<sup>50</sup>

<sup>46</sup> Section 19(1) Tanzania Investment Act 1997

<sup>47</sup> Section 10(3) Income Tax Act Cap 332 (as amended by the Written Laws (Miscellaneous Amendments) Act, 2017 of 21 February 2017)

<sup>48</sup> Section 3 Income Tax Act Cap 332 (as amended)

<sup>49</sup> Section 20(1) Tanzania Investment Act 1997

<sup>50</sup> Section 82(2)(e) Income Tax Act Cap 332

## 29. What are the other incentives available to PPP projects?

There are no other specific incentives available to PPP projects.

## 30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?

According to a recent Budget Speech by the Minister for Finance, areas accorded priority in the release of development funds included:

- (a) Roads: construction and maintenance of regional and district roads (Road Funds) (TZS 676 billion); and roads construction projects that included payment of contractors and consultants (TZS 540 billion).
- (b) Power: power generation projects, improving transmission lines and rural electrification (TZS 422 billion).
- (c) Rail: Advance payment of first phase construction of the Standard Gauge Railway from Dar es Salaam to Morogoro (TZS 300 billion).
- (d) Air: Acquisition of two aircraft and advance payment of four other aircrafts (TZS 235 billion).
- (e) Water: improvement in supply of water in rural and urban areas (TZS 186 billion).
- (f) Health: improve health services delivery at all levels (TZS 171 billion) and procurement of medicines, medical equipment and reagents (TZS 156 billion).
- (g) Education: higher learning education students' loans (TZS 393 billion).

The same budget speech has also provided for the development projects that are expected to

be implemented in the coming budget year 2017/18 based on macroeconomic objectives and targets. Priority for 2017/18 will be on flagship projects earmarked in the National Development Plan 2017/18. These projects are expected to deliver higher multiplier effects as envisaged in Tanzania Development Vision 2025 and the plan itself which are:

- (a) Construction of the central railway line to standard gauge;
- (b) Reviving Air Tanzania Company Limited by acquiring four new aircrafts;
- (c) Iron ore and coal mining projects in Liganga and Mchuchuma;
- (d) Establishment of special economic zones;
- (e) Liquefied Natural Gas (LNG) plant; and
- (f) Mkulazi Sugarcane Plantation and sugar factory.

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## ÇAKMAK AVUKATLIK ORTAKLIĞI

### GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

Turkey is one of the top countries using the PPP model in the infrastructure sector and has a large PPP project portfolio set to be realized in the near future.

Build-operate-transfer (“**BOT**”) was the first PPP model used in Turkey in the early 1980s in the energy sector. It was followed by build-operate (“**BO**”) and transfer of operational rights (“**TOR**”) projects. The build-lease-transfer (“**BLT**”) model also started to be used in the late 2000s, mainly in the healthcare sector. All of these models have been used for a significant number of projects in various sectors. In accordance with the Report of the Ministry of Development Concerning the Developments on the Implementations of the Public-Private Partnership <sup>1</sup> dated February

<sup>1</sup> [http://www.kalkinma.gov.tr/Lists/Yaynlar/Attachments/750/Kamu-%C3%96zel%20%C4%B0%C5%9Fbirli%C4%9Fi%20Raporu\\_2016.pdf](http://www.kalkinma.gov.tr/Lists/Yaynlar/Attachments/750/Kamu-%C3%96zel%20%C4%B0%C5%9Fbirli%C4%9Fi%20Raporu_2016.pdf)

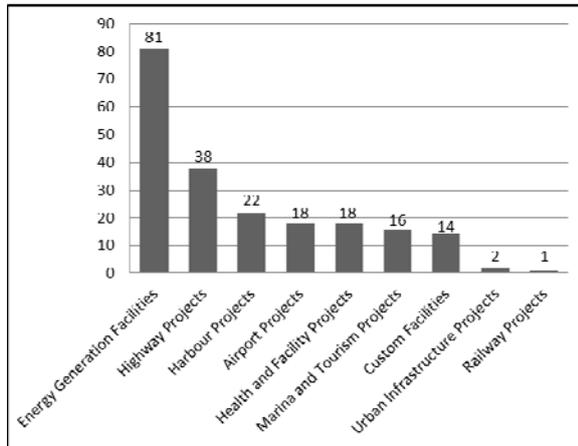
2017 (“**PPP Report**”), and in accordance with the information provided on the website of the Ministry of Health, the numbers of projects undertaken based on various models are, as of January 2017, as follows:

Model	Number of Projects	Percentage
BOT	101	48%
BO	5	2%
BLT	18	9%
TOR	87	41%
Total:	211	100%

Out of 211 total projects, 29 projects are at the construction stage and 182 projects are at the operation stage.

2. Which sectors apply a PPP model to develop infrastructure projects?

The PPP model has been used mainly in the energy, transportation and healthcare sectors. It is also expected to be used in the education, municipal waste disposal, water management (irrigation, water treatment, wastewater management, etc.), and railway sectors in the near future. In accordance with the PPP Report, the number of projects by sectors as of January 2017 was as follows:



**3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

As of October 2017, 5 motorway projects, 1 airport project, 17 health campus projects, 5 marina projects, 2 sea port projects, 3 customs gate projects, 2 nuclear power plant projects and 1 five-star hotel project are the major PPP projects that are at the construction stage. As also mentioned in the 2018 Program of the Council of Ministers<sup>2</sup>, more PPPs are planned to be developed during 2018. These PPPs include the following sectors and projects:

*Health Sector:*

- Denizli City Hospital
- Aydın City Hospital
- Antalya City Hospital
- Diyarbakır Kayapınar Hospital

*Transportation Sector:*

- 740 km Kınalı-Tekirdağ-Çanakkale-Savaştepe Motorway Project (including Çanakkale Strait Bridge)

<sup>2</sup> Published in the Official Gazette No. 30224 dated 28 October 2017 (Repeated).

- Karaman Airport Project
- Artvin Ropeway Project

*Tourism Sector:*

- İzmir Çeşmealtı Marina

*Custom Gates:*

- İpsala Customs Gate

Environment (waste water and solid waste management) and education are the new sectors that the PPP model is planned to be applied in the near future.

## LEGISLATION & REGULATION

**4. What are the principal laws and regulations? Is there a framework PPP Law?**

Under Turkish law there is no framework PPP Law, although there is a draft law in circulation based on the UK model, but its destiny is uncertain. There are, however, specific pieces of legislation covering each type of PPP model. The main legislation regarding PPP projects are as follows:

- Law No. 3096 on the Authorization of Enterprises other than Turkish Electricity Authority for Power Generation, Transmission, Distribution and Trading;
- Law No. 4283 on the Construction and Operation of Electrical Power Plants and Purchasing of Electricity through Build-Operate Model;
- Law No. 3996 on the Realization of Certain Investments and Services through Build-Operate-Transfer Model;
- Law on Privatization No. 4046;

- Law No. 6461 on the Liberalization of Railway Transportation;
- Law No. 3465 on the Authorization of Enterprises other than the General Directorate of Highways for Construction, Management and Operation of Access Controlled Highways;
- Law No. 6428 on the Construction of Facilities, Renovation of Existing Facilities and Purchasing of Services by the Ministry of Health through Public-Private Partnership Model (“**Health PPP Law**”) and its Implementing Regulation; and
- Decree No. 652 on the Establishment and Duties of the Ministry of National Education.

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There is no centralized PPP authority in Turkey. The principal regulatory bodies are as follows:

- The Ministry of Energy and Natural Resources;
- The Ministry of Health;
- The Ministry of National Education;
- The Ministry of Transportation, Maritime and Communication;
- The Privatization Administration;
- General Directorate of State Airports;
- General Directorate of Highways; and
- General Directorate of State Railways.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The legislation does not restrict the rights of foreign investors to develop or operate PPP projects in Turkey. On the contrary, foreign investment is promoted with various incentives provided under the Foreign Investment Law No. 4875 and its secondary legislation. The Foreign Investment Law provides a broad definition of foreign investment, which covers funds in convertible currency, corporate securities, machinery and equipment, and industrial and intellectual property rights. In addition, “*any rights generated in Turkey and relating to dividends, sales proceeds, receivables or other investment rights with monetary value, as well as assets with an economical value such as rights relating to exploration and extraction of natural resources*” are included within the definition of foreign investment. The Foreign Investment Law repeats the well-established principle that foreign investors are to be granted equal treatment with local investors.

Foreign investors can also benefit from the incentives provided with respect to a specific type of project or sector, such as the tax incentives in place for health PPP projects during their construction term. Furthermore, immovable property rights on Turkish lands, including the superficies rights, can be obtained by foreign investors. The rights of foreign investors are also protected by bilateral investment treaties. As of October 2017, there are 74 bilateral investment treaties in force to which Turkey is party.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The legislation for PPP projects does not envisage a long-stop date for the completion of construction, but does not prohibit the inclusion of such a provision in the project

agreements either. A long-stop date is generally regulated under the project agreements for PPP projects based on the freedom of contracts principle, which is set out in the Turkish Code of Obligations.

In the recent PPP projects, the long-stop period was usually provided as 12 months following the expiration of the scheduled construction term. Failure to achieve the completion within this period gives the relevant public authority the right to implement certain sanctions against the project company including termination of the project agreement.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

Although force majeure events are defined under some of the above-mentioned PPP laws and regulations, the general tendency is to define them in the project agreements. Definitions under both the legislation and the project agreements are generally non-exhaustive and cover events that occur due to a natural cause or human act or omission beyond the control of the parties.

As a result of the occurrence of a force majeure event, the construction and operation terms may be extended to remedy the damages of the project companies; or if it is decided by the parties that the extension will not remedy the damages and it is impossible to continue to implement the project agreement, the project agreement may be terminated. In case of termination, the project company's damages, including the sponsors' equity and debts to the lenders, are usually payable by the relevant public authority. The amount to be paid to the project companies also includes loss of profit in some of the PPP projects.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The purpose of PPP projects is to realize projects through the partnership of public and private entities and to allocate the risk to the party that can best handle it. Since the risks regarding expropriation, change in law and adverse court decisions are more likely to be under the control of or attributable to the public authorities, these risks are generally undertaken by the relevant public authority. Upon occurrence of any such event, payments to be made to the project company may be adjusted and/or the term of the agreement may be extended to remedy the negative effects of such events. If the implementation of the project agreement becomes impossible, the parties may terminate the project agreement and in such a case, similar to the force majeure event termination, the project company's damages, including the equity and debts to the lenders, are paid by the relevant authority.

On the other hand, the risks related to the long-term operation of the PPP projects are generally undertaken by the private sector. However, a certain part of these risks may be undertaken by the public authorities through minimum payment guarantees regarding, for example, the volume services, and passenger or occupancy guarantees, in order to promote the PPP investments.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

A reinstatement test is not specifically provided for under the legislation. However, in

practice, it is usually provided for by the project agreements based on the principle of freedom of contract. It is generally agreed by the parties that a reinstatement test will be conducted to understand whether the insurance proceeds received for the occurrence of an insured risk are sufficient to enable the project company to repair and reinstate the facilities and to comply with its payment obligations under the funding agreements during the period commencing from the date of the event of loss until the final payment date under the funding agreements. If the insurance payment is insufficient to do so, the insurance payment shall be used to make repayments to the lenders instead of being used to repair and reinstate the facilities.

**11. Is the concept of “insurability” recognized in the project agreements?**

Customarily, the project agreements of PPP projects require the project company to obtain insurance for the potential risks to which the project may be exposed. However, the concept of uninsurable risks is also recognized in some of the PPP projects subject to certain conditions, such as the non-availability of insurance at all or its non-availability on commercially reasonable terms in the local or international insurance markets. In such cases, the relevant public authority undertakes the liability for uninsurable risks.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The legislation does not restrict the step-in or substitution rights of the lenders. On the contrary, the lenders’ step-in right is clearly regulated by the legislation for certain PPP projects. In practice, most of the PPP project agreements (or direct agreements signed

between the public authority, the project company and the lenders) provide step-in and substitution rights for the lenders. The step-in right permits the lenders to take control of the management of the project by taking measures such as changing the members of the board of directors of the project company. In case such measures are not sufficient to rectify the situation, the substitution mechanism, consisting of the transfer of the project agreement or the shares of the project company to another investor, may also be initiated.

Public authorities may also have step-in rights in cases where the project company violates the laws and regulations to a degree that will result in non-performance of the public services. The public authorities’ step-in right mainly consists of the assumption of the project company’s duties and is generally conducted in coordination with the lenders.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The legislation allows recourse to international arbitration with respect to both the project agreements, between the project company and the public authority, and the direct agreements, between the lenders, the project company and the public authority. In practice, most of the PPP project agreements and direct agreements provide for recourse to international arbitration. Furthermore, it is possible to choose a foreign law as the governing law of these agreements, except for certain sectors for which the legislation requires the use of Turkish law, such as the healthcare sector. In practice, public entities in Turkey generally tend to have Turkish law as the governing law of the project agreements.

## FINANCING &amp; INCENTIVES

- 14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

A market testing procedure is used for health PPP projects in Turkey, and is provided for by both the relevant legislation and the project agreements. Accordingly, a market testing procedure shall be performed every 5 years in order to determine the supplier who will provide the services in the most favorable manner. The project company has a right of preemption if it agrees to provide the services in the same conditions and price provided by the bidder who submitted the most favorable bid.

- 15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

As a general rule, the acceptance is done by the relevant public authority. However, in some projects, including health PPPs, an independent technical adviser is also involved in the acceptance process. The duty of the independent technical adviser is to draft a report determining whether the construction is completed or not. Although such reports are not binding for the parties, the public authorities are required to take such reports into account in their decision making process.

- 16. Are there any expected changes or reform of the existing legislation?**

Although the PPP Report touches upon the need for a framework legislation for PPP projects, it does not provide any timeframe for the adoption for such legislation.

- 17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

PPP projects may include a fixed payment mechanism or adjusted payment mechanism in accordance with the type of the project. For example, for health PPP projects that include two types of payment as the availability payments alongside the service payments, the availability payments are protected against both inflation and foreign exchange risks, while the service payments are protected against only inflation.

- 18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no rate of return guarantee or cap for PPP projects in Turkey.

- 19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

A payment guarantee can be provided for PPP projects by (i) a payment guarantee mechanism provided under the project agreement (for example, in health PPP projects a guarantee is provided to project companies for a certain rate of annual occupancy for volume services), (ii) a debt assumption agreement (whereby the public authority undertakes to assume the debt to lenders upon termination of the project agreement), and (iii) a Treasury guarantee depending on the type of the project. In practice, public authorities usually tend to use one or more of these mechanisms to attract foreign investors and lenders.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

As a matter of Turkish law, Ministries do not have a legal personality separate from the personality of the State, and they sign and implement project agreements on behalf of the State. Consequently, the obligations of the Ministries qualify as State obligations. If the relevant public authority is not a Ministry, then the Treasury can provide separate guarantees for the projects. These guarantees can be provided: (i) as contractual guarantees, (ii) in the form of debt assumption, which is regulated by a special legislation as explained in Question 24 below, or (iii) in the form of a Treasury guarantee, which is available in some types of PPP models.

**21. Are deductions from the service and availability payments subject to a cap?**

Deductions to be made from the payments to the project companies are usually subject to a cap in order to provide a guaranteed cash flow for continuity of the project. In most of the recent PPPs, deductions to be made from the availability payments are limited to 10% of the relevant availability payment, and deductions to be made from the service payments are limited to 20% of the relevant service payment.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

As a general principle, the legislation allows variations for PPP projects due to the changing economic conditions and the needs of the public. The variation amount is generally limited with a cap under the legislation or the project agreements. In most of the recent PPPs, variations in the construction works are limited to 20% of the

total investment amount during the construction period and variations in the services are limited to 10% of the service payments during the operation period.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

In general, the gains resulting from the refinancing of PPP projects are required to be shared with the relevant public authority. For example, in the health PPP projects, the legislation requires that the gains arising from a refinancing and/or debt restructuring be equally shared by the project company and the administration through adjustment of the availability payments.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

In most of the recent PPPs, the lenders signed a direct agreement to have direct interface with the relevant public authority. In so doing, the public authority undertakes some obligations directly vis-à-vis the lenders under a separate agreement and the lenders get control over some actions that may affect the continuity of the projects. Direct agreements mainly regulate (i) the lenders' step-in rights; (ii) the process that the relevant public authority is obliged to pursue when it has the right to terminate the project agreement; and (iii) the lenders' right to receive the termination compensation directly.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination**

**scenarios including project company default terminations?**

Law No. 4749 Concerning Public Financing and Debt Management provides the possibility of debt assumption by the Treasury for (i) BOT projects with a minimum investment amount of TL 1 billion, and (ii) health PPP projects and education PPP projects realized by the BLT model with a minimum investment amount of TL 500 million. According to the Regulation on Assumption of Debts by the Undersecretariat of Treasury<sup>3</sup>, the limit of the debt assumed by the Treasury shall not exceed 85% of the principal debt amount if the implementation agreement is terminated due to the project company's fault, whereas the Treasury will assume the entire debt if no such fault is attributable to the project company. The Treasury may also assume the financial costs arising as a result of the termination of any derivative transactions that are concluded in connection with the loan agreement, up to 10% of the principal debt amount.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The compensation to be paid in case of termination of the PPP project agreements usually consists of the equity of the project company, the costs of financing (loan payments, interests etc.), and the loss of profit of the project company. If the termination is caused by a default of the project company, loss of profit is not compensated by the administration.

The termination payments may also be made directly to the lenders if the direct agreement or project agreement so provides.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

There is no general domestic equipment incentive provided for all PPP projects. However, there are such incentives in some sectors. For example, the Renewable Energy Law No. 5346 provides for a domestic equipment incentive for projects commissioned by 31 December 2020 for five years from the date of the commencement of operation.

**28. Are there tax advantages available to PPP projects?**

In accordance with the legislation, most of the PPP projects are exempt from value added tax, stamp-tax and legal fees for certain transactions during their investment periods. These incentives are usually not provided for the operation term.

**29. What are the other incentives available to PPP projects?**

In accordance with Decree No. 2012/3305 Concerning State Aid for Investments and the Communiqué No. 2012/1, certain incentives, such as customs duty exemption, tax reduction, social security premium support, interest rate support, income tax withholding allowance and land allocation are provided for investments in Turkey based on the region, scale, sector, and type of investment. These incentives are available subject to certain conditions, such as the location and amount of the investment.

<sup>3</sup> Published in the Official Gazette No. 28977 dated 19 April 2014.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

As explained in Question 1 above, according to the PPP Report, there are 182 PPP projects currently in operation and 29 PPP projects at the construction stage. The total investment amount of the PPP projects that are in the construction stage or in operation is approximately USD 53.7 billion as of January 2017.

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# TURKMENISTAN



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## CENTIL LAW FIRM

### GENERAL

1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?

No, the PPP model is not commonly used in Turkmenistan to develop infrastructure or any other projects. Nevertheless, the majority of PPP model projects are implemented within construction, trade and supply projects. Speaking of types, due to the absence of a solid legal framework for PPP, the current models of PPP used in Turkmenistan are not similar to traditional ones, established in western countries, but are closer to Joint-Venture projects.

2. Which sectors apply a PPP model to develop infrastructure projects?

Designing, construction, procurement, trade and supply sectors.

3. Is there any new PPP project in the pipeline of the government? Is there

any new sector to which the PPP model is planned to be applied in the near future?

N/a.

### LEGISLATION & REGULATION

4. What are the principal laws and regulations? Is there a framework PPP Law?

There is no framework PPP law in Turkmenistan. There are no by-laws regarding the PPP model either. Laws and by-laws of general application will be used to govern any PPP project in Turkmenistan.

5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

There is no special regulatory body for PPP projects. In the absence of special regulation relating to PPP, PPP is regarded as an investment project. Investment projects are vested to the authority of the Ministry of Economy.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no specific restrictions for foreign investors to develop/operate PPP projects. However, the absence of a legal framework, and the little knowledge and lack of familiarity of the state authority with the PPP mode will make it impossible for foreign investors to implement a project in accordance with internationally recognized models of PPP.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Yes, it is a common practice to include a long-stop date for the completion of construction in project agreements. There is no specific indication or restriction regarding a long-stop date in Turkmen legislation.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

Turkmen legislation does recognize the concept of force majeure, however there is no force majeure event definition in Turkmen law. The occurrence of a force majeure event shall be confirmed by a certificate issued by the Ministry of Economy of Turkmenistan upon the request.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Under the provisions of general laws, expropriation of private property for the purpose of state needs is allowed under Turkmen laws, but a compensation mechanism is not specified. Any change in law, as a rule, becomes effective from the moment of its

publication in the official newspaper and does not have a retroactive effect.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Not regulated under Turkmen laws.

**11. Is the concept of “insurability” recognized in the project agreements?**

Not regulated under Turkmen laws.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

PPP projects are not specifically governed by Turkmen laws. Under the provisions of general laws, step-in and/or substitution mechanisms do not exist. Contractually such mechanisms can be created by the agreement of the parties and by inclusion of the relevant provisions into contracts.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

As of today, Turkmenistan is not a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“Convention”). Accordingly, a foreign arbitral award obtained in a state which is a party to that Convention shall not be recognized automatically and shall be enforceable by virtue of a written motion

submitted to the Arbitration Court of Turkmenistan.

There are no restrictions in Turkmen laws to choose a neutral law as a governing law of contract.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

PPP projects are not specifically regulated by Turkmen law. Turkmen laws of general application envisage a testing procedure to procure services to be provided by the state company.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Turkmen laws of general application provide that the acceptance of the facilities shall be done solely by the public authority which is the state commission of acceptance. This commission includes the representatives of various relevant ministries and committees of the Government. As a result of testing and acceptance, the state commission issues an act of state acceptance which is a valid and sufficient evidence of the successful acceptance of the facilities. The title to these facilities shall be issued and registered on the basis of this state act of acceptance.

**16. Are there any expected changes or reform of the existing legislation?**

We are not aware of any possible changes in existing legislation or proposed reforms.

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

PPP projects are not specifically regulated by Turkmen law. All benefits and protective measures granted to foreign investors shall be specified in Presidential Decree.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no specific regulation of PPP projects under Turkmen laws. The issue of a guaranteed rate of return or a cap on the rate of return is not regulated by the laws of general application. In the absence of specific laws, it is unlikely that the Government will agree to accommodate any guaranteed rate of return or a cap on the rate of return for the project company or sponsor under the PPP project.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Since there is no special regulation of PPP projects, no payment guarantee is provided under PPP or similar projects. All guarantees (if any) and incentives are limited to those that could be negotiated and granted by the Government via specific Presidential Resolution and consequently under the agreement to be signed by the parties to a PPP project.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

Since there is no specific PPP regulation in Turkmenistan, the functions of the administration do not qualify as state obligations unless such obligations are undertaken by the Government. Therefore, the Treasury does not provide separate guarantees.

**21. Are deductions from the service and availability payments subject to a cap?**

Since there is no specific PPP regulation in Turkmenistan, this matter is not addressed in Turkmen laws.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Since there is no specific PPP regulation in Turkmenistan, this matter is not addressed in Turkmen laws. Thus, any cap for variations at the construction stage, under the general terms of construction law, should be delineated in the agreement between the parties to the PPP project.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

Since there is no specific PPP regulation in Turkmenistan, this matter is not addressed in Turkmen laws.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The lenders may enter into a direct agreement with the Ministry of Economy which is authorized to act on behalf of the Government

of Turkmenistan. There is no standard set of rights that the lenders usually acquire under a direct agreement. The set of rights may vary depending on the project and on the agreement reached between a foreign investor and the Government and included in the agreement.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

This matter is not addressed in Turkmen laws.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

This matter is not addressed in Turkmen laws. Nevertheless, such provisions may be included in the agreement between the parties to a PPP project, provided that the Government will agree to such terms.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No incentives for domestic (local) manufacturing of equipment or materials are provided in Turkmen laws. However, general rules applied to investment projects require a project to employ at least 70% of local workers.

**28. Are there tax advantages available to PPP projects?**

This matter is not addressed in Turkmen laws.

**29. What are the other incentives available to PPP projects?**

This matter is not addressed in Turkmen laws.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

We are not aware of any PPP projects developed in 2016. However, on 8 January 2016 the President of Turkmenistan enacted a Decree on the elaboration of the presidential program for social-economic development for the period of 2017-2021 (“**Program**”). Section III of the Program covers the development of the PPP sector in the country. The Program is not published yet.

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# UKRAINE



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## VASIL KISIL AND PARTNERS, Kyiv

### GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Taking PPP in the broad sense as joint public-private projects, PPP is quite common because of the number of remaining state assets. Specialized legislation was developed in the past to enable various forms of partnership, including concession. Several concession projects were initiated in the past for state roads development. The majority of such projects are of the Build-Operate-Transfer type. It is quite common for the projects, while considering application of PPP, to switch to the more common public procurement model because its structure is simpler and its procedures are polished by a much longer history of application. Besides, the private financing markets have little capacity nowadays in Ukraine. On the contrary, the government receives comparatively cheap financing from the international financial institutions (IFIs), which is purposed for particular target projects. That financing usually goes through

public procurement procedures, including specific procedures of those financing IFIs.

We note that profit sharing agreements, which are rather common in the oil and gas sector, are explicitly excluded from operation of the PPP regulations in Ukraine. For that reason, we do not comment on them here either.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

Road construction, utilities supply, and sea ports concession are the major sectors where the application of a true PPP model was considered and attempted. The Law of Ukraine "On Public-Private Partnership" allows the application of PPP in the following sectors:

- minerals research and mining, excluding those under production sharing agreements;
- production and distribution of heat, natural gas, and power;
- development and operation of roads and ports;
- machinery-production;
- collection, refining, and distribution of water;

- health care;
- tourism, recreation, culture, and sport;
- irrigation and draining;
- waste treatment, excluding collection and transportation;
- real estate management;
- social services;
- power saving;
- restoration of residential buildings ruined in the course of anti-terrorist operations;
- installation of modular and construction of temporary houses for internally displaced;
- education and health care services; and
- management of architectural monuments and cultural heritage.

The public partner may also decide to apply PPP in other areas, unless the law restricts the respective activity to state enterprises, institutions, and organizations.

**3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

Over the past couple of years there was a lot of discussion around pilot road concession projects: Kyiv Outer Ring Road, Lviv – Krakovets toll road, etc. Last year the Ministry of Infrastructure of Ukraine initiated three PPP projects for concession of sea ports and development of sea port infrastructure. The Ministry intends to focus on those projects as a pilot to prove that established foreign PPP

practices work in Ukraine. The government would probably postpone application of the PPP model in other sectors.

## LEGISLATION & REGULATION

**4. What are the principal laws and regulations? Is there a framework PPP Law?**

The Laws of Ukraine "On Public-Private Partnership", dated 01 July 2010, No. 2404-VI, with further amendments, should be considered as the framework PPP law in Ukraine. It is a comparatively recent development, which still waits for its full application. In 2016, major changes to it came into effect, making significant improvements to PPP regulation and prospects of its application.

Another framework law is the Law of Ukraine "On Concessions", dated 16 July 1999, No. 997-XIV, governing procedures for the most widespread PPP form – the concessions. It has rather developed subordinate legislation covering nearly all peculiarities of the concession process.

A number of specialised laws govern concession in particular sectors, most suitable for such kind of projects. Among them: the Law of Ukraine "On Concessions for Construction and Operation of Automobile Roads", dated 14 December 1999, No. 1286-XIV; the Law of Ukraine "On Particularities of Transferring in Lease or Concession of Municipally-Owned Items of Heat Supply, Water Supply, and Canalization", dated 21 October 2010, No. 2624-VI; and the Law of Ukraine "On Particularities of Lease or Concession of Items of Fuel and Energy Sector being in State Ownership", dated 08 July 2011, No. 3687-VI, all with further amendments and relevant subordinate regulations.

The World Bank and the EBRD are now financing several projects for developing amendments to PPP laws or introducing new regulations. However, they are not adopted yet, therefore we do not comment on them here.

Another separate law governs lease of state assets, but it is rather seldom used to structure true PPP relations, therefore we do not comment on it either.

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There is currently no principal regulatory body for PPP under the laws of Ukraine. There used to be a dedicated body, but it proved to be ineffective because it lacked powers. The Ministry of Infrastructure of Ukraine is responsible for the currently initiated PPP projects for development of sea ports infrastructure. The Law of Ukraine "On Public-Private Partnership" requires the Cabinet of Ministers to adopt necessary by-laws as well as gives to it most of the authority concerning PPP projects with state-owned property.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The laws of Ukraine make no difference for foreign or local investors for PPP projects. The national regime is established for foreign investors.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

A PPP agreement cannot be made for a period of more than 50 years. That limitation also provides a theoretical limit for completion of construction. Aside from that, the laws do not

limit that term. However, the PPP agreement must determine that term.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

There is no special regulation of force majeure for PPP. Under the laws of Ukraine, a party is not responsible for non-performance caused by an event beyond the party's control. The agreement and obligations are usually postponed for the time of effect of such event. As a matter of good business practice, the force majeure event must be certified by the Chamber of Commerce of Ukraine or a competent authority, unless differently specified in the agreement.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The Constitution of Ukraine protects the right of private ownership as one of the core and inviolable rights. It guarantees that no expropriation can take place, unless on the grounds of public need in cases and under the procedure specifically prescribed by laws and subject to prior and full compensation. Furthermore, in case of foreign investments, the Law of Ukraine "On Foreign Investments" prohibits their nationalization. Ukraine is also a party to a significant number of bilateral investment treaties (BITs) which protect foreign investments and forbid their expropriation.

There are several guarantees to deal with the change in law risks. Formally, the laws which were effective at the time of making the PPP agreement and directly regulate the mutual rights and duties of the parties shall continue to apply in case of change of legislation. However, the rule applies only to civil and

commercial laws, and does not cover many areas, including national security, taxation, currency regulation, customs, and any other area, where there is not equality of parties. If the tariffs for services or goods rendered in the result of PPP are state regulated, a change of such tariffs must be justified. Otherwise, the private partner may terminate or suspend the agreement. In case of violation of rights under the agreement by a state or local authority, the private partner is entitled to compensation of damages.

The adverse court decisions risk has no specific approach in the laws. However, the parties may resort to international arbitration, which by itself largely mitigates such risk.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The laws do not provide for such reinstatement test. It is rather a contractual matter.

**11. Is the concept of “insurability” recognized in the project agreements?**

The framework PPP law in Ukraine does not cover insurance. The special concessions law requires insurance for accidental loss or damage of the property which is transferred into concessions. There is no concept of “uninsurability”.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

There is no step-in or substitution mechanism in case of default of the project company. The

public partner would usually have to cancel the contract and launch a new tender. We have come across several matters when the financing partners insisted on a kind of step-in procedure. To a certain extent such or similar provisions can be included in the PPP transaction documents.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

If it is agreed in the PPP agreement, the disputes with foreign partners can be settled through arbitration. If the state partner under the agreement is the Cabinet of Ministers, it may decide that the state of Ukraine waives its immunity for this agreement if the private partner requires so.

Direct agreements with lenders may provide for arbitration clauses as well, provided at least one party to it is a foreign company.

A foreign law cannot be the governing law of the agreement. Only the law of Ukraine can.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Under the PPP law, the public partner shall perform an efficiency assessment for the PPP project after the PPP is initiated and before arranging a tender for the private partner. The procedure for assessment was adopted by the Cabinet of Ministers of Ukraine. The efficiency assessment includes:

- detailed substantiation of socio-economic consequences of PPP (including economic and financial characteristics of PPP and

changes in the quality of the services and products supply) and ecological consequences of PPP (including influence on the environment);

- substantiation of higher efficiency of PPP in comparison to not involving a private partner;
- risk assessment of PPP and determination of risk management;
- determination of form of PPP; and
- social, economic, and ecological perspectives after the PPP agreement termination.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The law does not specifically govern acceptance of facilities from the private partner. The agreements would usually provide for involving an independent engineer or a technical adviser on the grantor's part for the acceptance procedures. The public partners would hardly be capable of accepting the facilities merely on their own.

In certain cases, the law provides for mandatory commissioning procedures. For example, the procedure for acceptance of real estate depends on its risk assessment. The state building and architecture authorities may verify information in the developer's application on completion of complex construction.

**16. Are there any expected changes or reform of the existing legislation?**

The Law of Ukraine "On Amendments to Certain Laws of Ukraine On Removal of

Regulatory Barriers for Development of Public-Private Partnership and Stimulation of Investments into Ukraine", dated 24 November 2015, No. 817-VIII, which came into effect on 24 May 2016, started a new wave of reform of PPP regulation and provided significant improvements to the Law of Ukraine "On Public-Private Partnership", including introduction of the notion of "project companies", possibilities for temporary ownership by the private partner of the created property, introduction of new types of state support and guarantees, possibility of arbitration, etc. The adoption of respective changes to the subordinate legislation is ongoing.

The World Bank and the European Bank for Reconstruction and Development (EBRD) are now financing several projects for developing amendments to PPP laws or introducing new regulations. However, they are not adopted yet, therefore we do not comment on them here.

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

There is no specific regulation on the payment mechanisms. This is largely a contractual provision.

The common business practice provides that the inflation, unlike foreign exchange protection, however, is usually acceptable as a stabilisation coefficient in the financial model. The foreign exchange risks may theoretically be treated similarly, but we expect that would raise certain objections on the public partner's part and require thorough substantiation, in which part it should or should not apply.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

In practice, the return is calculated from the project parameters according to the pre-agreed terms. If the revenues depend on the state-regulated tariffs of the goods or services delivered by the PPP project, they may not be unreasonably changed by the state authority. That rule should also work, but may be problematic to enforce, if the public authority which is responsible for the tariff is not a party to the PPP agreement. If the state authorities fail to comply or perform other actions which violate the rights of the private partner, the private partner could be authorised to a compensation.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

The public partner may, theoretically, provide state guarantees of its obligations under the agreement. In case of state property, the Cabinet of Ministers of Ukraine decides on providing such guarantee. We note that such guarantees are rather uncommon so far.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The state guarantee, if provided, does qualify as a state obligation to be paid from the state budget of Ukraine. Otherwise, the obligations are not covered by state guarantees. However, it does not free the state partner from compensating damages. The State Treasury would probably not directly act as respondent to the claims from PPP agreements since

public authorities usually have their own contractual capacity. However, all public authorities are so-called budget organisations and are financed through and keep their funds on the treasury accounts. The treasury thus would have to perform any claim, satisfied by the court against the public authority, but on the account of funds available at relevant treasury account of the public authority. If such funds are not available, the state authority would have to ask for additional financing from the State Budget then.

**21. Are deductions from the service and availability payments subject to a cap?**

The PPP law does not provide for any such deductions. It is purely a contractual matter consequently.

However, we note that when PPP is structured as concession, the concessionaire should pay a concession fee for its right to perform construction or manage assets. The calculation of that fee shall be determined in the concession agreement in accordance with the rules adopted by the Regulation of the Cabinet of Ministers of Ukraine, dated 12 April 2000, No. 639, with further amendments. The fee is calculated as a percentage from the value of the item granted into concession, from the revenue in fact, plus a fixed fee determined during tender. If the number of items granted or managed in concession changes during the term of concession, e.g. because of decommission of a building or because of construction completion, the concession fee shall be recalculated in accordance with the terms that were in effect at the time of making the concession agreement.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The laws of Ukraine do not provide for such cap. From the practical point of view, the

expenses will be limited by project stage budget and procurement procedures.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

There is no such requirement.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

This option is not governed by the regulations, but may be practically available to the financing party. The direct agreement would usually institute some additional security on the provided financing: in terms of direct cash flow to the financing parties, for example, their access to information and other project company's default preventive opportunities. It may as well govern the step-in and change of the project company procedures and relevant consequences for the project and earlier extended financing.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

There is no such mechanism, unless the government provides state guarantees, which is rather rare, however. Those may be used to ensure state obligation under a loan taken by the state or a third party for the purposes of the PPP financing. It may cover the full amount of the loan. The exact amount and the conditions shall be determined in the agreement.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The private partner may claim compensation of damages if the termination of the project was caused by violation by the public partner of its obligations.

If the state guarantees are provided, the terms are covered by the agreement of the parties.

In all cases the settlements are governed by the relevant agreements among the parties concerned. It is rather uncommon, however, that the public partner undertakes responsibility before the sponsors or lenders of the private partner.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No In general, the legislation does not provide for material origin incentives or requirements for PPP projects anymore. Practically, usage of local equipment and materials may be an advantage in comparison to other PPP candidates if the tender documentation suggests or requires so.

**28. Are there tax advantages available to PPP projects?**

No.

**29. What are the other incentives available to PPP projects?**

The state partner ensures availability of land which is required for the project, including negotiations with competent authorities to

provide lease or servitudes, as well as buy-out of land from private owners for public needs.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

In 2016, there were three pilot PPP projects initiated for sea ports infrastructure development. The amount of investments is being estimated.

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# UNITED KINGDOM



Sebastian Buss

## WHITE & CASE LLP

### GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Yes. Projects procured on a design-build-operate-transfer model with the principal contractor/project company (“**Project Company**”) sub-contracting construction, maintenance and service functions.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

The PPP model has been applied to a wide range of sectors in the UK, including education, accommodation, waste and healthcare.

- 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

In the 2016 Autumn Statement, the Chancellor of the Exchequer Philip Hammond said that a list of new projects available for private finance

would be produced. This was expected to be published with the March Budget 2017; however, the announcement is now no longer expected until late 2017.

It is understood that schemes will be proposed covering healthcare, transport, prisons and defence accommodation, in each case to be developed under the Private Finance 2 model (“**PF2**”).

The government has also reaffirmed its commitment to the UK Guarantees Scheme (UKGS) keeping it open for an extra five years until at least 2026. So far the scheme has issued £1.8 billion worth of guarantees supporting £4 billion of capital investment in UK infrastructure across 9 projects. Three guarantees have been approved in 2016.

### LEGISLATION & REGULATION

- 4. What are the principal laws and regulations? Is there a framework PPP Law?**

There is no specific PPP framework law but the UK is, for the time being, subject to EU procurement rules and has enacted legislation which implements these rules (e.g. the Public Project Agreements Regulations 2015) and also legislation which includes provisions to assist

with the enabling of PPP projects in certain sectors (such as the Infrastructure Act (2015)).

Although there is no framework PPP law, the Government has published detailed guidance in the form of the SOPC4 guidance under the PFI regime and now the PF2 guidance under the PF2 regime. These include detailed instructions and benchmarking on structuring PF2 projects, the allocation of risk, as well as specific template contractual terms. The Project Agreement terms set out in the PF2 guidance are those used to answer the relevant questions below, although it should be noted that there is scope to derogate from this benchmark position, albeit an Authority is unlikely to stray too far from the government's established position and there are certain fundamental principles which will restrict the extent of such derogation.

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There is no single UK PPP authority. The Infrastructure and Projects Authority has been established to support major infrastructure projects involving public sector capital and assist with Private Finance 2 implementation.

In addition, the National Infrastructure Commission was set up on 5 October 2015 as an independent body tasked with enabling long-term strategic decision making "to build effective and efficient infrastructure for the UK".

One of the main tasks of the National Infrastructure Commission is to undertake a National Infrastructure Assessment during each parliament, making recommendations to the Government and then holding the Government to account for the implementation of these recommendations. A consultation on the process and methodology for this assessment was concluded in October 2016.

In terms of procurement of PPP projects, this was previously split between central and national-level procurement by particular government departments and local level procurement by local authority bodies such as Local Education Authorities or regionally/sector focussed public corporations such as NHS Trusts. Further to the implementation of PF2 in 2012/13, the government has sought to centralise PPP procurement with national level procurement agencies being established for applicable sectors, such as the Education Funding Agency.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no legal restrictions per se and PS2 does not contain any such restrictions, however, the Authority can object to unsuitable shareholders and participants.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

PF2 guidelines recommend that the handover or service commencement should not generally be allowed to be delayed indefinitely and a long stop date is therefore generally included after which the Project Agreement may be terminated by the Authority.

The long-stop date should be reasonable, taking into account the nature of the project and the length of time the Project Company and its lenders should reasonably be allowed to remedy the situation and should be extended to account for relief events, force majeure etc.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

Under the PF2 model "Supervening Events" are divided into three categories:

- (a) Compensation Events: i.e. events which are clearly at the Authority's risk and in respect of which the Project Company should be compensated - "time and money relief".
- (b) Relief Events: i.e. events which are best managed by the Project Company (although not necessarily in its control) and for which the Project Company bears the financial risk, but in respect of which no rights of termination should arise - "time-only relief"; and
- (c) Force Majeure Events: a limited set of events which arise through no fault of either party, which are best managed by the Project Company (although not in its control) and in respect of which rights of termination can arise.

"Force Majeure Event" is defined as the occurrence after the date of the Project Agreement of:

- (a) war, civil war, armed conflict or terrorism;
- (b) nuclear, chemical or biological contamination unless the source or the cause of the contamination is the result of the actions of or breach by the Project Company or its sub-contractor; or
- (c) pressure waves caused by devices travelling at supersonic speeds, which directly causes either party to be unable to comply with all or a material part of its obligations under this Project Agreement.

On the occurrence of a Force Majeure Event, the parties should consult to find a way to continue the Project although there may be no obligation to do this. Either party should be able to terminate for prolonged force majeure (typically 6 months). On termination for prolonged force majeure, the Project Company is entitled to a termination amount from the

Authority which is determined on the basis that force majeure is outside the control of both parties and so the risk of occurrence should be shared. It therefore typically does not include loss of profits (see Question 25 below for further details).

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Expropriation, sequestration or requisition of a material part of the project assets and/or shares of the Project Company is an Authority risk, giving the Project Company the right to terminate for "Authority Default".

Where not covered under the expropriation scenarios, changes in law tend to be dealt with through a reimbursement of costs, rather than giving a termination right. Costs arising from discriminatory and specific changes in law (i.e. only impacting the Project Company/project or similar projects) which were not foreseeable at the time of the signing of the Project Agreement, and whether involving capital expenditure or not, should be borne by the Authority during both the construction and the service phases of the Project Agreement.

Costs arising from non-discriminatory/non-specific changes in law should, during the construction phase, be a Project Company risk, whether or not the Project Company was or should have been aware of the Change in Law at the time of the signing of the Project Agreement. General non-discriminatory changes in law which come into effect during the service/operation phase and which were not foreseeable at the date of the Project Agreement should be an Authority risk if they involve capital expenditure and a Project Company risk if they do not.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

An economic reinstatement test above which the lenders are entitled to appropriate the insurance proceeds in place of applying them to reinstatement of the damage is envisaged in the PF2 guidance as a “last resort” of the lenders, although it is generally considered not to be appropriate where there is a low risk of total destruction of the asset (such as with a road or rail project, or a project that has a number of geographically diverse sites). In practice, however, in many projects lenders will insist on an economic reinstatement test which will be set out in the lenders’ direct agreement. The test may be determined by reference to a financial threshold or by reference to the ability of the project company to satisfy financial ratios.

If the result of the project economic test allows the Lenders to appropriate the insurance proceeds, the Project Company remains under an obligation to reinstate the asset. In practice, the Project Company will rarely have the financial means to do so and the result will be a Project Company default allowing the Authority to terminate the Project Agreement and to rebuild the project through a retendering process.

**11. Is the concept of “uninsurability” recognized in the project agreements?**

The UK regime recognises the concept of “uninsurable risks”, which includes both unavailability of insurance for a particular risk, or premiums for a particular risk being charged at a level which is not commercially viable. The PF2 guidance makes it clear that there should be no protection provided by the Authority to the Project Company for a specific term or condition of a policy

(including deductibles at a specific level) becoming unavailable.

Where a risk is determined to have become uninsurable, the Authority will assume the risk through self-insurance and the Project Company will be excused from the obligation to insure such risk, with a reduction made to the unitary charge corresponding to the premiums the Project Company is no longer paying.

If the uninsurable risk materialises, the Authority can choose either to pay an amount equal to the insurance proceeds that would have been payable had the insurances been available or to terminate the Project Agreement. If the Project Agreement is not terminated the Project Company is generally required to approach the insurance market at regular intervals to determine whether the risk has become insurable again.

In January 2016, the solvency and supervisory regime applicable to EU insurers and reinsurers, Solvency II, introduced a preferential treatment for “qualifying infrastructure investments”. This is intended to create enhanced incentives for insurers to invest in infrastructure projects by reducing the amount of capital which insurers must hold against the debt and equity of such qualifying infrastructure projects.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

PF2 contains a right of step in for the Authority in certain emergency type circumstances or where the Project Company is in breach of its obligations (after a remedy period).

If the step in is not the consequence of a Project Company breach then the Authority

should indemnify the Project Company for direct losses suffered as the circumstances would be outside the scope of the obligations of the Project Company. If the step in occurs as a result of the Project Company's breach, the Project Company will continue to be paid the unitary charge less an amount equal to all the Authority's costs required to carry out the Project Company obligations.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

PS2 guidelines contemplate the use of enforcement either through the courts or through arbitration.

Although from a legal standpoint it is possible for the parties to select the governing law, it would be highly unusual that the Project Agreement would be under a foreign law and extremely unlikely that the Authority would accept this.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Yes. PF2 guidance suggests that "soft" services (e.g. catering) to be provided by the Project Company should be value tested at five year intervals. In general, however, PF2 envisages that such services will now be provided or procured by the Authority rather than the Project Company.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The PF2 guidance recommends that acceptance testing should, in most cases, be done by way of a joint assessment by the Authority and Project Company or by an independent third party, although there will be cases where both parties may accept that the Authority is the best judge (e.g. a defence equipment project). It is made clear that the Authority should in no circumstances rely on any technical or other adviser appointed solely on behalf of the Senior Lenders, but may accept an adviser that has been jointly appointed and owes duties to all sets of interested parties.

At the time of acceptance, there should be no "approval" of the means of delivery of the Service by the Authority, as this would involve the Authority assuming the Project Company's delivery risk. Instead, acceptance should be based as far as possible on satisfaction by the Project Company of objective acceptance tests. Similarly milestone acceptance by the Authority is not deemed appropriate as, again, it dilutes the Project Company's delivery risk.

**16. Are there any expected changes or reform to the existing legislation?**

There are no changes that are expected imminently to the existing PF2 approach. However, since the UK's vote to leave the European Union in June 2016, there has been uncertainty surrounding legislative change in this sector. The "Leave" vote has no legally binding impact and there is no change to the legal or regulatory structure of the sector pending the UK actually ceasing to be a member of the EU.

It is unclear whether the UK will be able to liberalise public sector procurement rules (which are based on EU requirements) post-Brexit. This may be difficult if the UK wants to continue to seek funding from EU institutions such as the European Investment Bank (EIB) or European ECAs.

There is further political and legislative uncertainty in the UK following the General Election on 8 June 2017, in which the Conservative government failed to return a majority. The impact of this political uncertainty on the PF2 Model is currently unknown but the Prime Minister Theresa May, has indicated previously that the government might decide to underwrite more infrastructure projects or agree to more favourable pricing and incentives, in an attempt to develop key strategic infrastructure projects and reignite the UK economy.

## FINANCING & INCENTIVES

### 17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?

The payment mechanism is included as a schedule to the Project Agreement and operates by way of a unitary charge with non-performance/non-availability deductions as appropriate. The payment mechanism should be drafted in a way so as to enable the Authority to monitor the Project Company's performance. It typically does not include a fixed portion.

Unless indexation is accounted for in the Project Company's bid (which is not the preferred approach), the payment mechanism should include arrangements for indexing the unitary charge so as to allow the Project Company to protect itself against inflation over the course of the Project Agreement. The UK regime does not specifically contemplate FX protection and this is likely to be built into the Project Company's contingency if required.

### 18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?

The Project Agreement does not provide a capped or guaranteed equity IRR for sponsors except in the termination compensation payable for Authority default or Authority voluntary termination (see Question 25 below).

### 19. Is any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?

No.

During the financial crisis a State guarantee (or direct lending) was provided in a small number of projects but this was on an exceptional basis to address the lack of liquidity in the credit markets. This practice has been stopped.

### 20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?

Where the authority is a government department, then the obligations are those of the State.

Where, as in many projects, the project is concluded with local authority bodies such as Local Education Authorities or regionally/sector focussed public corporations such as NHS Trusts, there is no recourse either by law or through issue of a guarantee to the State. However, these are becoming less common and the government is seeking to centralise PPP procurement with national level procurement agencies.

### 21. Are deductions from the service and availability payments subject to a cap?

In many payment mechanisms there are typically no caps on deductions except at the level of zero meaning that where deductions exceed the amount of a unitary charge, the

excess will be carried forward against future unitary charges, but may not result in a negative unitary charge.

Care is taken however when setting the level of deductions. PF2 guidance makes clear, however, that the deductions regime should take account of the commercial structure used by the Project Company to provide the services. Even for poor performance, the level of deduction should allow for the reality that the Project Company still needs to pay staff and sub-contractors. If the deduction exceeds the Project Company's profit, then the viability of performance may be threatened and performance may actually get worse rather than better.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

No. There is generally no cap on the amount or cost of Authority requested variations. However, the Authority will be liable for the cost of changes requested by it through either a lump sum payment or an adjustment to the unitary charge (usually at the Authority's option). Variations during the service period will often require a lump sum payment to be made to cover any capital expenditure involved and a unitary charge adjustment to cover changes in services.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Yes. It is quite typical for the Authority to insist on including a requirement that any refinancing gains are shared with it.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Yes. The Agent (on behalf of the lenders), Authority and Project Company are all parties to the lenders' direct agreement. The lenders have the right to be informed by the Authority prior to any termination of the Project Agreement following which a termination standstill period will be applied. Lenders will also have the right to appoint a temporary step in entity and ultimately to novate the Project Agreement to a suitable substitute contractor. An undertaking of the Authority to make payments under the Project Agreement directly to the lenders following a Project Company default is sometimes included.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

No. There is no debt-assumption mechanism contemplated in PF2.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

See various termination scenarios below and relevant compensation payments:

- (a) Termination for Authority default or voluntary termination by Authority: Authority is obliged to compensate (i) the senior debt (including hedging) liabilities; (ii) Project Company redundancy payments and sub-Project Company breakage costs; and (iii) the loss of future

IRR of the Project Company's shareholders, usually determined by reference to the base case IRR after taking account of the amounts previously paid by way of distributions and/or under shareholder loans.

- (b) Termination for Project Company default: The PF2 model has adopted a market value approach to compensation for Project Company default. If the lenders choose not to step-in under the direct agreement and sell the project themselves, the project shall be retendered and the compensation shall be the resale value. If there is no liquid market i.e. there is an insufficient number of contractors in the prevailing relevant markets to ensure a fair resale value, the compensation will be based on a NPV calculation taking account essentially of the net present value of all future unitary charges (ignoring deductions) less the net present value of all costs required to carry out the Project Company obligations.
- (c) Termination for prolonged Force Majeure: The Authority must compensate the Project Company for (i) senior debt (including hedging) liabilities; (ii) Project Company redundancy payments and sub-Project Company breakage costs; and (iii) equity contributions less amounts previously paid by way of distributions and/or under shareholder loans. Compensation for loss of profit is not included.

Termination for Project Company corruption or breach of refinancing provisions: Only senior debt (including hedging) liabilities are compensated where the Authority terminates due to a corrupt act by the Project Company or where the Project Company breaches refinancing provisions on the basis that sponsors should be responsible for the actions of the Project Company in these circumstances.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Certain local requirements may be included in sub-Project Agreements for the provision of goods and soft-services, although there is no fundamental local content requirement.

**28. Are there tax advantages available to PPP projects?**

There is no specific tax relief for PPP projects although PF2 projects are now commonly structured by way of license (enabling the Project Company to do no more than go on to the land to perform the construction works and Services) rather than lease and lease back. The Project Company may therefore be eligible for composite trade tax treatment, under which all Project Company expenditure on the Project may be treated as being trading expenditure and thereby, in principle, wholly eligible for tax relief as an allowable trade deduction. This may give tax relief to design and construction expenditure that would not otherwise qualify.

**29. What are the other incentives available to PPP projects?**

Government participation in equity is an increasingly common feature which is aimed at reducing the long-term borrowing costs for the Project Company and thus help make PF2 projects attractive to long-term institutional investors looking for relatively low-risk, long-term stable returns for large infrastructure projects.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

According to a report prepared by HM Treasury (available at

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/579271/PFI\\_and\\_PF2\\_projects\\_2016\\_summary\\_data.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/579271/PFI_and_PF2_projects_2016_summary_data.pdf)), as at 31 March 2016, there were 716 PFI and PF2 projects, of which 686 were operational, compared to 679 operational

projects in 2015. The total capital value of projects was £59.4 billion, compared to £57.7 billion in 2015. The main sectors of the PPP projects developed during 2016 included health, education, defence and transport.

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# URUGUAY



Gonzalo Secco



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## FERRERE

### GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

In Uruguay, traditional public works concessions have been the predominant model used. Notwithstanding, in recent years due to a growing need to access private sector resources and experience to improve the provision of public services and goods, it became necessary to have a specific legal framework regulating PPP models, using the latest solutions on the subject, applied in those countries where they have evolved most.

Since 2011 Uruguay has had new PPP rules, which do not repeal the public concession system but stand alongside it.

Considering the rather recent approval of PPP rules and the market's size in terms of investment, it can be concluded that the PPP system is becoming increasingly relevant in Uruguay.

The PPP model used is BOT (Build-Operate-Transfer) where the Public Administration

entrusts to a private party, for a fixed period, the design, construction and operation of infrastructure or of one of those activities, in addition to financing. At the end of the PPP contract term, the private party transfers the PPP project to the Public Administration.

As of May 2017, experience with PPPs has been limited to four projects awarded (one for prisons and the other three for roadway infrastructure), along with other projects about to be tendered involving roadway infrastructure, railway infrastructure, and infrastructure for early childhood centres and educational centres.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

PPP contracts can be executed only in the following areas: infrastructure (such as roadways, ports, airports and railways); energy infrastructure; waste treatment; prisons; health care centres; social housing; sports complexes; urban development; and land settlement works. Certain related services can also be contracted.

In no case may PPP contracts involve: educational services at learning centres; health services in the case of health centres; or security, sanitary or inmate retraining services in the case of prisons.

**3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

Yes, there are new projects in the pipeline of the government involving roadway infrastructure and infrastructure for early childhood centres and educational centres. However, even though the PPP model is planned to be applied in new sectors such as health and housing infrastructure, these projects are at a very initial stage of preparation, specifically in the public initiative stage (the first stage in the PPP process), and they are not expected to be published in 2017.

## LEGISLATION & REGULATION

**4. What are the principal laws and regulations? Is there a framework PPP Law?**

Uruguay's PPP regulatory framework was outlined by Law No. 18,786, passed in August 2011, for contracts involving the development of infrastructure works and the provision of services related thereto.

Regulatory Decree No. 17/012 was signed in January 2012 to regulate diverse aspects facilitating the implementation and execution of PPP agreements entered into by the pertinent Public Administration and the private sector.

Regulatory Decree No. 280/012 was approved in August 2012 to amend certain articles of the previous decree based on experience garnered in the initial stage of the system's application.

Regulatory Decree No. 251/015, approved in September 2015, introduces certain changes in PPP system operation, which reflect the experience of the two PPP projects awarded

through that date. This decree seeks to more precisely define the competencies of the different agencies involved and the timeframes for action, in an effort to achieve a more expeditious process.

Additionally, other laws and regulations on PPPs are:

- Decree No. 45/013, issued in February 2013, establishes that the tax benefits included in the provisions of Articles 11 et seq. of Law No. 16,906, passed in January 1998, in the context of Public Works Concessions and PPP Contracts, can be granted by the Executive Branch provided they are set forth in the bidding conditions for the pertinent tender prior to the submission of bids.
- Recommended Best Practices Guides prepared by the National Development Corporation, for entities participating in PPP contract formalization processes.
- Law No. 17,555 (Articles 19 and 20), passed in September 2002, and Decree No. 442/002, issued in November 2002, regarding Private Initiatives which at the proponent's option do not follow the process indicated in the PPP rules.

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There is no centralized authority for assessing the advisability, structuring, development and implementation of PPP projects, but instead there are various bodies that participate in the different stages of the process. Following are the main bodies involved:

The contracting Public Administration, which in a particular PPP project within its competence will be responsible for the design, structuring and execution of the PPP contract.

The concept of Public Administration comprises the Branches of Government, the Court of Auditors, the Electoral Court, the Administrative Claims Court, Autonomous Entities, Decentralized Services, and Departmental Governments.

The Technical Commission is appointed by the contracting Public Administration for each PPP project and advises the Public Administration on all stages of the contracting procedure.

The National Development Corporation (“**CND**”) is responsible for fostering PPP projects and preparing the applicable technical guidelines. It also advises on the identification, design, study, promotion, selection and contracting of the same.

The PPP Projects Unit operates within the Ministry of Economy and Finance (“**MEF**”). It is responsible for tracking the economic and financial aspects related to initial studies for PPP projects. Similarly, it verifies compliance with budget aspects, evaluates associated risks, and reviews the bidding conditions, the appropriateness of bids received, and the provisional award in relation to the previously defined project model.

The Office of Planning and Budget (“**OPP**”) is the executive unit of the Office of the President of Uruguay. It is responsible for ensuring the appropriate development of each project in line with the fundamental conditions and features of the PPP contracting model.

The MEF, jointly with the OPP, reports on the prior assessments and contracting bases for PPP projects, taking into consideration the project’s social and economic impact, budget aspects, economic-financial viability, and the benefits of adopting this contracting mode.

The creation of an Assessment Coordinating Committee for PPP projects is at the

discretion of the OPP and MEF, for purposes of achieving coordinated actions by the two bodies.

The Project Registry centralizes contracts signed for the development of PPP projects, calls for bidders and private initiatives, etc.

The Court of Auditors has competence regarding the adjudication of contracts in competitive PPP project processes. It also is involved in the event of amendment of PPP contracts.

The National General Accounting Office (“**CGN**”) is responsible for keeping an identifiable record of firm and contingent liabilities under PPP contracts; reporting the amounts thereof, separate from Public Debt, for use in the preparation of each budget law and subsequent laws for the rendering of accounts; and reporting on the investment made per tax year and by budget item.

#### **6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no restrictions on the participation of foreign investors in the development and operation of PPP projects in Uruguay.

The PPP experience in Uruguay has included international public tenders, in which foreign investors have participated under the same conditions as local investors.

#### **7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Yes. The PPP rules set a time limit of 35 years for PPP agreements, including extensions.

As of March 2016, PPP projects tendered in Uruguay have established contracting terms ranging between 20 and 22.5 years.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

The PPP rules include as grounds for contract termination the impossibility of the contractor's compliance as a consequence of a force majeure or unforeseeable event.

If the unforeseeable or force majeure event was to affect compliance solely with certain contract obligations, or with those related to part of the agreed investment, and to the extent that the other obligations can be fulfilled separately, the parties (the contracting Public Administration and the contractor) must agree, in line with the bidding conditions, as to the adjustment of the legal, technical and economic stipulations of the agreement, to adapt it to fulfil the subsisting obligations.

PPP projects include references to damage indemnifiable by the contracting Public Administration to the contractor, in the event of extinguishment of the agreement due to a force majeure or unforeseeable event. This aspect is covered further in the response to question No. 28 below.

In turn, the general civil liability system, provided for in Articles 1343 and 1549 of the Uruguayan Civil Code, eliminates all hypotheses of liability for any obligation under a contract if the nonfulfillment is due to a force majeure event. The said Articles define force majeure as any event beyond the parties' control and that is both unforeseeable and irresistible.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

For each PPP project, in order to quantify its cost, prior to and as part of the project assessment documents, risks are identified and it is determined whether they will be allocated to the private sector or rest with the contracting Public Administration.

Experience with PPP projects in Uruguay in general shows the following allocation of the principal risks:

Risk category	Administration	Contractor	Risk description
Risks of implementation	X		Difficulty in delivery of land in line with a previously defined schedule, causing delays in the construction process. Risks of expropriation.
Risks of operation and maintenance-availability		X	Level of service and quality of project cannot be achieved in line with specifications.
Risks of construction – delays		X	Engineering design established by contractor for project may be insufficient, which may give rise to additional works and/or complementary investments. Risks of increased costs due to delays in execution of activities and programs.
Risks of construction- cost overruns	X	X	Increase in costs due to increases in volumes of materials, inputs, labour and design specifications.

Risk category	Administration	Contractor	Risk description
Geological risks		X	Geological risks of existing emplacements.
Archaeological risks	X		Archaeological remains are found during execution of work that interfere with normal development of the construction project.
Environmental risks	X		Changes in environmental rules that affect project execution.
Environmental risks		X	Damages for unforeseeable environmental losses.
Technological risks		X	Equipment and technology necessary for operation reach end of useful life and become obsolete, or are not operational to satisfy project requirements, leading to cost increases.
Financial risks - financing		X	Non-obtainment of appropriate financing. Project is unable to raise sufficient funds to be materialized, which causes delays.
Financial risks – interest rate		X	Interest rates fluctuate unfavourably, increasing financial costs.
Financial risks – exchange rate	X	X	Exchange rate fluctuates unfavourably, affecting financing and cost of imported inputs.
Risks of force majeure	X		Natural events, conflicts of war, terrorism or other uninsurable risks preventing project development, increasing costs, interrupting service so as to not permit appropriate operation.
Political risks – changes in legislation	X		Change in law and/or regulations of standards (technical, environmental, economic, etc.) affecting costs, income and investments, impacting project viability.
Political risks – contract termination	X		Due to political reasons project development ceases and generates early termination, requiring payment of compensation and/or taking legal action.
Political risks – macroeconomic situation		X	Risks deriving from national and international macroeconomic situation.
Social risks – conflicts alien to project	X		Protests, work stoppages, strikes and/or cultural issues that interfere with normal development of project, lengthening timeframes and increasing costs beyond initial estimates.
Labour risks		X	Labour conflicts.

It is noteworthy that in the PPP project involving roadway infrastructure (published in June 2016), in relation to the distribution of risks between the Public Administration and the contractor, the commitment of the State to grant a fair treatment to the investments is specifically stated, pledging not to damage their settlement through unjustified or discriminatory measures. In addition, the PPP project introduces minor modifications in relation to the transfer of risks due to labor disputes and the process for obtaining authorizations and permits, with greater flexibility for the contractor. Likewise, in the two PPP projects (published in 2017) involving infrastructure for early childhood centers and educational centers, small changes were introduced in relation to the transfer of risks due to labor conflicts with greater flexibility for the contractor.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The PPP rules establish oversight powers for the contracting Public Administration. In the event of the contractor's noncompliance of with its obligations under the PPP agreement, the contracting Public Administration may apply monetary penalties to be deducted from payments it is required to make and/or from the contract performance bond to be provided by the contractor.

In relation to the protection of lender credits, the PPP rules establish that the contractor may establish, to the benefit of its creditors and by virtue of the execution of a PPP agreement, pledges on future fund flows to be generated by the project, as well as guarantee trusts and all other types of personal or real guarantees and current or future rights.

Specifically, the PPP rules regulate the assignment of the PPP contract to the benefit of the project's creditors, for purposes of having such creditors assume the performance of the contract by means of assignment thereof to a third party. The contract will define the compliance risks that will authorize the creditor to demand performance of the contract assignment obligations by the contractor. For this to occur, the contractor must have the prior authorization of the contracting Public Administration, which must verify that the proposed assignee meets the requirements and conditions necessary to continue the performance of the contract. Once the assignment has taken place, the assignee will subrogate the assignor in its rights and obligations.

Another guarantee regulation under the PPP rules is the pledge of rights deriving from PPP contracts and on the assets included in its execution, exclusively to guarantee the fulfilment of the obligations with the financiers of the work, its operation or maintenance. The creation of this right requires notification to the contracting Public Administration. The pledge creditor shall have the right to enforce the pledge either because the guaranteed obligation is not totally or partially met at its due date, or when the contract is terminated due to the contractor's non-performance. In both cases the pledge creditor must notify the contracting Public Administration of its intention to enforce the pledge. When enforcement derives from contract termination due to the contractor's non-performance, such notice of intention to enforce the pledge must be given within ten days following notice to the creditor of the decision to terminate the contract.

**11. Is the concept of "uninsurability" recognized in the project agreements?**

Yes. The PPP projects published provide for the contractor's liability for damages caused to

the works being performed or to infrastructure in general, to persons working at same and to third parties, as well as public or private property, regardless of whether such damages derive from manoeuvres at the premises or other reasons attributable to same, its representatives, employees, subordinates and subcontractors, during the term of effectiveness of the contract.

The projects have provided that the contractor must obtain, prior to the commencement of contract performance and up to approximately four years following its termination, all-risk insurance for an amount similar to that of the contract. Policies must be approved by the contracting Public Administration.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Yes. The PPP rules establish as cause for contract extinguishment, among others, the impossibility of performance due to insolvency proceedings with respect to the contractor, and the occurrence of any grounds disqualifying the contractor from performing the contract. In such cases the contracting Public Administration may take over the purpose of the PPP contract.

For such purposes, the contracting Public Administration shall appoint an intervener, who shall have the powers necessary to ensure contract performance. The intervener shall be civilly, criminally and administratively liable for the intentional or negligent actions or omissions it incurs in the exercise of such capacity.

Intervention cannot continue for a period exceeding twenty-four months. In such period the Administration must resolve on whether to

continue or cease the activities subject of the contract.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The PPP rules establish that arbitration shall be applicable for the resolution of disputes deriving from the application, interpretation, execution, performance and extinguishment of contracts entered into in the context of said rules. The arbitrators shall be appointed by mutual agreement of the parties or, in the absence thereof, in accordance with the provisions of Article 480 of the General Code of Procedure, and shall decide under law. The arbitral tribunal's award shall be final and not subject to appeal.

The contract relationship that may arise between the contractor and those financing the project (while it must be authorized by the contracting Public Administration) is not part of the PPP contract, and hence is not subject to the aforesaid rule. The contractor and its lenders may turn to international arbitration and foreign law to govern their relationship.

If the guarantees established by the contractor in favour of the lenders are as provided in the PPP rules, such guarantees must be subject to local law and to arbitration as indicated in the first paragraph of this response.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

Yes. While the criteria for evaluating bids in tender processes must be stipulated in the pertinent bidding conditions, PPP rules require bids to be judged on the basis of, among other

aspects, the bidder's background and experience in the subject of the PPP contract, its technical and economic solvency, the quality of the services to be provided, and the value and technical appropriateness of the bid.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

One of the guiding principles of the PPP system is the principle of "control," whereby the contracting Public Administration must establish in PPP agreements adequate control mechanisms for the effective protection of user rights and the continuity and efficiency of the provision of the pertinent services.

The contracting Public Administration shall be competent to control contract performance, and must inform the PPP Projects Unit, semi-annually, on the status of compliance with same. It must likewise inform the said Unit of any material change or noncompliance within ten business days of verification of such change or noncompliance.

The controls to be exercised by the contracting Public Administration shall cover technical, operating, legal, economic, financial, accounting and environmental aspects.

The contracting Public Administration shall have broad powers of control and may use different instruments to exercise its functions such as requirements for information, external audits, performance evaluations, inspections, and expert reports. For such purposes, the contractors shall be obliged to provide, at the request of the contracting Public Administration, all information and documentation related to compliance with the contract that the latter requires, without the possibility of alleging trade secrets regarding same.

In the eight PPP projects published so far, the choice has been for a control body appointed by the contracting Public Administration, consisting of technical experts, who exercise their functions with technical independence.

**16. Are there any expected changes or reform to the existing legislation?**

No substantial changes in the current PPP system are expected in the short term.

### FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

PPP rules indicate that as consideration for the activities assumed, depending on the type and features of each project, the contractor may receive different types of income, on an exclusive or combined basis, paid by users or the contracting Public Administration, among others. Depending on each project's features and structure, the agreement may provide for the contracting Public Administration to collect income consisting of payments by the contractor, users or others who may be stipulated depending on the case.

Experience with PPPs shows that the contracting Public Administration has applied terms of payment for availability, linked to meeting certain indicators, in Uruguayan legal currency at the quotation of the Indexed Unit ("UI") on the payment date.

The UI has been included in PPP projects as the currency in which the bidders must submit their bids. The UI is a unit of value that is readjusted based on Uruguayan inflation, measured by the Consumer Price Index ("IPC"), expressed in pesos. The authority that sets and publishes the value of the UI is

the National Statistics Institute (“INE”). This unit is published at the start of each month.

While the rules do not provide as to the impact of inflation or exchange rate fluctuations, PPP projects underway in Uruguay have regulated the subject by assigning the risk to the contractor.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

No. PPP rules establish that the contracting Public Administration does not guarantee a minimum level of income, or minimum profitability to the contractor for performance of the PPP agreement.

**19. Is any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

No. No guarantee is provided by the contracting Public Administration for the payments for which it is liable under PPP agreements.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The payment obligations of the contracting Public Administration qualify as State guarantees or risks, provided the definition of the contracting Public Administration includes one of the Branches of Government.

**21. Are deductions from the service and availability payments subject to a cap?**

This issue is not regulated by PPP rules.

In the published projects, the contracting Public Administration did not limit the deductions that could be made on payments to the contractor.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The PPP contract may recognize the power of the contracting Public Administration to modify the contract, stipulating the specific aspects of the contract susceptible to such modification, the consideration applicable in such cases, as well as the maximum amount of the additional investments that modifications may require and the term within which the power may be exercised.

In this hypothesis, the contractor shall be entitled to economic compensation pertaining to the additional net costs it incurs for same. The maximum amount of new investments or of spending for the service may not exceed 20% of the budget for the work or the expense in operation agreed to in the original contract.

Similarly, the PPP contract may establish the conditions with which the parties must comply for revision. In all cases the maximum amount of these new investments cannot exceed 50% of the budget for the work or the expense in operation pursuant to the original contract, and in the construction phase said percentage cannot exceed 30%.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

No. The rules do not establish any obligation for the contractor to share gains obtained by the performance of a PPP project.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

No. The lenders (while they must be authorized by the contracting Public Administration) regulate their relationship directly with the contractor.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

This aspect is not governed by PPP rules.

The published PPP projects include provisions on the contracting Public Administration's obligations vis-à-vis the contractor's lenders, in the event that extinguishment of the PPP contract is due to a cause attributable to it. The PPP projects have provided that payment to financial creditors will be made in the order of preference of their credits, up to the limit of same, and up to the total amount of indemnification to be paid to the contractor as a consequence of the extinguishment of the PPP contract, and, as applicable, on a pro rata basis in accordance with their credits.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

PPP rules do not provide for this aspect.

Published PPP projects include provisions on the contracting Public Administration's obligations in the event that the PPP contract extinguishment is due to a cause attributable to same. Only in such case will the contractor be

indemnified for damages it may suffer, along with payment for all investments made, less those already amortized.

Grounds for contract extinguishment attributable to the contracting Public Administration have been understood to include, among others, withdrawal due to reasons of public interest, impossibility of performance due to actions taken by the State, contract non-performance due to non-payment by the contracting Public Administration for a period of time, unforeseeable events and force majeure.

PPP project provisions have included in the concept of damages loss of profits, financing costs and derivative contract termination costs, if any, in addition to all other present or future damages, be they as compensation, indemnification or differential, for any reason of an administrative, civil, labour, tax and/or criminal nature.

In general it is provided that in the event of contractor debts, the contracting Public Administration, upon notice to the contractor for a certain term, shall first apply deduction of the contractor's debts to the contracting Public Administration, in second place it shall deduct and pay the debts to the contractor's personnel, and in the third place shall deduct and pay financial creditors their credits pending payment.

Payment to financial creditors is to be made in the order of preference of their credits up to the limit of same and up to the total amount of the indemnification to be paid to the contractor, as a consequence of extinguishment of the PPP agreement, and on a pro rata basis depending on their credits, if applicable. If there is any remainder it shall be paid to the contractor.

The order of preference established in the case of debts shall be applied both to the damages

component and to payment of reimbursement of investments.

For the case of PPP contract extinguishment by mutual agreement of the contractor and the contracting Public Administration, published PPP projects have provided for the need to obtain prior written consent of the creditors holding a pledge on the rights deriving from the contract, and/or assignment of same. The payment to be made by the contracting Public Administration to the contractor shall follow the guidelines indicated above in this chapter.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Pursuant to the provisions of Decree No. 181/015, issued in July 2015, contractors on PPP projects may amortize the right they hold over a period of ten years, provided that it is so established in the bidding conditions. This provision is applicable to final awards issued as of July 1, 2015.

Since the date of approval of the decree PPP projects have included this incentive.

**28. Are there tax advantages available to PPP projects?**

For PPP projects, the Executive Branch may grant tax exemptions and tax benefits including: (i) exemption from all taxes and assessments paid upon importation of equipment, machinery and material provided they are not declared competitive with national industry; (ii) credit for VAT included on acquisitions of goods and services that are part of the cost of equipment, machinery, materials and services for the promoted activity; and (iii) exemption from Net Worth Tax (IP) on intangible and fixed assets for use in the investment project for the entire term of the contract.

As of March 2016, the five published PPP projects included such an exemption by the Executive.

**29. What are the other incentives available to PPP projects?**

No additional incentives are available beyond those indicated in Sections 26 and 27 above.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

In the 2014-2015 period, the Government invested US\$300,000,000 through PPP projects. This was the first experience with PPP projects in Uruguay, focusing on a prison and roadway infrastructure.

In August 2015, the President of Uruguay announced the investments planned for the 2015-2019 period, noting that priority would be given to investments in infrastructure, to ensure the sustainability of growth and the levels of production of the Uruguayan economy.

The investment in infrastructure through PPP projects includes: (i) a package of seven projects for the rehabilitation of national roadways, with an estimated investment of US\$800,000,000, four of which have been launched in 2016 and 2017; (ii) investment in the railway sector through a PPP project launched in 2016, with an investment of approximately US\$90,000,000; and (iii) a package of projects for early childhood centres and educational centres, with an estimated investment of US\$432,200,000. Two of these PPP projects have been launched in 2017.

Following is the investment plan announced by the Government for the 2015-2019 period:

Sector	Estimated investment in US dollars (US\$) millions
<b>Energy.</b> Regas plant; Electrical transmission network; Wind, solar and biomass generation	4,230
<b>Highways.</b> Reconstruction, rehabilitation and improvement of national highway routes	2,360
<b>Social infrastructure.</b> Early Childhood Centres, Educational Centres, Improvement of Hospital and Prison Infrastructure	1,870
<b>Housing.</b> Social housing	1,320
<b>Communications.</b> Communications network	750
<b>Water and Sewage.</b> Sewage network, drinking water, waste water treatment	550
<b>Ports.</b> Wharfs, Dredging, Port Terminals	550
<b>Railways.</b> Track and rolling stock	360
<b>Other.</b> Routes and rolling stock	380
<b>Total</b>	<b>12,370</b>

It is estimated that 1/3 of these investments will be made through PPP contracts. The remaining 2/3 may involve contracting with the private sector through other systems.

On June 16, 2016, the Executive Branch presented its Rendering of Accounts of the aforementioned five-year infrastructure budget plan with an analysis of the progress made in 2015. In summary, the Rendering of Accounts document states that the amount of investments executed in 2015 represented approximately 20% of the amount projected of USD12,370 million, with a heterogeneous

degree of execution by sector. The sector with the least progress is the roadway sector, with approximately 10% of the investments planned for the period 2015-2019. In contrast, the communications sector is the one with the greatest progress in execution, with more than 30% of the total executed.

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# UZBEKISTAN



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## CENTIL LAW FIRM

### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

No, the PPP model is not commonly used in Uzbekistan to develop infrastructure or any other projects.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

N/a.

3. **Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model is planned to be applied in the near future?**

N/a.

### LEGISLATION & REGULATION

4. **What are the principal laws and regulations? Is there a framework PPP Law?**

There is no framework PPP law in Uzbekistan. There are no by-laws regarding the PPP model either. Laws and by-laws of general application will be used to govern any PPP project in Uzbekistan.

It should be noted that recently a draft Law “On public-private partnership” was published on the portal for the discussion of regulatory legal acts of the Republic of Uzbekistan.

The purpose of this law is to regulate relations in the field of public-private partnerships in a number of spheres, including: telecommunications, infrastructure, subsoil, the automotive industry, metallurgy, alternative energy, and agriculture, amongst others.

Under the law, it will be possible to engage in constructional design, financing, construction, reconstruction, exploration, maintenance, operation and trust management under public-private partnerships.

The private partner will be provided with state financial and economic support, as well as state guarantees.

The draft is still under public discussion and it is hard to predict whether the current version of the draft will be approved or not.

**5. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There is no special regulatory body for PPP projects. In the absence of special regulation relating to PPP, PPP is regarded as an investment project. Investment projects are vested to the authority of the State Committee on Investments.

**6. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no specific restrictions for foreign investors to develop/operate PPP projects. However, the absence of a legal framework and the little knowledge and familiarity of the state authority with the PPP mode will make it impossible for foreign investors to implement a project in accordance with internationally recognised models of PPP. There has been an attempt to carry out one PPP project in Uzbekistan. The project had stalled at the stage of negotiation and was eventually cancelled.

**7. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Yes, it is a common practice to include a long-stop date for the completion of construction in project agreements. There is no specific indication or restriction regarding a long-stop date in Uzbek legislation.

**8. How are force majeure events defined, and what are the consequences of their occurrence?**

Since PPP is not regulated in Uzbekistan, we reply to this question on the basis of laws of general application. There is no force majeure definition in Uzbek laws. In an investment agreement, a force majeure clause is discussed, negotiated and finalized in an Investment Agreement between the major investors

(sponsors) of the project and the government represented by Minister of Foreign Trade of the Republic of Uzbekistan. Therefore, what events to include into force majeure and what are the consequences of force majeure occurrences are subject to negotiation between the parties.

**9. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Since PPP is not regulated in Uzbekistan, we reply to this question on the basis of laws of general application.

As a general rule, foreign investments and foreign investors' assets located in Uzbekistan are not subject to nationalisation. However, in limited situations such as during natural disasters, accidents, epidemics etc. nationalisation (requisition) of property is permitted, provided adequate compensation is made by the Government. The quantum of such compensations is not clearly determined by the legislation other than stating that it must be "adequate and proportionate" to the property nationalised. If the foreign investor/owner of the nationalised property does not find compensation commensurate to the loss, he may bring a claim in an Uzbek court, so the court may assess the "adequacy" of the compensation. In practice, however, courts tend to agree with state-assigned compensations and reject such claims.

The major political risk is the change of political will in the country and, as a consequence, the breach or repudiation of the Investment Agreement by the Government, violation of or annulment or revocation of Governmental and Presidential Decrees issued with respect to the specific investment project.

The independence of the judicial system and its immunity from political and nationalistic influences in Uzbekistan is not yet well established. Enforcement of court judgments can sometimes be time consuming because of a large number of outstanding court judgments. Uzbek laws, regulations and court practice are subject to frequent change, varying interpretations and inconsistent and selective enforcement.

**10. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Not regulated under Uzbek laws.

**11. Is the concept of “insurability” recognized in the project agreements?**

Not regulated under Uzbek laws.

**12. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Not relevant. PPP projects are not governed by Uzbek laws. Under the provisions of general laws, step-in and/or substitution mechanisms do not exist. Contractually such mechanisms can be created by the agreement of the parties and by inclusion of the relevant provisions into contracts. However, their implementation should be made in compliance with Uzbekistan mandatory laws.

**13. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The choice of arbitration as the form of dispute resolution and any centre of good international arbitration practice as the seat of arbitration is valid and binding under the Laws of the Republic of Uzbekistan. The Republic of Uzbekistan is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**Convention**”). Accordingly, a foreign arbitral award obtained in a state which is party to that Convention should be recognised and enforced by an Uzbek court, subject to the qualifications in the Convention and compliance with Uzbek civil procedure and the procedures established by the Laws of the Republic of Uzbekistan on commercial arbitration for the enforcement of arbitration decisions.

There are no restrictions in Uzbek laws to choose foreign law as a governing law of project agreements and direct agreements with lenders.

**14. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

PPP projects are not regulated by Uzbek law. Uzbek laws of general application envisage a testing procedure to procure services to be provided by the state company.

**15. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Uzbek laws of general application provide that the acceptance of the facilities shall be performed solely by the public authority which is the state commission of acceptance. This commission includes the representatives of

various relevant ministries and committees of the Government.

As a result of testing and acceptance, the state commission issues an act of state acceptance which is a valid and sufficient evidence of the successful acceptance of the facilities. The title to these facilities shall be issued and registered on the basis of this state act of acceptance.

**16. Are there any expected changes or reform of the existing legislation?**

Pursuant to the Strategy of Action for the Five Priority Areas of Development for 2017-2021, the draft law “On Public-Private Partnership” shall be prepared by the third quarter of 2017. As of the date of this report, the draft law has not been published for a public discussion.

## FINANCING & INCENTIVES

**17. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

No payment mechanism for PPP projects exists. Foreign investors receive incentives and protection via a Cabinet of Ministers’ Decree and a President’s Resolution, as well as bilateral investment agreements to be entered with the Government of Uzbekistan represented by the State Committee on Investments. These documents establish special tax, investment, payment, convertibility, and other regimes granted to specific investors in connection with certain projects developed in Uzbekistan.

**18. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no regulation of PPP projects under Uzbek laws. The issue of a guaranteed rate of return or a cap on the rate of return is not regulated by the laws of general application.

**19. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Since there is no special regulation of PPP projects, no payment guarantee is provided under PPP or similar projects. All guarantees (if any) and incentives are limited to those that could be negotiated and granted by the Government via an Investment Agreement and the specific Cabinet of Ministers’ Decree and specific Presidential Resolution.

**20. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

Since there is no PPP regulation in Uzbekistan, the functions of the administration do not qualify as state obligations unless such obligations are undertaken by the Government via entering into an Investment Agreement or a payment demand guarantee.

**21. Are deductions from the service and availability payments subject to a cap?**

Since there is no PPP regulation in Uzbekistan, this matter is not addressed in Uzbek laws.

**22. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Since there is no PPP regulation in Uzbekistan, this matter is not addressed in Uzbek laws.

**23. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

Since there is no PPP regulation in Uzbekistan, this matter is not addressed in Uzbek laws.

**24. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

There are no limitations of Uzbek laws that would prevent the lenders from signing a direct agreement. A direct agreement must be signed with the State Committee on Investments. There is no standard set of rights that the lenders usually acquire under a direct agreement. The set of rights may vary depending on the project and on the agreement reached between a foreign investor and the Government and included in the Investment Agreement.

**25. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

There are no statutory provisions addressing this issue. PPP projects are not regulated by specific laws in Uzbekistan. From our experience, under projects other than PPP, the obligations of the state authorised authority are specified in an Investment Agreement. They may include, among other things, the assumption of the debt of the project company.

**26. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

There are no statutory provisions addressing this issue. PPP projects are not regulated by specific laws in Uzbekistan. From our experience, under projects other than PPP, this matter has been reached contractually by the parties and included in the Investment Agreement and other project agreements.

**27. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

No, there is no incentive for local manufacturing of equipment or materials used in the construction of PPP projects under Uzbek law.

The most common ratio of local employees to foreign staff in a joint venture is 80/20%.

**28. Are there tax advantages available to PPP projects?**

There are no tax advantages available to PPP projects.

**29. What are the other incentives available to PPP projects?**

There are no incentives specified by Uzbek law available for PPP projects.

**30. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2016?**

As far as we are aware, only one PPP project had been started but never finished due to the absence of legal framework and failure of the parties to reach an agreement of various matters of the project.

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