

GLOBAL PUBLIC — PRIVATE PARTNERSHIP (PPP) GUIDE 2018-2019

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Georgia
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Montenegro
Pakistan
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Poland
Romania
South Korea
Tanzania
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Turkmenistan
Ukraine
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Uruguay
Uzbekistan

2018
2019



GLOBAL PUBLIC - PRIVATE PARTNERSHIP (PPP) GUIDE

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FOREWORD

ÇAKMAK PUBLISHING is pleased to publish the 2018-2019 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 23 jurisdictions around the world.

The following are notable observations from this 2018-2019 edition of the *Guide* regarding the regulatory regime and available incentives for PPP projects in the 23 jurisdictions explored:

- In most of the countries, 14 out of 23, PPP projects are commonly used, while in the remaining 9 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 (20 out of 23 countries), the healthcare sector (14 out of 23 countries) and the energy sector (16 out of 23 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, law enforcement infrastructure, office developments, and public administration infrastructure.
- 9 out of the 23 countries have a centralized and PPP-specific regulatory authority to supervise and regulate the PPP projects.
- 8 out of the 23 countries have a PPP framework law, while the remaining 15 countries rely on their public procurement and concessions legislation or general legal principles.
- 7 out of the 23 countries provide for some sort of tax advantages for PPP projects.
- 5 out of the 23 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.

Naz Bandik Hatipoğlu
Nigar Özbek
Nazlı Başak Ayık
Editors

Ankara, September 2019

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 was 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 sectors, 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 was applied in 2017 and 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.

4. **What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2017?**

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

5. **Is there an upward, stable, or downward trend in PPP projects?**

Considering the rapid growth in the infrastructure sector and enlarged role of PPP Authority in developing more PPP projects we see an upward trend in PPP projects.

LEGISLATION & REGULATION

6. 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, 2018
- Guidelines for Unsolicited Proposals, 2018
- Guideline for VGF for PPP Project, 2018
- Guideline for PPPTAF 2012 & Scheme for PPPTAF, 2012
- National Priority Project Rules, 2018
- Rules for Public-Private Partnership Technical Assistance Financing, 2018
- Policy for Implementing PPP Projects through Government to Government (G2G) Partnership, 2017
- 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

- Guidelines for Formulation, Appraisal and Approval of Small Projects, 2010.

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

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

8. 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 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.

9. 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.

10. 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 in the legislation. However, the model PPP documents, which are actually prepared on a project wise basis mostly with the technical assistance from multilateral investment banks like the Asian Development Bank, ADB, generally include such a long-stop date provision (commonly two-six months following the completion of construction) to address the handover or service commencement, which should not generally be allowed to be delayed indefinitely. A long-stop date is therefore generally included. After the long-stop date, 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.

11. 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 ionizing radiation, fires 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.

12. 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.

13. 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 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.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) 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: (i) 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 (ii) 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.

15. 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.

16. 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 jurisdiction; 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.

17. 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.

18. 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.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

Structured loan and syndicated loan are the most commonly used project finance models for PPP projects in Bangladesh including the most recent ones. In general, the project company must maintain a maximum debt to equity ratio of 70:30 except in the power sector for which a debt to equity ratio up to 80:20 is allowed.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. 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 into 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.

30. 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.

31. Are there tax advantages available to PPP projects?

There are provisions permitting PPP investors to benefit from various fiscal incentives (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 pipeline, hi-tech park, ICT village or software technology zone, IT park, large water treatment plant and supply through pipeline, 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 ten 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 1 January 2015 (other than coal fired), the tax holiday is a 100% exemption during the first five 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 30 June 2020 and achieving COD before 30 June 2023, the available exemption is 100% for the first fifteen 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.

32. 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.

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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?**

Despite the slow economic development of Bosnia and Herzegovina we could say that the PPP model has experienced development and more frequent use in solving the problems of public importance in our country. So, the PPP model is used to engage private sector potential in financing public needs of society in order to improve the quality of life of Bosnia and Herzegovina citizens. The level of private sector involvement in public infrastructure begins to grow. In 2017 there were PPP projects which have promoted sustainable development and have tried to remove legal and social obstacles. Although there are still these obstacles, such as inconsistencies between laws in different levels of government, the PPP model plays the major role in creating a favorable environment for exploiting the private and public potentials in the purpose of better life quality for citizens.

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

The PPP model is applied to infrastructure facilities in Bosnia and Herzegovina, the most in the energy industry and for creating better use of sustainable and renewable energy sources and water supplying. Then, it is used to improve citizens' needs, such as in improving public transportation or public lighting. Therefore, we find a PPP model in utilities and road infrastructure in most cases and partially in the mining and mineral sector, the energy industry, agriculture and healthcare sectors. Through 2017, most attention was devoted to addressing health problems and improving the quality of available health services and providing the new level of service to patients so, on that way, the health system could include the private institutions as well.

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 project that perhaps attracted the most attention in 2017 and which is concerned with public private partnership is the project in Banja Luka with the name "Public-Private Partnership in Bosnia and Herzegovina". It is the project of the Office of the Coordinator

for Public Administration Reform, funded by the Fund for Public Administration Reform. The major goal of this project is the establishment of a functional PPP system which is harmonized with EU standards and European practice. 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.

These are long-term projects lasting from 5 to 40 years with the aim of providing better public services in the public sector for citizens.

4. What are the number investment amounts and sectors of the PPP projects developed in your jurisdiction during 2017?

There are no reliable reports of the number, investment amounts and sector of the PPP projects developed in the jurisdiction of Bosnia and Herzegovina during 2017 yet. There are also no reliable data about contracts made in the cantons in Federation of Bosnia and Herzegovina. The only data we could find is about a project in Brčko District, but that project was realized in 2011; it is a Clinic for the Treatment of Dialysis Fresenia Patients in Brčko District and it has cost five million euros.

5. Is there an upward, stable, or downward trend in PPP projects?

As we mentioned earlier, we do not have reliable and 100% certain data about contracts nor about investment amounts in PPP projects in Bosnia and Herzegovina. But we surely

know that the trend in PPP projects is upward because PPP projects have a more proactive approach for action of public importance. So, considering that public sources remain limited and that they cannot at the same time meet the needs of the public in different spheres, PPP projects are the most appropriate solution. Progress in such projects is seen primarily in infrastructure.

LEGISLATION & REGULATION

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

Within the framework of their jurisdictions, cantons in the Federation of Bosnia and Herzegovina have laws on PPPs, which means that every canton has their own way of resolving the PPPs issues. Even though the entities' legislation is harmonized, some legal issues are differently resolved in some of the cantons. So, we could say that PPPs legislation in Bosnia and Herzegovina is a mix of national, entities 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, No 40/02 and 61/06)

Republic of Srpska:

- Law on PPPs (Official Gazette of the Republic of Srpska No 59 of 2 July 2009)

- Law on Concession of Republic of Serbia (Official Gazette of the Republic of Srpska, No. 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

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

The adoption of PPP Law of the Federation of Bosnia and Herzegovina and the PPP Law of Bosnia and Herzegovina is still in process, so PPP is not fully regulated by the laws in national and entities scope. But some cantons of Federation of BiH, as well as Republic of Srpska have their laws in this area, so the changes have started. For successful implementation of PPP projects, it is not only important to have an existing law but to be applicable in practice. According to this, laws of cantons and PPP Law of Republic of Srpska have the most jurisdiction in this scope, so all PPP projects are regulated according to this legislation until we have some changes in legislation at the national and entity levels.

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

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

National level:

- Commission for Concessions of Bosnia and Herzegovina

Federation of Bosnia and Herzegovina:

- Commission for Concessions of the Federation of Bosnia and Herzegovina

Republic of Srpska:

- Department for Implementation of PPP Projects

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

In implementing the law on PPP, the public partner is obliged to respect the following approach: the way of protecting public interest, the principle of market competition, the way of efficiency, the principle of equal treatment, the way of mutual recognition, the principle of proportionality, the principle of transparency, the freedom of contracting, etc. 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.

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

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.

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

In accordance with the Law on Concessions of Bosnia and Herzegovina, a concession contract should contain, in addition to all other elements, a description of events considered as force majeure. Force majeure events are not directly defined in the laws regulating PPP projects. Considering that, the contractual parties agree which law will be applicable in the event of their dispute, the definition of force majeure events could be found in BiH laws. So, 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.

12. 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?

With legislation that regulates relations within PPP projects it is largely created favorable conditions for contractual parties and their rights. In that case, each partner takes responsibility for the risk he can affect to, or the responsibility is divided. Considering that every law and regulation is adopted according to the Constitutions of Federation of Bosnia and Herzegovina and Republic of Srpska, as well as Constitution of Bosnia and Herzegovina and Statute of Brčko District, private capital and ownership protection is one of the first and the most important principle incorporated from constitutions to the laws. Although, the PPP laws do not regulate the political and legal risks specifically, there are protection of foreign direct investment and market economy, protection against any discrimination and other rights that must be respected through the PPP project, due to principles and rights defined in constitutions.

13. 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 questions could be found in the project agreements, where the parties can freely regulate those questions in accordance with these agreements.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) recognized in the project agreements?

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

15. 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 the case that changes or additions are made to the pre-existing contract, and that rights and responsibilities of both parties will change, then those changes must be carried out with regard to the law on PPP, which means that the government (or mayor at the level of the local municipality) must approve the text of the contract. In case of termination of the contract, it 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.

16. 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 laws on PPP and the laws on concession, in the case of any disputes which arise in the case of acts contrary to the law provisions, the Court of Bosnia and Herzegovina is competent. However, the way of settling disputes can be defined under international arbitration if agreed by the parties.

17. 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?

Within the tender procedure and prior to the public invitation for potential bidders, 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. A feasibility study shall be submitted to the Commission for consideration and approval. According to the Law on Concessions of Bosnia and Herzegovina, the Commission shall inform the competent authority whether its project approved within a period of one month from the date of the study receipt.

When taking a decision, the Commission shall take into account the following:

- a) the impact of the project on providing services to users;
- b) the impact of the project on the fee charged to users;
- c) does the project fit into the purpose which is previously determined;

- d) does the project bring profit to the state.

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

18. 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, considering that one of the main parts of the contract on concession between the contractual parties are defined sanctions for failure to fulfill contractual obligations. The obligations of the concessionaire are to build and equip the object for its uninterrupted use and operation.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors? Are there any expected changes or reform to the existing legislation?

Some of the PPP laws stipulate that the PPP partnership agreement must also contain methods and conditions for securing the financial construction of the project as well as the conditions under which financial institutions can participate in the project. Also,

the Law on PPP of Republic of Srpska defines financial and operating leasing as finance models in PPP projects. In case that the public sector is the purchaser of the investment, the carrier of the risk of construct or the risk of demand then the value of the project is managed as an investment by the public sector and it is considered as financial leasing. In case that private partner is the carrier of the risk of construct or the risk of demand then the value of the project is not managed as an investment by the public sector and it is considered as operating leasing and in the budget is recorded as the purchase of services from a public partner. All other issues related to finance models are regulated by an agreement between the parties. The obligations of the sponsors are not regulated by the law and we do not have reliable data about their equity contribution obligations.

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

There is no legal provision, neither in the Law on concession of Bosnia and Herzegovina, 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.

21. 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.

22. 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 for PPP projects. Relating laws (Laws on PPP in cantons of the Federation of Bosnia and Herzegovina and Law on PPP of Republic of Srpska as well as the Law on Concessions of the Federation of Bosnia and Herzegovina and Law on Concession of Republic of Serbia) do not regulate any of the mentioned payment guarantees.

23. 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.

24. 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 project parties, because the laws regulating concessions and PPPs do not have legal provisions to this issue.

25. 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.

26. 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.

27. 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 the direct agreements with the relevant public authority and the content of those agreements is regulated in Article 26 of the Law on Concessions of Bosnia and Herzegovina. In the laws on PPP in cantons of the Federation of Bosnia and Herzegovina it is prescribed that according to the Law on PPP it must be made the Regulation on Contents of the PPP contracts which regulates the content of the agreement that includes all rights and obligations of contractual parties. Also, this regulation specifies the legal protection in the procedure of selecting a private partner in accordance with the Law on Public Procurement.

28. 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 includes 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.

29. 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.

30. 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 criterion for the calculation of concession fees is the representation of local products and services.

31. Are there tax advantages available to PPP projects?

Tax advantages are available to the PPP projects. When granting concessions in Bosnia and Herzegovina, 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.

32. 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 Bosnia and Herzegovina, the amount of such compensation may be reduced or symbolic. The private partner has the right to apply for the grant from the state budget for the realization of the investment. In the Article 4 of the Law on PPP of the Republic of Srpska it is stated that PPP is based primarily on the support of private funds, which does not exclude public funds that constitute a motive to launch PPP projects.

Report for 2018

Regarding to developments of the year 2018, we inform that there are no new projects in that year. Project Clinic for the Treatment of Dialysis Fresenia Patients in Brčko District is still only official project in Bosnia and Herzegovina which was realized in 2011. Zenica-Doboj Canton was the first to publicly present a list of thirty-nine projects suitable for realization with the private sector with a total value of EUR 100 million. Health, heating, public lighting, traffic infrastructure, waste management and construction of sports grounds are mainly the content of these projects. It is a great interest to get to know the conditions offered by foreign investors - primarily from Italy, Switzerland, Turkey and Poland. These projects are pending.

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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 model, 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 investments. 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 was applied in 2017 and is planned to be applied in the near future?**

At the Federal level, the Investment Partnership Program (“PPI”) (multi-ministerial body created with the purpose of increasing the partnership between the private sector and the Government for the implementation of infrastructure projects)

forecasts more than 100 projects on the pipeline for the next years in the toll roads, mining, railways, ports, oil & gas and energy sectors, such as:

- (i) 22 Airports;
- (ii) 4 Port Terminals;
- (iii) 10 Toll Roads; and
- (iv) Mining Rights.

At the State level, new concessions for toll roads are expected, as many of the concessions awarded in the 90's are approaching their final term.

At the Municipal level, new projects are expected in the public lighting area and sanitation (two areas where PPPs may be used). BNDES, the Brazilian National Development Bank and CEF, Caixa Econômica Federal – a Brazilian state bank, together with the IFC, International Finance Corporation - are conducting technical studies to structure those projects.

These may take the form of PPPs, common concessions, or other form of privatization.

4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2018?

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.

5. Is there an upward, stable, or downward trend in PPP projects?

There is an upward trend in PPP projects, and an upward standard of care with the quality of the projects. The new partnership model proposed by the PPI, aims at contracts with clearer rules, public participation, involvement of the Union Court of Auditors (TCU), predictability, more time for proposals preparation by the companies, with the

objective of launching projects that are more attractive and sustainable during the concession period.

LEGISLATION & REGULATION

6. 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 Concessions 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.

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

In 2018, a reform of the Federal PPP Law started to be discussed in Congress. It includes (i) the possibility to the Granting Authority to pay the concessionaire a percentage of the estimated Project net revenue in the event of decrease in demand; (ii) the possibility for the Granting Authority to reduce the payment to the concessionaire in case the project revenue exceeds the expected revenues and (iii) prohibit Granting Authorities to use the resources of special funds provided under law to guarantee PPP Projects in matters unrelated to the PPPs.

In addition, a reform on the Public Procurement Law, which has influence on public concessions and PPPs is also being discussed in Congress. It includes some changes; for instance, elevation of the level of performance bonds offered by the contractor, certification of projects and alternative mechanisms for dispute resolution.

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

Federal Decree No. 5.385/05 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 jurisdictions (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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) 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 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.

15. 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.

- 16. 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.

- 17. 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.

- 18. 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.

FINANCING & INCENTIVES

- 19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?**

Throughout the last decade, BNDES has been the main source of long term funding for infrastructure projects in general. In light of the subsidised source of financing offered by BNDES, market oriented sources played an ancillary part in the financing of infrastructure, i.e. providing completion guarantees, bridge financing, or complementing BNDES funding.

Recent efforts by the Government aim at redefining BNDES role – it is now a priority that BNDES puts its emphasis in crowding-in private funding, by reducing the level of subsidies, and fostering the development of capital markets.

New structure, such as project bonds distributed abroad, backed by ECAs, or mini-perms, have already been put in place and those experiences are likely to be replicated in future projects.

- 20. 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 the PPP Contract.

21. 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.

22. 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.

23. 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.

24. 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.

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

Pursuant to the Public Concessions 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.

26. 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.

27. 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.

Recent projects modelled by the Government of the State of São Paulo together with the IFC – International Finance Corporation, provided for a direct agreement between the lender, the relevant public authority and the concessionaire (“*Acordo Tripartite*”).

28. 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.

29. 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.

30. 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.

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.

32. 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 No. 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 four years, among other conditions.

Pursuant to Law No. 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.

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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 May 2018, parliament of Georgia adopted a Law on Public Private Partnerships (“PPP Law” or “Law”). The PPP Law provides a legal framework for the projects where public and private sector cooperate in developing of public infrastructure and provision of municipal services.

The PPP Law was enacted in July 2018 however in late August, when the government of Georgia passed the bylaws, providing detailed rules and procedures for working out and implementing of public-private partnership projects (“**PPP Projects**”), including the process of selection of private partners.

Despite the fact that PPP Law was adopted only recently, PPP model is still quite frequently used to develop infrastructure projects in Georgia.

As the practice shows, Build-Operate-Transfer (“**BOT**”) and Build-Own-Operate (“**BOO**”) 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?**

Having huge transit potential, Georgia makes efforts towards development of its transport infrastructure and logistics, including highways, seaports, airports and railway. Considering this, so far BOT agreements have been used for development of major transport infrastructure: construction of Anaklia deep-sea port (which commenced in December 2017), rehabilitation and development of Tbilisi and Batumi airports (completed in 2017), BOT is also applied for modernization and construction of waste management plants, which are to be built in several municipalities of Georgia, including the capital city of Tbilisi. BOO is mainly used for power generation (mainly including HPPs) while BTO is considered to be applied for development/rehabilitation of sport infrastructure.

3. **Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model was applied in 2017 and is planned to be applied in the near future?**

The largest PPP project which is being 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 and healthcare/rehabilitation infrastructures.

As PPP Law is relatively new and the potential investors (private partners) are now considering the newly created business opportunities, it is expected that fresh PPP Projects and interesting sectors for investment will emerge in 2019. For this purpose, the government of Georgian and newly created PPP agency is working actively with the potential local and foreign investors.

4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2018?

There is no official statistics separately for PPP Projects. As noted, the most frequent PPP Projects are implemented mainly in energy and transport infrastructures. Total amount of investments for the ongoing and already implemented projects is more than USD 1 billion.

5. Is there an upward, stable, or downward trend in PPP projects?

At this stage, the trend can be considered as stable however, as mentioned, it is expected that the number and volume of PPP Projects shall increase.

LEGISLATION & REGULATION

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

At this point, principal laws and regulations are: Law of Georgia on Public-Private Partnerships; Resolution of the Government of Georgia on Working Out and Implementation of Public-Private Partnership Projects; Resolution of the

Government of Georgia on Approval of the List of Especially Important Objects; Resolution of the Government of Georgia on Approval of Rules for Considering the Disputes Arising out of Selection Process as per the Law of Georgia on Public-Private Partnerships.

With regards to the PPP Law, it should be mentioned that, according to EBRD, it “significantly improves its PPP framework and makes it more compliant with internationally accepted standards and best practices”.

For better understanding the role and importance of the newly created legal framework, it is interesting to briefly examine the elements of PPP Law and to illustrate the novelties introduced thereby.

Firstly, it allows both, concessional and non-concessional partnership, which, respectively means that a private partner may collect funds directly or indirectly from the end consumers of the public (municipal) services rendered by the private partner. In alternative, a private partner is compensated by its public partner for the rendered services or public infrastructure created.

Secondly, the law provides explicit criteria for PPP Projects, among which is that: the project term should be of no less than five years while the value of the project should be of no less than USD 2 million. As mentioned, the project shall be related to the provision of public (municipal) services by a private partner or operation and/or creation and maintenance of a public infrastructure. As part of optimal allocation of risks and obligations, the project shall be fully or partially financed by a private partner.

Importantly, PPP Law and its bylaws provide clear guidance on the rules related to project identification, initiation and preparation as well as detailed procedure on selection of private partner, stages of project implementation, monitoring and even post-implementation relations. Interestingly enough, the project may

be initiated not only by the government but by a potential private investor as well. This rule mainly concerns the energy sector, which is recognized as one of the strategically important sectors under the Law. In this context, the Law also envisages the possibility of granting long-term guaranteed purchase agreement to the investor. The energy sector has some exemptions from general rules, e.g.: only PPP Projects in energy sector can be negotiated directly, with only one partner, skipping the public tendering and evaluation procedure. At the same time, while for the projects larger than 100MW, the initiation process shall include feasibility study conducted by independent company.

To conclude, the PPP Law incorporates all the principal elements necessary for comprehensive and effective regulation of the relations between the state and investors. Accordingly, the newly created legal framework adequately addresses the requirements of all major stakeholders: the government, private sector and financial institutions, promoting boosting investments in Georgia's infrastructure and improved public services.

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

Considering that the mentioned principal laws and regulations were developed in 2018, no major reforms are expected however, depending on the shortcomings potentially detected in practice, the existing rules may undergo minor changes.

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

Based on the Law, the Government of Georgia has established the Public-Private Partnership Agency (“Agency”) in the form of a legal entity of public law.

The Agency shall be engaged in the development of the public private partnership

and perform key functions related to public-private partnerships. It shall *inter alia*:

Identify and initiate prospective PPP Projects; assist the competent bodies in identifying prospective public-private partnerships and conduct assessment of project concepts proposed by the competent bodies; assist the competent bodies in the initiation of public-private partnerships, as well as in determining their key terms and conditions; arrange for selection, hiring and supervising consultants at any stage of public-private partnership, if necessary; assist the competent bodies in negotiations with prospective investors, if required; coordinate actions, including public private partnership implementation monitoring activities, with the competent bodies responsible for public-private partnership; undertake capacity building activities and support the competent bodies in gaining expertise in the area of public-private partnership; create and manage a database of all public-private partnerships in Georgia; create standard forms of PPP contracts.

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

PPP Projects may be implemented in any sector of public infrastructure and services, except for mining, oil and gas.

Importantly, however, process of selection of PPP partners shall be closed if the project concerns the objects of especial importance, such as: railway and subway, penitentiary, post infrastructure and underground laboratories of geophysics.

10. 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.

The only limitation period that can be of interest in this context is that the duration of PPP Project should not be less than five years.

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

Resolution of the Government of Georgia on Working out and Implementation of Public-Private Partnership Projects provides only general guidance on this matter. Article 30 of the Resolution sets standards for PPP contracts. With regards to force majeure events it is noted that “PPP contract shall provide regime when the parties are released from liabilities and after certain time, the parties will be entitled to terminate the contract in case of event which is out of one’s control and which objectively renders it impossible to fulfil the obligations”.

Otherwise, 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). ...”

12. 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 is silent on allocation of political risks however as the public body acts as a partner of PPP Project, it is in the best interests of the public partner to minimize political risks associated with the project. In addition, in practice, political risks obviously fall under the competence of the public partner.

As concerns legal risks, the matter is covered by both, PPP Law and the other pieces of legislation, including the Law on Promotion and Guarantees of Investments.

Section VI of PPP Law concerns the guarantees and state promotion of PPP. In particular, Article 27 concerns PPP guarantees, while Article 28 covers the means and types of promotion and compensation for PPP:

- Article 27 speaks about direct agreement between the parties of PPP and the creditor (defined as “any state authority, international financial institute, Georgian or foreign commercial bank which issues a loan or guarantee to the concessioner, contractor or to public or private partner of PPP”) and the specifics of such direct agreements.
- Article 28 provides means and methods of state promotion:
 - (a) output-based payments and/or availability payments;

- (b) guarantees on consumption, traffic, customers or revenue;
- (c) guarantees on tariffs and/or prices on public services;
- (d) guaranteed purchase agreements;
- (e) grants and subsidies for covering certain expenses;
- (f) provision of land, licenses and permits;
- (g) transfer to the PPP of exclusive rights to intellectual property belonging to the state or municipality.

Further details on 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 provide 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 six 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.

13. 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.”

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) 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.

15. 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.

According to PPP Law, PPP agreement may provide that in certain cases of private partner's material default, the public partner or creditors(s) may exercise their step-in rights. The public partner or creditor(s) may temporarily take over the operation of public infrastructure to ensure the effective delivery of public services concerned. The cost of such intervention shall be borne by the party specified in the PPP agreement.

The private partner may be substituted by another private partner, by the public partner and/or creditor(s) in cases and pursuant to the procedures set out in PPP agreement and/or the direct agreement [concluded with creditor(s)].

The substitute private partner shall meet all qualification requirements and other requirements based on which the PPP agreement was awarded to the initial private partner.

The procedure for the substitution of private partner shall be determined in the respective PPP agreement.

16. 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 relations based on PPP contracts may only be governed by the Georgian law. In case if

the investments are concerned, BIT between Georgia and the state of foreign private partner may apply. As concerns the dispute resolution, the parties are free to define the mechanism for dispute resolution, including the Georgian and international arbitration institutes. If there is no agreement on the matter, the dispute shall be resolved by the Georgian courts.

In practice as well, 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.

17. 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 as such and we are not aware of any project agreement providing for it. According to the law, draft project undergoes technical and economical assessment (feasibility study) as well as examination of social and economic effect, before it is initiated.

18. 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.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

The most usual structure is a mix of equity, or money from the shareholders of the private partner (Project Company) and debt in the form of structured or syndicated loans.

We are not aware of any PPP Project, which would provide for equity contribution obligation for its sponsors.

20. 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.

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

There is no statutory guaranteed rate of return or a cap on the rate of return.

22. 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 law provides such possibility; however, the matter of making such guarantees is considered on case-by-case basis.

23. 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.

24. 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.

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

Yes.

26. 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.

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

According to Article 27 of PPP Law, there can be made direct agreement between the parties of PPP (including the public partner) and the creditor (defined as “any state authority, international financial institute, Georgian or foreign commercial bank which issues a loan or guarantee to the concessioner, contractor or to public or private partner of PPP”). According to the same provision, such direct agreements may provide for the rights and guarantees for the creditor(s) which do not

contradict to the Georgian law. In addition, direct agreements may provide the right of the creditor to substitute the private partner, in cases prescribed by the law. Right of access to the project-related information as well as right of compensation in cases prescribed by the contract are among the possible rights of the creditor(s) as well.

In practice, 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”.

28. 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 provides such possibility but does not envisage detailed mechanism for it. Thus, the matter can be regulated through the agreement. 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.

29. 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 specific and unified rules for such occurrences. According to the law, “the outcomes of termination of PPP contracts are regulated by general rules of the Georgian law and the agreement”. As concerns

the practice, one of PPP agreements provides 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.”

30. 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 however, such specific terms may be prescribed for particular projects and be envisaged in government resolutions and/or in EOI document.

31. Are there tax advantages available to PPP projects?

At this stage no tax advantage is available.

32. What are the other incentives available to PPP projects?

PPP Law provides various incentives, including:

- transfer of public infrastructure and/or related property to private partner;
- free access/usage of public infrastructure;
- direct agreement with creditor(s);

- output-based payments and/or availability payments;
- guarantees on consumption, traffic, customers or revenue;
- guarantees on tariffs and/or prices on public services;
- guaranteed purchase agreements;
- grants/subsidies for covering certain expenses;
- provision of land, licenses and permits;
- transfer of exclusive rights to IP.

You can also find various incentives for the development of particular projects on case-by-case basis according to the government resolutions.

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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 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 was applied in 2017 and 2018 and 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.

4. **What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2017 and 2018?**

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 2017 and 2018 in Hungary.

5. **Is there an upward, stable, or downward trend in PPP projects?**

As said under Question 3, the government's approach of not favouring the model has not changed, therefore

there is a stable unfavourable trend in PPP projects.

LEGISLATION & REGULATION

6. 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 CXLI of 2015 on Public Procurement;
- Act XVI of 1991 on Concessions; and
- Act V of 2013 on the Civil Code.

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

We do not foresee any changes in the foreseeable future.

8. 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 responsible for national economy or the relevant local municipalities (as the case may be).

9. 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 (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, the OECD 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 (or any local municipality) 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 (requesting local presence, local licenses, etc.); however, these are general and common restrictions applying to everyone in the given sector.

10. 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 the monetary incentive built in the payment mechanism to keep the construction deadlines, where the start of the payment of the availability fee is generally linked to the commencement of the operation period 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.

11. 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 and/or cost reimbursement or, if the force majeure event is continuing for more than an agreed time period (e.g. thirty-sixty 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 an extensive 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.

12. 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, in the event of war, riot, revolution, embargo, etc.). The breach of this obligation is considered as a “relief event”.

Expropriation or direct discriminatory 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.

13. 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.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) recognized in the project agreements?

The investor shall take out and maintain insurance during the whole period, covering

each phase of the PPP project in respect of risks specified in details in the project agreement. The concept of “uninsurability” is not recognized in the Hungarian market in the sense that not only one particular asset but the construction and operation in its entirety is insured, however adequate mitigation mechanism is generally built in the project agreements in respect of risks which are originally listed as insurable becoming uninsurable (being a risk in respect of which insurance may not be concluded with an insurer of good repute on the insurance market or the premium payable for insuring that risk is at such a level that the risk is not generally being insured against). The failure to maintain the insurance is usually considered as an event of default.

15. 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 a general rule of PPP projects being conceptually tender-based, the replacement of a contractual partner constitutes a substantial modification of the contract, therefore, the public authority should not replace the successful tenderer without the contract being re-opened to competition. However, in some restricted and clearly defined cases outlined in the initial procurement documents the Concession Act and also the Public Procurement Act allows that a new entity steps in the project next to the original project company or such new entity may entirely substitute the original project company. Based on this, the parties may agree in the project agreement to conclude a direct agreement among the public authority, the lenders and the concessionaire, which entitles the lenders to intervene for the purpose of avoiding termination of the project agreement when breached by the Concessionaire. Under such direct agreement in specific cases set out in the relevant direct agreement, an additional obligor appointed by the lenders steps in the project; or if the concession company becomes insolvent,

the lenders 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.

16. 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 Act XXVIII of 2017 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.

17. 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.

18. 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 advisers) 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.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

Syndicated loan based project finance model was generally used in the large scale PPP

projects. We have also seen project bond used for the refinancing of a motorway PPP project.

In large scale PPPs, we have seen minimum capital requirement set out for the sponsors, in these cases the minimum amount of the registered capital of the project company to be paid in by the sponsors was around 7.5 % of the total cost of the project.

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

In motorway PPP projects the preferred payment mechanism is the availability based payment mechanism, under which the concessionaire is entitled to receive payments from the public authority in the form of a unitary availability payment. The amount of the regular unitary payment is calculated by the reference to the following factors: (i) availability; (ii) safety; (iii) payments for heavy vehicles; and (iv) indexation to changes in Hungarian and Euro inflation and to the Euro-Forint exchange rate.

The payment is predominantly based on the “availability” of the project, which is generally subject to various performance adjustments (deductions deriving from availability and performance measures, or bonuses in case of a low accident statistics, etc.).

To eliminate the risk of changes in inflation and exchange rates, the PPP agreements provide that the unitary availability payment is indexed to general inflation both in Hungary and in the Euro-zone and to the Euro-Forint exchange rate.

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 fifteen – forty-five 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.

21. 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.

22. 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. See our answer to the below Question 23 for further explanation.

23. 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 undertaken by the public authority under the project agreement (including the payment obligations) qualify as private law obligations. The payment obligations of the relevant public authority are obligations payable from the central budget or

from the budget of the local municipality (depending on which entity concludes the PPP agreements: the State, a central budgetary organ or a local municipality).

It is worth noting here that, it was a requirement for the PPP projects that their financial structure should be implemented in a way that the asset constructed under PPP contracts is recorded off government balance sheet. In such case, gross fixed capital formation expenditure is not recorded for government during the period of construction, with a negative impact on government deficit/surplus. The impact on government deficit will be limited to the regular service fees (yearly availability fee) paid to the partner, which are spread over the long-term contract and no debt impact is recorded.

In the mid-2000s, the off-balance sheet treatment of the PPP projects made them attractive 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, as existence of government guarantees might distort the risk and reward distribution in a PPP, which may result in an on-balance sheet statistical treatment of the project.

24. 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.

25. 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.

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

There is no legislative requirement. The PPP agreements may provide for the right of the public authority to receive certain per cent (generally 50%) share of any refinancing gain.

27. 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 the large-scale PPP projects, the lenders generally sign a direct agreement with the relevant public authority. The agreement is generally concluded between the relevant public authority, the lenders, and the project company; and entitles the lenders to intervene for the purpose of avoiding termination of the PPP agreement when breached by the project company. The lenders have generally the right to step-in the project or substitute the project company as explained under Question 15 above. Furthermore, the lenders and the public authority in numerous undertakings regulate how they will perform those rights under the PPP agreements or the finance documents, which directly affect the other party.

28. 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.

29. 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 termination payments are payable generally to the project company under the PPP agreement, and not to the sponsors or the lenders. Though certain elements of the termination payment payable in different termination scenarios are defined as being linked to payments made by or to be made to lenders/sponsors, such elements may be for example the *lenders' liability* as amount owing to the lenders under the finance documents, the *capital contributions* to the share capital of the project company by the sponsors or the *distributions* received by the sponsors.

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. The same amount is payable as a result of the voluntary termination of the project agreement by the State. If the termination is due to the project company's default, the project company sometimes needs to suffer a "haircut", where the State will only

pay as compensation a certain percent of the net present value of the total monthly availability fees payable less the costs of future operation by the State, but no more than the lenders' liability.

30. 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.

31. 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 9%) for development projects in certain industries/undeveloped areas of Hungary. By such tax allowances, 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 thirteen years.

32. 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).

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INDIA



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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?**

Yes. Typically, PPP projects in India are awarded on a design, build, finance, operate and transfer model. However, recently, a few projects have witnessed concessions being offered on operation and maintenance models. It is rare to see PPP projects without any retransfer back to the public authority, unless it is for purchase of goods such as in power projects.

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

A PPP model has been applied to a wide range of sectors in India, including roads & highways, airports, ports, power and healthcare. Roads is the sector in which PPP is most commonly used.

- 3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model was applied in 2017 and is planned to be applied in the near future?**

Numerous PPP projects across sectors including highways, railways, airports, healthcare, urban housing, waste to energy are

in the pipeline. For example, development of 6 brownfield airport projects is expected to be awarded shortly.

While there was no completely new sector to which PPP was applied in the financial year 2017-18, some of the emerging sectors were railways, waste to energy and inland waterways.

- 4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction in 2017?**

In the financial year 2017-18, 208 PPP projects were awarded. The aggregate project cost for these 208 projects is estimated to be around 75 trillion Indian Rupees (i.e. around USD 1 trillion). The maximum number of projects were set up in roads/highways and renewable power sectors. Not all of these may have achieved financial closure. As reported by the World Bank, 44 PPP projects across airports, electricity, railways, roads, water and sewerage achieved financial closure in the year 2017.

- 5. Is there an upward, stable, or downward trend in PPP projects?**

From the financial years 2013-14 to 2015-16, there was an upward trend in the number of award of new PPP projects. Compared to previous years, this number remained stable in the financial year 2016-17 which saw the award of 1174 new projects. However, the financial year 2017-18 saw a downward trend, with only 208 new projects being awarded.

LEGISLATION & REGULATION**6. What are the principal laws and regulations? Is there a framework PPP law?**

There is no central framework PPP law in India. State actions in PPP projects are tested on the basis of constitutional provisions governing the relationship between the State and its citizens. Article 14 of the Constitution of India has been interpreted to require, *inter alia*, that the State's actions are reasonable, rational, non-arbitrary and non-discriminatory. These principles have been used to test the award and performance of public contracts by the State.

Guidance is available for public authorities in the form of model concession agreements for PPP projects across various sectors issued by the Planning Commission of India. The Department of Economic Affairs, Ministry of Finance, Government of India, has also issued documents and guides for strengthening PPP framework. However, these do not have legal sanctity.

Some of the sectors such as power, airports, mining, and telecom have their own specific legislations which encompass governing/regulating certain aspects of PPP projects.

A few states in India such as Andhra Pradesh and Punjab have enacted framework PPP laws, but the applicability of such laws are restricted to the PPP projects being awarded by the concerned state governments only.

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

Presently, there is no central framework PPP law in India. The Public Procurement Bill, 2015 was introduced in the Parliament of India in the year 2015 with a view to enact a law to regulate the public procurement process in India, but this has not been enacted.

8. What are the principal regulatory bodies for PPP? Is there a centralized PPP authority?

There is no central principal regulatory body for PPP or PPP authority in India. Approval of the Public Private Partnership Appraisal Committee ("PPPAC") constituted by the Government of India may be required to be obtained by the project authorities (if under the administration of the central government) prior to the launch of the PPP project. However, PPPAC is not a regulatory body.

Similarly, various state governments in India, pursuant to their respective PPP policies have constituted appraisal committees for approving the launch of PPP projects. However, like the PPPAC, these appraisal committees are not regulatory bodies.

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

There are no specific restrictions for PPP projects. Foreign investments in India are subject to the provisions of the Foreign Exchange Management Act, 1999 read with the Consolidated Foreign Direct Investment Policy ("FDI Policy") issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, which specifies, *inter alia*, sector specific norms for foreign investment. Generally, the FDI Policy permits 100% investment by foreign participants under automatic route in major infrastructure sectors such as roads, power, and airports. However, there are sectors which have caps on foreign participation such as defense and civil aviation (commercial airlines).

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

Typically, the project agreements specify the scheduled commercial operation dates ("SCOD") and the long-stop dates to commence commercial operation ("Long-Stop Date") for the concerned projects.

Generally, the project agreements provide that if a concessionaire commences commercial operation after SCOD but prior to the expiry of the Long-Stop Date, liquidated damages are levied upon the concessionaire for such delay. However, if the concessionaire is unable to commence commercial operations by the Long-Stop Date, the concerned project authority is entitled to terminate the project and forfeit performance security.

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

Under the model concession agreements issued by the erstwhile Planning Commission of India, force majeure events are classified into three categories namely non-political events; indirect political events and political events, and an inclusive list of events is specified for each of these categories. A few examples of force majeure events are set out below:

- Non-political events: Act of God, strikes or boycotts (other than those involving the concessionaire or its contractors);
- Indirect political events: War, political or economic upheaval and civil commotion;
- Political events: Compulsory acquisition in national interest or unlawful refusal to grant/renew any license or permit required by concessionaire to perform its obligations.

The occurrence of a force majeure event excuses the concessionaire from the performance of its obligations during the subsistence of the force majeure event. Typically, if the concessionaire is unable to collect revenues/fees due to such force majeure event, the concession period is extended by a corresponding period.

In case the force majeure event subsists for a time period longer than the pre-specified period, either party is entitled to terminate the project agreement.

Upon termination due to force majeure, the project authority is required to pay termination payments to the concessionaire. The amounts of termination payment depend on the type of force majeure. For example, the termination payment for termination due to political force majeure is the highest amongst the aforesaid categories.

12. 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?

Compulsory acquisition or expropriation of project assets is generally treated as a political force majeure event, the consequences of which have been specified in response to Question 11 above. The Requisitioning and Acquisition of Immovable Property Act, 1952 enables the central government, *inter alia*, to requisition and take possession of any immovable property for any public purpose in lieu of payment of compensation which is determined in accordance with the said Act.

Typically, if as a result of change in law, the concessionaire suffers an increase in costs or benefits from a reduction in costs which is above certain thresholds, the project authority or the concessionaire may propose amendments to the project agreement so as to place the concessionaire in the same financial position as it would have enjoyed if there had been no such change in law. The project agreements also specify the mechanism to be followed in the event that, both parties are unable to agree and finalize the proposed amendments.

In the case of *Energy Watchdog v. Central Electricity Regulatory Commission* [(2017) 14 SCC 80], certain generating companies were awarded thermal power projects on the basis of competitive bidding which set the tariff upfront. These companies were importing coal from Indonesia, where a change in law occurred which significantly increased the cost of importing coal. The companies, *inter alia*,

requested for relief under their respective power purchase agreements on the ground of change in law. The Supreme Court of India while interpreting the provisions of the power purchase agreements held, *inter alia*, that ‘any change in law’ (under the agreements) refers only to Indian law.

The risk of adverse court decisions is not provided for, and the consequences of the decisions will typically be set out in the decision itself.

13. 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?

Financing documents typically stipulate that, insurance proceeds will be used to reinstate project assets and any surplus will be used to pay the project lenders. However, there is no common standard, and financing documents can often stipulate monetary thresholds above which insurance proceeds should be used to pay the lenders.

While computing the termination payments payable by the project authority to the concessionaire, the insurance cover is generally deducted from the amount of termination payment.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) recognized in the project agreements?

The concept of uninsurability is generally not recognized in project agreements. Typically, procurement of relevant insurance coverages is the responsibility of the concessionaire under the project agreement as well as the financing documents. In case of unavailability of the relevant insurance coverage, the concessionaire may negotiate such requirement with the project authority and/or the lenders.

15. 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?

Usually the project agreements allow the project authorities to suspend the rights of the concessionaire and step-in upon occurrence of any material default by the concessionaire.

Please refer to the response of Question 27 with respect to lenders’ right to substitute the concessionaire.

16. 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?

While Indian law permits contracting parties to stipulate their choice of jurisdiction, such choice may not oust the jurisdiction of Indian courts which may disregard the contractual choice of jurisdiction if the parties show “good and sufficient reasons” or such choice results in “perpetuating injustice”. As a matter of practice, project agreements and substitution agreements permit arbitration to be carried out in accordance with the (Indian) Arbitration and Conciliation Act, 1996 only, and the governing law is the Indian law.

17. 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 project agreements for PPP projects in India do not provide for a regular market testing. In certain sectors, the pricing/tariff related issues are regulated by the concerned sectoral regulators and periodically revised. For example, tariff determination for airport operators is undertaken by Airports Economic Regulatory

Authority in India, which typically sets the tariff for a period of five years. Similarly, the tariff for national highways concessionaires is determined by the National Highways Authority of India, which is revised annually.

18. 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 done solely by the public authority?

The model concession agreements of the planning commission of India envisage an independent engineer to observe, monitor and review the results of the tests to determine compliance of the works with the specifications and standards. The independent engineer is required to issue a completion certificate to the concessionaire and the project authority, if it is of the view that the aforesaid tests were successful.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

Long term debt financing by banks and financial institutions is the most commonly adopted model of financing infrastructure projects in India. In addition to the above, raising of funds through issuance of non-convertible debentures and bonds has also become prevalent in the recent times.

Yes, typically the sponsors are required to infuse equity contributions in the project company. The debt-equity ratio is determined by lenders, and is typically in the range between 70:30 to 80:20.

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

Typically, the payment mechanism is regulated through escrow arrangements between the concessionaire and project authority.

Depending on the project, provisions with respect to indexation may be built in the relevant contracts based on the consumer price index and wholesale price index.

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

The project agreements do not provide a capped or guaranteed return for sponsors except in computation of termination payments payable for termination except for termination due to concessionaire's default.

Some sectoral regulators set tariffs taking into account a reasonable rate of return for the project developers.

22. 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.)?

Typically, the project authorities do not provide any payment guarantees for PPP projects. In a few cases, project authorities provide letters of credit or prefunded escrow accounts for assurances on payment.

23. 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 stated above, it is rare to see payment guarantees.

Were a public authority to provide a payment guarantee, this would not be treated as a Treasury guarantee, and recourse would only be available against the relevant public authority. In

case the project authority is a department of the government, its obligations would qualify as the State (Treasury) obligations.

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

No. Generally, deductions from service and availability payments are not subject to a cap.

25. 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 variations requested by the project authority. The project authority is liable to reimburse the concessionaire for any additional works and services based on the price quoted by the concessionaire.

26. 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 project authority. However, since termination payments payable by project authorities are linked to the debt due for the project, refinancing may impact the project authority's termination payment obligations. As a result, refinancing may require prior consent of the project authority.

27. 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 common for a tripartite agreement (known as the substitution agreement) to be executed between the lenders, project authority and the concessionaire, which typically provides, (i) the right to lenders to substitute the concessionaire upon occurrence of default; (ii) that the project authority will notify the lenders and allow them to substitute the concessionaire prior to taking any termination actions; and (iii) mechanism for substitution.

28. 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?

Yes. Debt due (less insurance cover) typically forms part of the termination payment payable by the project authority to the concessionaire in the event of termination of the project agreement in all cases. Equity payments are also paid as part of the termination payments, but these differ depending on the cause of termination. The value of equity is adjusted to reflect the change in its value on account of depreciation and variations in price index. Typically, the adjusted equity forming part of termination payment is as follows:

- Termination due to indirect political force majeure: 110%;
- Termination due to non-political event: nil;
- Termination due to political force majeure or project authority's default: 150%;
- Termination due to concessionaire's default: nil.

29. 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 the response to Question 28 above.

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

Mostly, there is no fundamental requirement with respect to domestic manufacturing of

equipment. However, certain projects may require a portion of the equipment to be manufactured/sourced domestically. A recent example is Delhi Metro Rail Corporation, mandating in one of its projects that, 75% of the total trainsets to be supplied are required to be manufactured in India.

31. Are there tax advantages available to PPP projects?

There is no specific tax relief for PPP projects, although Section 80IA of the Income Tax Act, 1961 provides for certain tax deductions to entities engaged in infrastructure development, which largely covers major sectors which use PPP framework.

Also, depending on the type of project, state governments in India may provide certain local tax concessions pursuant to their industrial or social policies.

32. What are the other incentives available to PPP projects?

Subject to the structure of PPP projects, concessionaires may be provided incentives such as: (i) government participation in equity which reduces the long term borrowing costs for the concessionaire; (ii) viability gap funding by the government; and (iii) grant of government owned land on lease or license on a very nominal charge.

Further, certain state governments provide incentives such as interest subsidy (on availing loan from specified public financial institutions), stamp duty exemptions, discounted rates for power consumption, employment cost subsidy, pursuant to their respective industrial policies. The concessionaires may be able to avail the aforesaid state government incentives subject to them satisfying the eligibility criteria under the relevant industrial policies.

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JORDAN



Saleh Abdel Ati



Nadine Gildeh

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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?**

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 was applied in 2017 and is planned to be applied in the future?**

To the best of our knowledge, the government is currently involved in 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.

4. **What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2017?**

Information relating to the number, investment amounts, and sectors of the PPP projects developed in Jordan is not accessible to the public.

5. **Is there an upward, stable, or downward trend in PPP projects?**

There are not many PPP projects in Jordan at present, therefore it is difficult to assess if there is a trend.

LEGISLATION & REGULATION

6. **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.

7. 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.

8. 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.

9. 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 No. 54 of 2000 and its amendments, 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) recognized in the project agreements?

There are no provisions in the PPP Law and PPP Regulation to this effect.

15. 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.

16. 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.

17. 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.

18. 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.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

Syndicated and junior loans are commonly used to fund PPP projects. Lenders commonly request at least 25:75 equity to debt ratio from the sponsors.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

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

No.

27. 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.

28. 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.

29. 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.

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

No.

31. Are there tax advantages available to PPP projects?

No.

32. 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.

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LATVIA



Maris Brizgo

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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 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.

Since late 2009, when the Public and Private Partnership Law came into effect, no PPP project has been completed in Latvia pursuant to the procedures set out in this law. During the economic recession, according to the agreement with the International Monetary Fund, Latvia was prohibited from implementing PPP projects between 2009 and 2012. Later, a number of contemplated projects were discontinued after a negative opinion was received in respect to financial

and economic calculations. However, planning of several PPP projects have been started in the previous years in Latvia.

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 was applied in 2017 and 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:

- Renovation (retrofit) of the Riga Opera Theatre of Richard Wagner and management of the current infrastructure;
- Acoustic concert hall in Riga.

Currently, PPP project for construction of the by-pass road of Ķekava of highway E67/A7 is in tender procedure, selection stage.

In 2018, the Riga City Municipality announced the first stage of the concession tender for the purpose to select a private partner for a household waste management company in Riga. In 2019 the tender was finished, and the contract was awarded to a winner. The award decision is now under scrutiny of the Competition Council of Latvia.

4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2017?

During 2017 there were no PPP contracts concluded in Latvia.

5. Is there an upward, stable, or downward trend in PPP projects?

N/a.

LEGISLATION & REGULATION

6. 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 2009.¹

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”;

¹ Translation in English of the law is available in the following link: http://www.vvc.gov.lv/advantagecms/LV/tulkojumi/meklet_dokumentus.html?query=%22publik%C4%81s+un+priv%C4%81t%C4%81s+partner%C4%ABbas+likums%22&Submit=Mekl%C4%93t&resultsPerPage=10

- (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
- (h) Cabinet of Ministers Regulation No. 110 of 28 February 2017 “Regulation on Payment of Deposit”.

7. 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.

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

The Ministry of Finance (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) 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) 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) is the body responsible for the maintenance and administration of the registry of PPP contracts.

9. 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.

10. 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 thirty years. As an exception, it is permitted to have a contract duration exceeding thirty 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.

11. 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 the laws and regulations which 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.

12. 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 or services concession, a risk of demand from end-users should be transferred to the private partner.

13. 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.

14. Is the concept of ‘uninsurability’ (unavailability of the relevant insurance coverage) recognized in the project agreements?

The Public and Private Partnership Law does not provide for the concept of “uninsurability”.

15. 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;
- (d) The only shareholder of the special purpose entity has submitted an application to the Commercial Register Office on termination of its activity;
- (e) The court has declared insolvency of the sole shareholder of the special purpose entity.

In case of step-in, the funder is entitled to propose to the public partner a new private partner/shareholder. The funder should notify its exercise of the step-in rights within one month of receipt of a notice from the public partner. The exercise of the step-in rights is limited to a time period of six months.

The Public and Private Partnership Law also allows to agree in a public-private partnership agreement and an information exchange agreement concluded between the funder and the public partner that the funder shall also have the step-in right when any shareholder or member of a special purpose entity is replaced. In this case, the relevant procedures shall be provided for in this agreement.

16. 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.

17. 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.

18. 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 ten business days. In the commissioning process: (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) shall participate, if author supervision is not performed or resolution is not provided by him/her. However, refusal of the performer of construction works, the building supervisor or the designer to participate in acceptance for exploitation does not prevent the acceptance of the object for exploitation.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

According to the public information, the project of the Ķekava by-pass road might be financed by a loan from the European Investment Bank (EIB) at the volume of up to 45%, a loan from the Nordic Investment Bank (NIB) at the volume of up to 45%, as well as investment/subordinated loan from the private partner at the volume of up to 10%.

20. 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.

However, in relation to calculation of the amount up to which the increase of the contract value is allowed in case of acceptable amendments to the concession contract, the said law indicates that, the increase shall be calculated from the contract value after indexation, if indexation is provided by the contract. If no indexation is agreed in the concession contract, then the contract value after amendments is calculated, by taking into account the average inflation rate in the country of the public partner.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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 provides that, the information exchange agreement can be concluded between the public partner and the funder. The information exchange agreement provides for procedure how the information is exchanged between the public partner and the funder, inter alia, on violations of the PPP agreement and loan agreement, how the lender exercises step-in rights, and other issues.

28. 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.

29. 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 the material 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, and which can include the payment for investments made by the private partner, if the PPP contract is terminated by the public partner in the following cases:

- 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.

30. 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.

31. Are there tax advantages available to PPP projects?

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.

32. 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.

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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?**

Lithuania counts totally 58 on-going or completed PPP projects where EUR 176,3 million has been already invested by the end of 2018. However, only several of them are of high-value and should be considered as “real” PPPs. Nevertheless, 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 the roads, development of sports and entertainment arenas, energy

efficiency (street lighting) projects, 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 was applied in 2018 and is planned to be applied in the near future?**

The government has recently launched 3 high-value PPP projects for building 3 new military campuses with all the necessary infrastructure. They are in the process of selecting a private partner. Total value of these 3 projects is approximately EUR 133 million.

The government has also agreed to launch a new PPP project for reconstruction of Nemunas Ring race track. Approximate value of the project is EUR 10-12 million. PPP procedure has not been initiated yet.

4. **What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2018?**

During 2018, the tender procedures of several large PPP projects were significantly advanced – Two New Police Custody and Police

Stations facilities in Kaunas City and Panevezys City, as well as Multifunctional Hub (National Stadium). The latter currently is in the final phase of awarding a PPP contract to a private investor, whereas PPP agreements for Police Stations were already signed in January 2019. Total value of these projects is approximately EUR 56 million (CAPEX – EUR 26 million) for Police Stations project and EUR 90 million only for CAPEX for Multifunctional Hub.

In addition, several minor PPP projects at the municipality level has been initiated or has advanced in 2018: Reconstruction and Management of Lazdynai Swimming Pool (the value is EUR 20 million), Modernisation and Development of Road and Street Lightening in Trakai, Installation and Maintenance of Public Toilets in Kaunas, Establishment of Tauragė Multifunctional Health Center, Construction of Sports and Leisure Center in Klaipėda, Construction of Sports and Health Complex in Gargždai.

Moreover, in 2018, there was subsequent movement in other major infrastructure projects such as airport expansion (the investment project was renewed to assess additional optimal solutions for development of all three civil international airports of Lithuania and it is still being prepared).

5. Is there an upward, stable, or downward trend in PPP projects?

A slightly upward tendency could be observed in Lithuanian PPP projects. The amount of ongoing PPP projects is growing up slowly but steadily each year. The public authorities are more open and willing to execute projects particularly by using one of PPP's methods – this becomes even more important with respect to anticipated considerable reduction of EU financial aid for Lithuania after 2020.

LEGISLATION & REGULATION

6. 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 on Investments 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 three, but not more than twenty-five 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. In 2017, the Law on Concessions was 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 regulation came into force on 1 January 2018. The new Law on Concessions ensures that the award of concession contracts is based on the same principles and requirement as in the entire European Union. Similar to the old Law on Concessions, the new Law regulates the subject matter of the concessions, award procedures, 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 clarify which institutions are responsible for the preparation, approval,

implementation, and control of PPP projects, as well as the procedures thereof. Furthermore, the Rules define 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.

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

Recently, there have been some changes to the Law on Public Procurement and to the Law on Concessions. As the amendments were dedicated to the transposition of the Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement, none of these changes are significant to the existing PPP regulation.

No other significant changes or reforms are currently expected to the existing PPP regulation.

8. 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”), 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.

9. 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).

10. 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.

11. 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 generally are defined in PPP agreements as the occurrence of listed circumstances (war, riot, civil strike or unrest, embargo, fire, earthquake, hurricane, volcanic eruption and other natural disasters, etc.), which a 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 as 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 one hundred and eighty consecutive days) stipulated in the project agreement.

12. 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.

13. 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.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) 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.

15. 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 requires that, a provision dealing with step-in rights of the public party or third parties (meaning – Lenders or entities appointed by them) would be stipulated in the project agreement. 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).

16. 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. Furthermore, under the case-law, issues arising

out of application of imperative requirements of the procurement/concession laws are considered as a ‘public law’ and cannot be arbitrated. 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 – and, most probably, application of foreign law would also be subject to imperative requirements of national procurement/concession laws.

17. 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 – but it is rarely attempted. We are aware of only one such attempt – however, it was ceased during the tender procedures.

18. 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.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

The most commonly used project finance model in Lithuanian PPP projects is structured loan. Generally, the 30-40 % is financed by the share capital or subordinated loan issued by sponsors. The remaining part generally is financed by the banks.

20. 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 the 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.

21. 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 (subject to fines, penalty mechanism, etc.).

22. 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 have off-balance PPP projects. However, under the current regulations, some payment guarantees may be provided in city street lighting modernization projects. These guarantees are financed by Energy Efficiency Fund (“**ENEF**”), which was established on 18 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).

23. 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.

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

Due to the aim to have 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). The deductions from the service and availability payments can be partially considered as subject to a cap in generally foreseen cases where a cap is applied for a current payment ensuring that the current payment will not be lower than necessary to service debt to Lenders. But the sums that are on top of the cap are deferred to be deducted from subsequent payments.

25. 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).

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

Usually, project agreements do not require share of refinancing gains (due to aim to have off-balance treatment of the project).

27. 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).

28. 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 pay termination compensation which even in case of early termination due to the fault of the private partner should cover at least the significant majority of outstanding debt to lenders, and the full outstanding debt in case of termination due to other causes.

29. 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. Generally, the formulas seek to ensure that the private partner is paid for properly fulfilled part of the partnership agreement, adjusted with losses for aggrieved party. Normally, 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. 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.

30. 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. Furthermore, such incentives, most likely, would be found incompliant with national (and the European Union) legislation.

31. Are there tax advantages available to PPP projects?

No. According to the Lithuanian legal framework, no specific tax advantages are available to PPP projects.

32. What are the other incentives available to PPP projects?

No other specific incentives are available to PPP projects.

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MACEDONIA



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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 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 was applied in 2018 and is planned to be applied in the near future?**

The government has ordered feasibility studies regarding implementation of the PPP projects

in the health sector, namely the emergency medical services, the PET institute, medical services regarding integrated management, innovative surgical solutions and protection from hospital infections, and management of the General hospital in Skopje. Depending on the results from these studies, the government will decide whether to apply the PPP model in the health sector.

4. **What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2018?**

There is no complete data available regarding total investment amounts and sectors of the PPP projects developed in the Republic of Macedonia in 2017 and 2018. On Ministry of Economy's web page there is a PPP register published where only 30 PPPs are registered, and for 6 of them the contracts are concluded in 2017 and 2018.

5. **Is there an upward, stable, or downward trend in PPP projects?**

It is not possible to determine the trend in PPP projects, since there is no complete and clear data available regarding the number, investment amounts, and sectors of the PPP projects developed in the Republic of Macedonia. But still, from the data available we can conclude that PPP projects are mostly implemented in developing small HPP.

LEGISLATION & REGULATION

6. 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. There are 6 by-laws adopted by the Government for the implementation of this Law. The Public Procurements Law which refers to the award of public service contracts (public procurement contracts and PPP contracts). and Law on Obligations also apply.

7. 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 legislation is not an exception. The Law on Concessions and Public-Private Partnership was enacted in 2012 and has been amended four times so far; once in 2014, and three times in 2015. Recently the Parliament has passed a new Law on Public Procurements, which entered into force in February 2019.

8. 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 also established 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.

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

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

10. 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.

11. 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.

- 12. 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.

- 13. 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.

- 14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) recognized in the project agreements?**

The uninsurability clause could be included in the project agreements.

- 15. 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 the contract. Also, PPP projects could be transferred to the funders if that is stipulated in the project agreement.

- 16. 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.

- 17. 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.

- 18. 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.

FINANCING & INCENTIVES

- 19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?**

There is no complete data available regarding the finance models used in the PPP projects developed in the Republic of Macedonia.

Equity contribution obligations for the sponsors are determined in the tender

documentation prepared by the Commission for the conducting of the tender procedure.

20. 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 EUR or USD.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. 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.

30. 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.

31. Are there tax advantages available to PPP projects?

The legislation does not prescribe tax advantages regarding PPP projects.

32. What are the other incentives available to PPP projects?

Other incentives for PPP projects could be stipulated in the project agreements.

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MONTENEGRO



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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?**

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 was applied in 2018 and is planned to be applied in the near future?**

In the pipeline of the government, several new PPP projects exist 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 ports (*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 15,645m²).

- *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 30,597m² and aquatorium of 7,313m² is planned for a marina, a business or congress hotel, apartment facilities, and a 5,000m² 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.

- *Mediterran – Žabljak*

Construction of a new tourist resort. This is a former military complex in Žabljak with an area of 13,951m², 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), forty-five years' concession, with a possibility of extension up to twenty-two and a half 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. There are planned additional sections: Mateševo – Andrijevica; Andrijevica – Boljare.

- *Railway Line Belgrade (Vrbnica) – Bar and Railway Line Podgorica – Tuzi- Cross Border Albania*

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 m², expansion and reconstruction of maneuvering areas and apron, new fuel depot and parking with ground support facilities (including shelter).

Beside the above-mentioned sectors there are many investment opportunities through PPP projects in others sectors: healthcare sector, processing industry, mining, agriculture, environment, research & development, the ICT sector.

4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2018?

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.

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 2018 were registered 7 new contracts.

The sectors of these new contracts are the following:

- Electricity generation and use of hydroelectric potential;
- Exploitation of mineral raw materials of technical-construction stone;
- Exploitation of mineral raw materials of architectural construction (decorative) stone and technical-construction stone;
- Use of a part of water for bottling or packaging or supply of water for commercial purposes.

5. Is there an upward, stable, or downward trend in PPP projects?

The focus of competition policy in Montenegro are foreign direct investment, and improving the overall investment environment in order to attract primarily greenfield investments and implement projects through PPPs and concession.

Trend of PPP projects is upward, because the foreign direct investment can have a huge impact on economic growth in

Montenegro, and the establishment of macroeconomic stability, therefore the aim of competitiveness policy is to increase the inflow of foreign direct investment, by creating a favorable investment environment especially through PPP projects.

LEGISLATION & REGULATION

6. 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, 042/17);
- Law on Foreign Investments (“Official Gazette of Montenegro”, No. 8/11, 045/14);
- Law on Spatial Development and Construction of Structures (“Official Gazette of Montenegro”, No. 064/17, 044/18, 063/18, 011/19); and
- Law on State Administration (“Official Gazette of Montenegro”, No. 078/18).

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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

- 13. 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.

- 14. Is the concept of ‘uninsurability’ (unavailability of the relevant insurance coverage) recognized in the project agreements?**

N/a.

- 15. 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.

- 16. 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).

- 17. 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.

- 18. 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, use of the structure shall not be allowed prior to registering the structure into the Real Estate Cadastre. The investor is obliged to file an application for registration into the Real Estate Cadastre within fifteen days of the receipt of the final engineering supervision report.

The investor and the contractor which built the structure i.e. executed specific works thereon, shall take-over the structure and make a statement of final account showing the value of the works executed, within sixty days of the receipt of the final engineering supervision report, unless otherwise provided by the contract.

The investor and the contractor shall perform the final taking-over of the structure within thirty days from the expiry of the finishing works defects liability period, unless otherwise provided by the contract.

If the investor puts the structure into service or a part of the structure prior to the taking-over, the taking-over shall be deemed to be performed.

For complex engineering structures law prescribes that the investor shall, before commencing to utilise the structure, submit an

application for the issuance of an occupancy permit, at the latest within seven days of the receipt of the statement of the technical inspector that works were executed in accordance with the reviewed final design, as well as with regulations, standards, technical norms and quality standards applicable to certain types of works, materials, equipment and installations.

The investor and the contractor that has constructed the complex engineering structure i.e. that has executed specific works thereof shall conduct a take-over of the structure and make a statement of final account showing the value of the works executed, within sixty days from the date of receipt of the occupancy permit, unless otherwise provided by the contract.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

The project finance model in PPP project depends on the exact sector. It is commonly used loan from financial institutions, EBRD, EU funds, etc.

The equity contribution obligations set out for sponsor depends of the regulations, sponsor and PPP conditions for exact project.

20. 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.

21. 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.

22. 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.

23. 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”*.

24. 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.

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

N/a.

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

N/a.

27. 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. What are the other incentives available to PPP projects?

There are no other incentives available to PPP projects.

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PAKISTAN



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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) are used?**

The use of the PPP model to develop infrastructure projects is not widespread in Pakistan, however it has gained momentum over the years and is expected to increase significantly in the near future both on the federal and provincial level.

From policies that govern PPP projects in various sectors, all kinds of PPP models are allowed. Based on the interests that have been received by various government agencies on PPP infrastructure projects, the most commonly used PPP models are the Build-Own-Operate and Build-Operate-Transfer amongst others, including but not limited to, Build-Operate, Build-Own-Operate-Transfer, Design-Build-Finance-Operate-Transfer, Management Contracts, and Concession Agreements.

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

The initial use of the PPP model in Pakistan was more focused on the oil & gas and power sector. Since then its focus has been extended to other infrastructure projects, *inter alia*, roads/highways, economic zones, water & sewerage, tourism, ports, airports, rails and environment.

3. **Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model was applied in 2017 and is planned to be applied in the near future?**

There are several upcoming PPP projects implemented by the federal and provincial governments. The most remarkable projects are the construction of the Sukkur-Hyderabad motorway with a project cost of USD 2.3 billion and development of the Special Economic Zones in the PPP model in the province of Khyber Pakhtunkhwa (KPK). A list of PPP projects in the pipeline are available as follows:

- <http://www.pppa.gov.pk/index.php?cmd=nocompl>

- https://ppp.punjab.gov.pk/pipeline_projects
- http://www.pppunitsindh.gov.pk/project_s_new.php?pid=17&pstatus=Pipeline#

As for the application of the PPP model in new sectors, the Government of Sindh has recently used the PPP model for the development of fruit and vegetable retail markets.

4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction in 2017?

As there is no consolidated or exhaustive database for PPP projects developed in Pakistan (projects are implemented at both the federal and provincial level), the number of investments made for the year 2017 is not tabulated.

The target sectors for 2017 have been road infrastructure (motorways, bridges etc.), transport, education, electricity, and health.

5. Is there an upward, stable, or downward trend in PPP projects?

There is a significant upward trend since the number of PPP projects have increased in the past decade.

LEGISLATION & REGULATION

6. What are the principal laws and regulations? Is there a framework PPP law?

In addition to the regulatory and legal framework for PPP projects, the federal and provincial governments are facilitating a PPP framework for the development of infrastructure projects through PPP policies. One prominent example of the same is the

utilisation of the PPP model in the power sector of Pakistan whereby the federal and provincial governments have provided incentives and concessions to private investors to develop power projects.

It is only recently that through the promulgation of special PPP laws dedicated committees have been created (explained herein below in Question 8), at both the federal and provincial level (excluding the province of Balochistan), to implement PPP projects. For a project to be considered a classic PPP model under such laws, the implementing/government agency intending to undertake the project with a private investor must fall under the purview of a “*public-private partnership*” as defined by the relevant PPP law and seek approval of the PPP project from the relevant dedicated committee.

PPPs administered by the federal government are regulated by the Public Private Partnership Act, 2017 (“**PPP Act**”). Prior to promulgation of the PPP Act, a policy (Pakistan Policy on Public Private Partnerships 2010) had been issued by the federal government pursuant to which the PPP projects were set up.

The provincial governments have the mandate to use the PPP model in their respective provinces. The following provincial laws for PPPs, as amended from time to time, are in effect:

- Punjab Public Private Partnership Act 2014 (the “**Punjab Act**”);
- Sindh Public Private Partnership Act 2011 (the “**Sindh Act**”); and
- Khyber Pakhtunkhwa Public Private Partnership Act 2014 (the “**KPK Act**”).

The abovementioned four legislations are hereinafter collectively referred to as the “**PPP Laws**”.

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

Considering the development of PPPs is at its nascent stage in Pakistan, there have been periodic amendments to the PPP laws; however, no significant deviation from the existing laws has taken place so far. The Government of KPK is in the process of amending the KPK Act to make it more consistent with the other provincial laws.

8. What are the principal regulatory bodies for PPP? Is there a centralized PPP authority?

There is no centralized PPP authority in Pakistan.

Under the PPP Act, the Public Private Partnership Authority (“PPPA”) has been established that operates at the federal level only.

Whereas for the provinces, committees/boards have been created which are the equivalent of the PPPA in terms of their powers and functions. In addition to these dedicated committees/boards for PPPs, PPP units/cells have also been created under respective government ministries to aid the committees in implementing projects, as seen herein below:

Province	Dedicated Body	Supporting Institution
Punjab	PPP Steering Committee	PPP Cell
Sindh	PPP Policy Board	PPP Unit
KPK	PPP Committee	PPP Unit

As such, the Planning & Development and Finance departments of the respective

governments play a pivotal role in regulating and developing PPP projects.

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

Presently there are no express or implied restrictions on foreign investment through the PPP model in Pakistan.

Foreign investors are highly incentivised to invest for the development of public infrastructure and the same is seen through Government of Pakistan (GoP)’s commitments with other nation states such as the manifestation of the China-Pakistan Economic Corridor (CPEC). More recently the Government of KPK, vide amendment of the KPK Act, has granted a special exemption from open competitive bidding to PPP projects where the majority shareholding of the private investor (concessionaire) is of a state owned enterprise, entity, agency, corporation or company owned or controlled directly or indirectly by a foreign state¹.

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

The long-stop date for the completion of the construction phase is to be contractually ascertained in Pakistan. The PPP Laws do not stipulate a long-stop date since the same would be structured as per the requirements of the project for its effective implementation. The general practice is to define a closing completion date (frequently termed as the commercial operations date) by which the construction works shall be completed. In addition, project construction milestones may also be specified under the project agreement. In most cases, failure to meet the closing completion date for construction works is

¹ Section 28A of the KPK Act.

associated with liquidated damages and event of default.

As for the duration of the project, the KPK Act and Punjab Act cap the same to a period of thirty years², unless otherwise set forth in the PPP agreement, whereas the PPP Act and Sindh Act do not envisage a long-stop date for PPP projects.

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

Force majeure clauses are contractually regulated and the PPP Laws do not define force majeure events and the consequences thereof. It is the prerogative of the implementing authority to either dictate or negotiate the event(s) that will constitute a force majeure event under the project agreement. The most commonly used definition of a force majeure event in project agreements is that of an event or circumstance or combination of events or circumstances that is beyond the reasonable control of a party which therefore materially or adversely affects its performance under the contract. A force majeure event is often classified into two categories: political and non-political.

The consequences arising from a force majeure event are generally stated under a project agreement. This includes the duty to mitigate for a specified amount of time, a restoration period allowing the parties to resume their obligations, and early termination of the contract. In most of the projects the government will assume a significant portion of the loss resulting from a force majeure event.

The Sindh Act is the only legislation which requires every PPP agreement to expressly provide the basis on which the loss will be allocated between the government and the private party following a force majeure event.

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

Similar to force majeure events, allocation of political and legal risks between the contracting parties is regulated by the project agreement, as determined on a case to case basis.

Some political risks are also sub-categorized as “political force majeure events” in addition to being a separate event, such as the “change in law”, under the project agreement.

The Punjab Act and Sindh Act provide that the respective governments should always be willing to provide a guarantee with respect to political risks that are under their control³. The federal law (PPP Act) and the Punjab Act clearly establish that the federal government and the government of Punjab, respectively, shall not be liable for any risks beyond the purview of what is specified in the PPP agreement⁴.

In some instances, the project agreement will envisage a list of political and legal events that will constitute an event of default allowing the investor to terminate the agreement. Other consequences of a political and legal risk include compensation, amendment to the project agreement on mutually agreed terms, and extension of project milestones.

² Section 27 and Section 53 of the Punjab Act and KPK Act, respectively.

³ Section 19(2)(f) and Section 15(1)(IV) of the Punjab Act and Sindh Act, respectively.

⁴ Section 22 and Section 30 of the PPP Act and Punjab Act, respectively.

13. 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 required, a reinstatement test will be determined under the contract. Generally, the utilisation of insurance proceeds is contingent upon the satisfaction of debt obligations towards lenders; however, specific terms of the insurance coverage could be specified.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) recognized in the project agreements?

There is no such blanket recognition as the same would be contractually determined for different PPP projects.

Based on the agreements of the power sector, the project company is expected to seek insurance coverage for all insurable events. However, in certain circumstances the insurance companies might be reluctant to provide insurance coverage for certain events or would like to offer such insurance at a prohibitive price. In the foregoing scenario, the contract will stipulate an alternative arrangement. Considering insurance risk coverage is one of the important components of a project agreement, all such matters will be dealt with contractually.

15. 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 concept of step-in is well recognized in the realm of project financing wherein the lenders can exercise their contractual rights

and a recourse is available to them, *inter alia*, through a pool of securities including their ability under step-in rights.

The PPP Act and Punjab Act do not lay down a substitution mechanism; however, in the absence of an express prohibition the contracting parties can agree to include a step-in procedure in the PPP agreement.

The KPK Act empowers the contracting authority, notwithstanding anything contained in the PPP agreement, to temporarily take over the operation of the facility in the event of serious failure of the project company to perform its obligations and to rectify a breach within a reasonable period of time⁵. Further, the contracting authority may also agree with the lenders and project company to provide for the substitution of the project company upon serious breach by the project company or other events that could otherwise justify the termination of the PPP agreement or other similar circumstances⁶.

The Sindh Act provides that in the event that the project company fails to comply with agreed milestone activities, or fails to achieve the prescribed technical and performance standards, or commits any substantial breach of the PPP agreement, the relevant public authority or agency will be entitled to (i) take over the project and assume all related liabilities of the project company, including its debt obligations; (ii) allow lenders to exercise their step-in rights and security interests as specified in the loan documents for the project and replace the project company on the same terms and conditions, subject to approval of the substitute project company by the public authority/agency; (iii) take over the project and auction the remaining term of the PPP agreement through an open competitive bidding to interested qualified investors and

⁵ Section 51 of the KPK Act.

⁶ Section 52 of the KPK Act.

apply the proceeds to pay the debts of the project company; or (iv) invoke its other contractual remedies such as liquidated damages which fairly represents the degree of loss incurred by the government⁷.

16. 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 past, international arbitration has been agreed upon by the federal government for large scale projects or for claims exceeding a certain threshold. However, it is likely that the federal and provincial governments may not be inclined to agree on international arbitration particularly for small to medium scale PPP projects given the costs associated with the same.

Moreover, while it is possible to have foreign law as the governing law, there is a general perception, especially amongst the contracting authorities/agencies, that the applicable law should be that of Pakistan or the province or both. Having stated that, foreign laws may be adopted under the contract to incentivize foreign investment for a particular project.

17. 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?

There is no market testing procedure envisaged under the law. Some of the project agreements do require the project company to undertake testing. Performance testing, benchmark criteria, revenues are contingent with the above.

⁷ Section 28(IV) of the Sindh Act

18. 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 done solely by the public authority?

It is primarily conducted by independent engineers and the tests may be witnessed by recipient of services/ government agencies. Such acceptance of the facilities will be carried out in accordance with the procedure stated under the PPP agreement as the PPP Laws do not provide for the same.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

While all the above mentioned models are currently being utilised, the most popular model is project financing through a non-recourse or limited recourse debt financing with appropriate parent company guarantees. Another equally common model is corporate financing where funds are secured through balance sheet financing. Since the market is reasonably robust and sophisticated, it would allow all other kinds of models such as structured loan, syndicated loan, project bonds and sukuk financing.

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

The payment mechanism is contractually regulated. Typically, the lenders are risk averse

and would avoid assuming the risk of currency fluctuation and would seek adequate indexation and hedging arrangements within the project agreement(s).

The PPP Laws entitle the project company/concessionaire to receive compensation or user fee/levy in return of the services offered to the government(s); however, they do not provide a specific payment mechanism or protections available thereunder. User fee/levy/tariffs for projects that fall under the jurisdiction of a regulatory authority will be subject to such formulas or methods for establishment or adjustment of payments as determined by such regulatory authority and the same will adequately be reflected in the project agreement.

In some cases, the financial model for payments will be provided for in the bidding documents that will form part of the project agreement upon execution.

21. 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 or capped rate of return for the project company or sponsors under the laws of Pakistan. However, in sectors that are heavily regulated an assured rate of return is often provided such as the power sector. Whereas in competitive markets the rate of return will be determined according to the market forces of demand and supply.

22. 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.)?

Although public authorities are not required to provide a payment guarantee, in practice some sort of guarantee is often provided to the project company, especially in certain sectors

where the aim is to attract investment. A payment guarantee will be based on the nature of payment mechanism and can be in either of the following forms (the list is not exhaustive): bank guarantee, a revolving escrow account, and establishment of a viability gap fund to meet the minimum revenue requirements of the project.

23. 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 under the project agreement will that be of the contracting party. Therefore, obligations of a public authority or implementing agency cannot be imputed to the GoP and do not qualify as state obligations. In the foregoing scenario, GoP may provide a separate sovereign guarantee to the project company/concessionaire guaranteeing to undertake obligations of the relevant public authority in case of default.

As for project agreements that are directly executed by and on behalf of the GoP or provincial government (through the relevant ministry/department) the obligations created thereunder shall be considered that of the federal or provincial government as the case may be.

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

There is no scheme for service and availability payments provided under the PPP Laws. Accordingly, the terms on which such payments shall be made can be included in the project agreement.

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

As variation requests are not specifically dealt with under the PPP Laws, there is no limitation or cap on the quantum of variations

allowed. PPP agreements do generally provide for amendments to the contract or change in scope of work as requested by the public authority which will be dictated by a set of terms and conditions.

The only statutory limitation is placed by the Punjab Act which restricts variations in the PPP agreement during the implementation and operation phase of the project unless the following requirements are met:

- there is no increase in the agreed tariffs except the periodic formula-based tariff adjustments, unless the scope of works or performance standards are increased;
- there is no reduction in the scope of works or performance standards, fundamental change in the contractual arrangement or extension of the term of the PPP agreement, except in cases of breach by the government agency of its obligations;
- there is no additional government guarantee or increase in the financial exposure of the government; and
- the variation in the PPP agreement is necessary due to an unforeseeable event beyond the control of the government agency or the private party.

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

There is no such legal requirement and generally such matters are contractually regulated.

27. 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. Typically, direct agreements with public authorities would include recognition of lenders' right to step-in etc.

28. 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?

Typically, debt assumption will be provided for in the PPP agreement as the law does not prescribe a debt-assumption mechanism. It is uncommon for public authorities to assume debt of the project company in all circumstances. Apart from the debt assumed after an event of default/termination or through exercising its right under the step-in procedure, the public authority may not assume debt obligations in other circumstances, especially in relation to project company default terminations.

29. 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?

Payments due upon termination are also contractually determined and can include outstanding debt and equity obligations, payable especially in the cases of default by the government which has led to the termination of the agreement.

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

There are no incentives for domestic manufacturing of equipment or materials used in the construction of PPP projects.

31. Are there tax advantages available to PPP projects?

There are no specific tax benefits applicable to PPP projects under the laws of Pakistan and are generally provided on a case to case basis through the project agreement(s). However, please note that any tax concessions offered as a policy incentive or agreed contractually will require appropriate notification(s) to be issued by relevant tax authorities.

32. What are the other incentives available to PPP projects?

The federal and provincial governments do not offer incentives *per se* for PPP projects except for the different forms of government support that may be made available to private investors, on a case to case basis or to specific sectors, in the form of policy incentives.

The said government support can vary for different projects and can include the following:

- administrative support in obtaining licenses and other statutory and non-statutory clearances from the federal government, any public sector organization or a government agency for the purposes of the project;

- provision of utility connections for power, gas, and water at the project site;
- clearance of right of way or acquisition of land;
- rehabilitation and resettlement necessitated because of the execution of the project;
- government equity, in the form of land or infrastructure facilities owned by the relevant government or government agency;
- direct financial assistance through viability gap fund or other asset based facilitation for projects not financially attractive; and
- government guarantees for selected political or other risks.

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PARAGUAY



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GENERAL

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

Regardless of the type of contract, the main goal of PPPs, whether active or service, is to optimize the generated value of the activity so that the population receives greater economic benefits.

PPPs are organized into the following contract categories:

- Management and lease contracts: In which the investor takes over administration and management of a public enterprise for a fixed period of time; while ownership and related decisions such as the investment to be made, remains with the state.
- Concessions: In this case a private company oversees the management of a state-owned company for a specific period of time. During this period, the private firm makes investments at its own risk. These types of contracts are divided into three categories: rehabilitate, operate and transfer (“**ROT**”); rehabilitate, lease and transfer (“**RLT**”); and build, rehabilitate, operate, and transfer (“**BROT**”).

- Greenfield Projects: In this scenario a private company or a joint venture (state and private capital) constructs and operates a new facility for a fixed period of time. This category is further subdivided 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 foster the development of infrastructure, and to enhance Paraguay’s social and inclusive economic growth and development.

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

Where it concerns infrastructure, there is a deficit in several sectors in terms of transportation, energy, health services, and telecommunications. This is both at national and regional levels.

The PPP model can be used for many different types of projects, but is mostly used for transportation (roads, ports, airports), adequate international connection and modern quality social infrastructure (hospitals, schools), and adequate water treatment services 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 was applied in 2017 and 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) roads to the capital and the metropolitan area;
- (d) airport infrastructure;
- (e) social infrastructure: hospitals, health and educational centers, and correctional institutions;
- (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.

4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2017?

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 initiatives.¹

At the moment, there are five private proposals under evaluation for roads, ports, rails, airports, and water and sanitation infrastructure.

Article 51 of the 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 remains confidential.

5. Is there an upward, stable, or downward trend in PPP projects?

For the implementation of the PPP model, there seems to be an upward trend. Until the first semester of 2017 there were 29 PPP projects, from which 19 of them were from the private sector and 10 of them from the public sector.

LEGISLATION & REGULATION

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

Yes, the Law No. 5567/16 modifies Article 52 of the Law No. 5102/13 concerning the “Promotion of Investment in Public Infrastructure and Expansion and Improvement of Goods and Services in Charge of the State.” Additionally, the Law No. 5102 on the “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 complements both aforementioned laws.

¹ World Bank, PPP Knowledge Lab: <https://pppknowledgelab.org/countries/paraguay>

PPP regulation offers a tool to attract investment 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 exists a competent administration: a contracting institution that has competence in the subject matter of PPP.

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

The last change in the legislation was made on 26 January 2016 with the Law No. 5567 amending Article 52 of the Law No. 5102 on “Legislative Authority”. Apart from this, no other modifications are expected to the current legislation.

8. 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 PPPs, at the time of appearing in the bidding call. This is because all public works to be executed under the PPP model are previously tendered.

9. 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 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 USD 4,000,000.

10. 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(g) of Law No. 5102, a contract must include a maximum term, which, including its extensions, may not exceed thirty years, except for the exceptional extensions provided for in 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.

11. 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 result in 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 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...”

12. 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.

13. 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.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) 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 that should be covered, as long as it does not contradict the mandatory provisions of the law. According to Article 31 of the 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.

15. 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 a project company default?

Paraguay’s 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.

16. 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 the 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 dispute 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.

17. 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 advanced 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 sixty days. Once the term of the call has been fulfilled, the bids presented are evaluated and the contracts are awarded and signed.

18. 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 Article 17 of the Law No. 5102, 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.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loans, syndicated loans, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

The prefeasibility studies, for example, for the extension of route 2 (Ypacaraí - Coronel Oviedo) and route 7 (Coronel Oviedo Km. 183) were prepared by the Korean Cooperation Agency (Koica) within the framework of the Economic Cooperation Program of the Government of South Korea with developing countries. The elaboration of prefeasibility studies received technical assistance from the International Development Bank (IDB) and the Deloitte and Touche Consultancy.

The other approved projects received the financial support of Koica, the Government of the United States (Corps of Engineers), the IDB, and the Japanese International Cooperation Agency (JICA) for the prefeasibility studies.

20. 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 specifically 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 link payment methods directly to the performance of the contracted company.

There are several payment mechanisms 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.

21. 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.

22. 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 payment guarantees. 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 Específico* ("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 according to 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.

23. 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, using annual Treasury resources.

24. 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 limit of 2% of the total GDP of the Republic of Paraguay, calculated from the previous year's GDP figure.

25. 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.

26. 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.

27. Do the lenders sign a direct agreement with the relevant public authority? If so, 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.

28. 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?

Article 11 of the Law No. 5102, 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 associated with potential dispute resolutions.

29. 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?

A 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.

30. 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 current PPP regulation.

31. Are there tax advantages available to PPP projects?

The current PPP regulation does not provide specific tax advantages. However, the Law No. 60/90 on “Fiscal Incentives for National and Foreign Investment” is designed 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.

32. What are the other incentives available for 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 increases production 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.

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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) are used?**

The PPP market in Poland is still in a development phase (for more details please see points 4 and 5 below). Still most infrastructure projects have been developed in traditional formula (public procurement). As for PPP projects in Poland, commonly DBFO type based on availability payment is used or concessions.

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

Definitely, the PPP model (concessions) dominates in the road sector, taking into account the value of the projects. Currently there are four PPP contracts in operational phase and four PPP projects in the pipeline (please see point 3 below).

The PPP model has also been used in the energy-from-waste sector. The first and largest PPP deal in this sector, which has been

awarded *"European Waste Deal of the year 2013"* by Project Finance Magazine was a project to design, build, finance and operate an energy-from-waste facility in Poznan (the total value of the deal is approximately EUR 850 million, Hogan Lovells Warsaw has been an advisor of the private partner).

Other sectors worth mentioning are: accommodation and public buildings, healthcare, sport & leisure, water and sewage managements, energy efficiency, 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 was applied in 2017 and is planned to be applied in the near future?**

At present, although the governmental database shows that there are over 300 projects in the pipeline, a few of them are governmental schemes and are larger in scale. The ones worth mentioning are four PPP projects in the road sector, the express roads sections, launched by the General Agency of the National Roads and Motorways (Hogan Lovells was a legal advisor) and the projects supported by the Ministry of Investment and Development, such as: transportation sector: construction of the KST Tram Line in Cracow, stage IV; sport & leisure: the commercial

development of the Warsaw, Poland, National Stadium's surroundings.

The new sector in which PPP is analyzed to be applied is port infrastructure, both Zarząd Morski Port Gdański S.A. and Zarząd Morski Port Gdynia S.A. (state owned companies) take PPP model into consideration.

4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction in 2017?

According to the report on the Polish market in 2017 and 2018 published by the Ministry of Investment and Development, 36 projects proceeding to choose private partners have been published in 2017 while 9 PPP agreements were concluded whereas in 2018 there were 47 projects proceeding to choose private partners published and 16 PPP agreements were concluded. When it comes to their value, the biggest PPP projects are still in the transport sector. In 2017 and 2018 most PPP projects were carried out in the energy efficiency, sport and leisure, accommodation and buildings and transport sectors.

Moreover, as for the future, the Governmental Policy document for the development of public-private partnership (please see question 8 below), included the following assumptions:

- In 2017-2020, 100 new PPP contracts will be concluded;
- The value of investments carried out in PPP formula shall be at least 5% of investment expenditures in the public sector;
- By 2020, at least 10 procedures for the selection of a private partner will be initiated by the government sector;

- 40% of all proceedings - governmental and self-governmental - are to be successfully completed (currently less than 25% of proceedings are completed).

5. Is there an upward, stable, or downward trend in PPP projects?

The recent approach of the Polish government to PPP projects and the increase of the number of announcements of new PPP projects paint an optimistic outlook for the development of PPPs in Poland. The government and the local authorities are now more conscious, educated, experienced and determined to launch such projects. However, lessons learned from previous PPP projects should be applied to new projects to avoid repeating costly mistakes. The coming months will bring the commencement of several competitive bids for projects supported by the Ministry of Development, some are already on the go, such as the tramway project in Krakow and the pre-schools project in Warsaw.

Poland has become a positive environment for PPPs. The trend is definitely upward due to the following:

- Implementation of #PackageForPPP (please see point 8 below for details);
- Preparation in 2018 by the Ministry of Development (with support of Hogan Lovells) of PPP Guidelines encompassing: (i) Guidelines on preparation of PPP; (ii) Guidelines on PPP/concession proceedings; (iii) Guidelines on the PPP/concession contracts.
- In August 2018, the PPP Act has been amended with the aim of eliminating obstacles to the development of PPPs in Poland (please see point 7 for details);
- There are over 300 projects in the pipeline (please see point 3 above for details);

- After 2020, when EU funds will be limited, PPP will likely be an attractive form of financing public infrastructure projects.

LEGISLATION & REGULATION

6. What are the principal laws and regulations? Is there a framework PPP law?

The following are the acts regulating the PPP regime:

- the Act on Public –Private Partnership of 19 December 2008 (unified text Journal of Laws from 2017, item 1834 with consecutive amendments) ("**PPP Act**");
- the Act on Concession Agreement for Construction Works or Services of 21 October 2016, replacing the previous Concession Act (unified text Journal of Laws from 2016, item 1920 with consecutive amendments) ("**Concession Act**");
- the Act on Public Procurement Law of 29 January 2004 (unified text Journal of Laws from 2018 item 1986 with consecutive amendments) ("**PPL**"), used for conducting the proceeding aiming to choose the private partner in cases when the Concession Act does not apply to choosing the private partner.

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

In August 2018, the PPP Act has been amended with the aim of eliminating obstacles to the development of PPPs in Poland. The most significant changes are:

- introducing a new tool, so-called PPP project certification, based on an

application to the Minister of Investment and Development for an opinion on the merits of the implementation of the undertaking under PPP. This tool is useful primarily for public entities implementing smaller PPP projects. A positive opinion in this regard can certainly provide additional support in the process of making decisions about the implementation of the project in the PPP formula;

- an important change also applies to large investments financed from the state budget in the amount of over PLN 300,000,000. Planning such an investment requires carrying out the so-called PPP test, ending with issuing by the Minister of Investment and Development a non-binding opinion on the manner of investment implementation.
- introducing the obligation to prepare an efficiency assessment, carried out in order to make a multi-faceted evaluation of the project. Positive evaluation of the project in terms of legal, technical, business and financial, financial/price availability for users or public entity and efficiency compared to the traditional formula for investment (value for money) is the basis for a decision to implement the project in the PPP formula and start proceedings for choosing a private partner;
- introducing an explicit legal basis for step-in rights of the lenders and the possibility of execution of the direct agreements;
- introducing the possibilities to execute the PPP contract between the public authority and the SPV of the private partner established after the completion of the proceedings or during the proceedings;
- clarifying the rules on establishing the SPV by public and private partners in

order to execute the PPP contract and introducing rules on joining by the private partner the existing public company in order to execute the PPP contract.

8. What are the principal regulatory bodies for PPP? Is there a centralized PPP authority?

Under the amended PPP Act, the Ministry of Investment and Development has become the central entity coordinating and managing the development of PPPs.

The minister is now required to certify PPP projects and maintain the project database. These measures have been taken to help develop the market for PPPs due to the fact that after 2020, when EU funds will be limited, PPP will likely be an attractive form of financing public infrastructure projects.

The Ministry of Investment and Development promotes PPP and spreads the knowledge about PPP, supports public authorities to the proper use of this formula, monitors and assesses the PPP market in Poland.

The Ministry of Development prepared in 2018 (with the support of Hogan Lovells) PPP Guidelines encompassing: (i) Guidelines on preparation of PPP; (ii) Guidelines on PPP/concession proceedings; (iii) Guidelines on the PPP/concession contracts.

Mission of the Ministry of Investment and Development and Polish government is promoted as: #PackageForPPP. The package consists of:

- Governmental Policy document for the development of public-private partnership;
- Database of planned PPP projects;
- PPP investment base with concluded contracts;

- Proposals for changes in the law that will facilitate the implementation of projects in the PPP formula;
- A huge training project for government and self-government administration;
- Advisory support for PPP projects.

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

No there are no restrictions. This would be against the rules relating to the equal treatment of the EU companies and competition rules.

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

The legislation does not envisage such approach.

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

Commonly, PPP agreements specify the closed list of force majeure events, at the same time these events are characterized as the external events that have a significant impact on the performance of the agreement, which neither party could avoid or prevent against and which were not caused by any of the parties.

If a Force Majeure event occurs, parties shall engage in discussions aimed at finding a suitable solution to continue the PPP project. The solution will depend on the nature of a given force majeure event and its effects. It may involve changing the requirements of the public authority in the scope of services provided by the private partner, changing the payment mechanism or even extending the term of the PPP agreement.

The contract mechanism for force majeure events usually divides the risk of an event between a public authority and the private partner.

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

Mostly the political and legal risks are allocated on the public side. The occurrence of such a risk is treated as a compensation event. Compensation events may result in adjusting the project schedule and/or the remuneration of the private partner in such a way that the private partner remains in the economic position in which it would have been if the compensation event had not occurred.

13. 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?

There is no such reinstatement test envisaged. The project agreement usually envisages the Private Partner's obligation to set up the insurance policies on the required conditions.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) recognized in the project agreements?

Yes, it is, particularly in big PPP projects.

15. 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 amended PPP Act envisages taking control of the PPP project through step-in

rights and forms the legal basis to conclude the direct agreement by the public authority, private partner and the lenders.

16. 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 available and arbitration clauses can be observed in PPP agreements; however, it tends not to be a common solution.

Usually, the PPP agreements envisage a Polish common courts clause and Polish jurisdiction.

17. 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?

It is not directly mandatory by law to conduct market testing but it is a recommended practice. Usually public authorities conduct the market testing before the public procurement is commenced, using one of the available tools, the institution of the technical dialogue regulated by the PPL.

Also, as a part of an efficiency assessment (please see Question 7 above) it may be necessary to conduct such market testing.

18. 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 done solely by the public authority?

In larger PPP projects, there is a good practice of an independent engineer being selected.

The role of the independent engineer includes the following functions:

- Coordination,
- Control,
- Resolving issues to be agreed between the parties (e.g., compensation events, adjustment events, change orders, Force Majeure),
- Pre-arbitration (as the first stage of dispute resolution).

In small PPP projects, there is a tendency that the acceptance of the facilities is done solely by the public authority.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

Usually, PPP projects are structured where the project is performed by a special purpose vehicle. In consequence recourse to the sponsors and their contributions cannot be avoided in many projects.

Debt financing is commonly used. Bank loans are applied to the PPP projects and syndicated loans - but only with respect to big PPP projects.

As the PPP market in Poland is still in a development phase, not many financial institutions are willing to be involved in the financing of such projects, particularly those of significant value. There are three Polish banks that are particularly active in this field: BGK, PeKaO S.A. and PKO BP. International financial institutions, such as the European Investment Bank (EIB) and the European Bank

for Reconstruction and Development (EBRD) have also expressed an interest in larger, well prepared projects. There has also been increased activity by infrastructure funds, such as Marquerite, Meridiam and the Polish Development Fund.

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

The payment mechanism is regulated in the schedule to the PPP agreement. The most common payment mechanisms used in Polish PPP projects are the one based on the availability payment and concession model based on the revenues from the users, and the mixed ones (shadow toll).

The legislation does not provide inflation or foreign exchange protection. Valorisation mechanisms are commonly introduced in the PPP agreements, particularly in larger PPP projects.

21. 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. As for the cap on the rate of return there is no settled practice in the PPP agreements based on availability payment. The concession agreements however usually settle the cap on the rate of return. The achievement of this cap is the trigger to the termination of the concession agreement.

22. 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 there is not, there is no such market practice nor requirement of law.

23. 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 of the relevant public authority (for example local authority) do not qualify as State (Treasury) obligations and the Treasury does not provide separate guarantees to the concessionaire or the lenders.

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

The approach depends on the assumptions adopted by the public sector as to off balance treatment of the agreement. The tendency at present is to avoid the cap on the deductions from the availability payment however the possibility to adopt this approach is always analysed case by case. This may affect the bankability of the project.

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

Such variations are not usually subject to the cap; however, they are compensated to the Private Partner.

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

There is no such legal requirement but it is quite common market practice, particularly in larger PPP projects.

27. 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 a common practice, at present explicitly regulated in the amended PPP Act, to sign a direct agreement. The scope of such direct agreements is typical, including the notification obligations of the public authority, obligations

of the public authority to refrain from terminating the PPP agreement or using any legal remedies (such as contractual penalties) from the private partner, step-in rights, rights of the lenders to cure any breach of the private partner, possibility to introduce the recovery plan, etc.

28. 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 a debt assumption mechanism in all termination scenarios.

29. 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 specific approach varies case by case. Until now there was no settled approach. Usually in the event of termination due to the authority default the Private Partner receives debt, equity, and expected IRR. In case of the company default the Private Partner receives debt compensation, sometimes equity; however, without IRR and additionally some contractual penalty is deducted from the payment.

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

Such stipulations are not used very often due to the restrictions relating to the equal

treatment of the EU companies and competition rules.

31. Are there tax advantages available to PPP projects?

No, there are no such advantages.

32. What are the other incentives available to PPP projects?

The Polish government adopted the 'Governmental Policy in Respect to the Development of Public-Private Partnership' on 26 July 2017. In August 2018, the PPP Act was adopted with the aim of eliminating obstacles to the development of PPPs in Poland. The Ministry of Development has become the central entity coordinating and managing the development of PPPs. The minister is now required to certify PPP projects and maintain the project database. These measures have been taken to help develop the market for PPPs due to the fact that after 2020, when EU funds will be limited, PPP will likely be an attractive form of financing public infrastructure projects (please see also Question 8 above).

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ROMANIA



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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 public-private partnerships have benefited from the framework legislation in Romania for years. However, public-private partnerships governed by Act No. 178/2010 on PPP and Act No. 233/2016 (currently abrogated), did not enjoy much practical applicability. The previous act was abrogated by Government Emergency Ordinance No. 39/2018 on Public-Private Partnerships (“**GEO No. 39/2018 on PPP**”), recently enforced. The legislation in the field of public-private partnership was substantially amended with the intention to turn this mechanism into a more attractive one and thus to develop major projects of national coverage.

According to GEO 39/2018, PPP can take the following forms:

- Contractual PPP - made under a contract between the public partner, the private

partner and a new company, wholly owned by the private partner;

- Institutional PPP - based on a contract between the public partner and the private one, through which a new company is set up by the public partner and the private partner to act as a project company and, after being registered with the company register, becomes a party in the PPP contract in question.

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 territorial authorities for many years.

As a novelty, further specification is required: in contrast to the previous law, the current law on PPP has extended its application domain to the construction of goods and the operation of services.

3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model was applied in 2017 and 2018 (until 26th May) and is planned to be applied in the near future?

As delineated in Question 2 above, many PPP projects have been pending in Romania during the last few years.

The current Government Program includes investment projects in the Romanian transportation infrastructure by road, rail, air, sea and multimodal sector, in the health infrastructure (construction and modernization of hospitals), educational infrastructure, environmental infrastructure, etc.

Also, a new sector of activity has been added under the current legislation: the construction of goods and the operation of services.

Taking into consideration that the new regulation GEO No. 39/2018 on PPP has come into force on 18 May 2018, the new PPP projects are planned to be implemented after 26 May 2018.

For example, on 28 June 2018, the Romanian Government approved, by decision, the development of a public-private partnership for the execution of the following strategic investments, according to an official statement:

- Fit-out of Arges and Dambovită Rivers for navigation;
- Construction of Bucharest South Airport;
- Main channel Siret – Baragan;
- Construction of an electrical transportation means factory;
- Execution and operation of a national bank for blood, human plasma and stem cells;
- Regional Hospital in Timișoara;

- Regional Hospital in Braila-Galați;
 - A touristic sky compound in Făgăraș.
- 4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2017 and 2018 (until 26th May)?**

Due to the legislative uncertainties that affected the PPP field up to 2017 and the unfavorable economic climate, despite the fact that there are plenty of pending PPP projects, during 2017 not many have been completed. This was the reason for the need to amend the legislation by adopting GEO 39/2018, the new law being considered a step forward as it clarifies and simplifies the conditions for the conclusion of a public-private partnership.

Regarding the number of PPP projects developed in Romania until 26th May, please see the explanations at Question 3.

5. Is there an upward, stable, or downward trend in PPP projects?

Taking into consideration the official statements, which encompassed the strategic projects that will start in the first phase of the new legislation (as described at Question 3), a substantial upward trend in PPP projects could be noted.

LEGISLATION & REGULATION

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

Starting with the 18 May 2018, Government Emergency Ordinance no. 39/2018 on Public-Private Partnership has come into force, aiming at implementing a legislative framework capable of ensuring efficient cooperation between the public and the private sector regarding public investments.

According to **GEO No. 39/2018 on PPP** the public-private partnership has as object of the execution or, as the case may be, the rehabilitation and/or extension of a good or property under the patrimony of the public partner and/or the operation of a public service.

Also, the PPP projects are assigned in accordance with the following laws:

- Methodological Rules of 2 June 2016 for the enforcement of the provisions on the award of public procurement contracts/framework agreements of Act No. 98/2016 on public procurement, which remained in force but were amended in line with GEO No. 39/2018 on PPP;
- Act No. 98/2016 on public procurement;
- Act No. 99/2016 on sectorial procurement;
- Act No. 100/2016 on work concessions and services concessions.

Moreover, Act 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 incorporation and operation of the National Council of Appeals Settlement has been enacted, establishing

that the person who considers himself/herself injured may address: either by administrative-judicial procedure, the National Council of Appeals Settlement, either by judicial means of the court.

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

The entire PPP legislation has been amended and consolidated during this year (2018), thus no substantial changes or reforms are expected for the moment.

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

Following the total division of the Department for Foreign Investment and Public-Private Partnership (the former main regulatory body), through Government Emergency Ordinance No. 11 of 2016 on the establishment of reorganization measures at central public administration level, public-private partnership activities are taken over by the Ministry of Public Finance.

The Ministry of Public Finance is subrogated to the rights and obligations of the Department for Foreign Investments and Public-Private Partnership deriving from normative acts, contracts, conventions, understandings, protocols, memoranda and agreements in which the Department for Foreign Investments and Public-Private Partnership is a party, regarding the public-private partnership activity. Thus, the Government keeps the major role by proposing projects as well as conclusion and amendment of relevant agreements.

9. 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 Act No. 98/2016 on public procurement, of Act No. 99/2016 on sectorial procurement, and of Act 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 Directive 2014/25/EU which expressly forbids direct or indirect discrimination against economic operators from another Member State.

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

The Romanian PPP legislation does not provide a specific long-stop date for the completion of the construction works. However, GEO No. 39/2018 on PPP, provides, as a novelty, that the duration of a PPP must be over five years.

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; (iii) ensures a reasonable and affordable price level.

In accordance with Act No. 100/2016 on work concessions and services concessions, the duration of concession agreements is limited in order to avoid the non-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 five years, the maximum term of the concession may not exceed the reasonably estimated time required for the concessionaire to obtain a minimum income to recover the costs of the investments, the costs of exploitation of works or services as well as a reasonable profit.

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

The PPP legislation does not provide a definition for 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 otherwise provided by the law or*

otherwise agreed by the parties, 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 a view 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 Act No. 98/2016 on public procurement and Act No. 99/2016 on sectorial procurement, with a view to 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 as the successful tenderer the second-ranked bid, provided that the latter is admissible. In case there is no tender placed in the second admissible place, the contracting authority has the obligation to cancel the awarding procedure of the public procurement contract.

As provided by Act No. 100/2016 on work concessions and services concessions, the contracting entity has the obligation to cancel the award procedure of the concession contract in case the contract cannot be concluded with the tenderer whose bid has been established as the successful one due to the fact that the tenderer is in a situation of Force Majeure and there is no suitable tender ranked in the second place.

12. 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 GEO No. 39/2018 on PPP, the public-private partnership mechanism is characterized by several elements, 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.

Moreover, in terms of changes in law, this risk is hard to imagine, as this has just been amended by this Ordinance. When it comes to the determination of the awarding procedure of a PPP project, according to Laws No. 98, 99 or 100/2016, the following criteria is 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 an economic nature in connection with the operation of the concerned works and/or services. Briefly, it can be concluded that in the last decade the predictability of any major intrusions has been significantly increased thus offering stability to long term investments.

13. 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 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.

14. 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 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 *unpredictability* - Ro: *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.

15. 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?

As prescribed by Article 32 (p) of GEO No. 39/2018 on PPP, 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, Article 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 it does not fulfill its obligations under the contract or towards the financier of

the project (if the possibility of replacement was provided in the contract).

16. 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 Article 43 of GEO No. 39/2018 on PPP, 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 Act 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 incorporation and operation of the Nation Council of Appeals Settlement, which deals with all public acquisitions and its decisions are subjected to the Appeal Court.

According to Article 57 of the above-mentioned law, the parties may agree for the litigation in relation to the interpretation, conclusion, performance, amendment and termination of the PPP contracts to be settled through arbitration.

17. 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?

In accordance with Laws No. 98/2016 on public procurement and 99/2016 on sectorial procurement there is the possibility of the contracting authority to perform market consultations for the acquisition, and to inform operators on 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 violate the principles of non-discrimination and transparency.

18. 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 a view 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 Article 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 Beneficiary as of the preliminary handover at the completion of works.

In accordance with the provisions of the Regulation dated the 14 of June 1994 on the handover of building and corresponding installation works (as amended by Government Decision No. 343/2017), the

handover of any category and class of importance is carried out by the investor/owner for both new constructions and existing building interventions for which building/dismantling permits are issued under the terms of the law and shall be executed in two phases: (i) handover at the completion of works; (ii) final handover upon the expiry of the defect liability period.

The committees for the handover of constructions and corresponding installations are compulsorily formed of: a representative appointed by the investor, who is also the chairman of the committee, a representative appointed by the authority of the competent public administration that issued the building permit, 1-3 specialists in the field of building works subject to reception, depending on the category and class of importance of the constructions, designated by the investor, other than those involved in the design/execution of the investment objective; they act as employees of the investor, with an employment contract or on the basis of a service contract, as an authorized natural person, as the case may be, according to the law.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

At the time following adoption of GEO No. 39/2018 on PPP, the Romanian Government adopted the list of strategic investment projects to be prepared, assigned to and implemented in the PPP, these being the most recent projects developed in our jurisdiction. These are: three motorways, the administration

of Railways' hospitals and a medical compound; it could be noted an upward trend in PPP projects.

We know that one of these highways already enjoys funding from European funds, but attracting European funds remains a challenge that is difficult to overcome for public-private partnerships, but it is not impossible.

GEO No. 39/2018 on PPP regulates the following types of funding:

- In full, from the financial resources provided by the private partner (loans from banks are commonly used in PPP projects); or
- From the financial resources provided by the private partner, together with the public partner.

As regards the participation of the public partner in financing, as a novelty, it is foreseen to limit the contribution rate represented by financial resources other than non-reimbursable external funds and the national contribution related to such funds to 25% of the total inversion.

The public partner can contribute to the implementation of the public-private partnership project, mentioning that the new regulation also includes the granting of guarantees in favor of the public-private partnership fund sponsors who are credit institutions or financial institutions.

In order to establish and use the public funds necessary to make payments to the project company or the private partner for the implementation of the public-private partnership projects approved by the Government, within one year from the enforcement of this Emergency Ordinance, the Special Fund financing of public-private partnership contracts. The special fund for the

financing of public-private partnership contracts will consist of public revenues from fiscal and non-fiscal financial resources, including subsidies, provided for by the normative act establishing this special fund.

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

According to Article 2 of GEO No. 39/2018 on PPP, 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 more than half of the revenue to be obtained by the project company from the use of the good or goods or the public service operation that is the object of the project comes from payments made by the public partner or by other public entities for the benefit of the public partner.

As per Article 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 the conditions set thereto are cumulatively met. In such cases, according to Article 35, the PPP agreement is subject to an adjustment mechanism for the payments to the private

partner and the project company, in case the unilateral amendment is unfavorable to the private partner, by reducing the works that have to be performed or in any other manner.

21. 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 a guaranteed rate of return or a cap on the rate of return neither for the project company nor for the sponsor.

22. 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.)?

GEO No. 39/2018 on PPP regulates under Article 13 the manner in which the public partner can contribute to the implementation of the PPP project:

- (a) the establishment of certain rights in favor of the project company or the private partner under the terms of the public-private partnership agreement;
- (b) cash contributions to the share capital of the project company;
- (c) assuming payment obligations vis-à-vis the private partner or project company or payment obligations related to the completion of investments with public financial resources also coming from post-accession non-reimbursable external funds and from the national contribution related to them, under the conditions provided by the national legislation and that of the European Union;
- (d) granting guarantees to public-private partnership fund sponsors who are credit or financial institutions.

23. 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 any separate guarantee to the concessionaire or the lenders.

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

In accordance with Article 32 of GEO No. 39/2018 on PPP, among the mandatory elements that have to be regulated by the PPP agreement is also set 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 Article 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 a cap for the deduction from the service/availability payments.

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

According to GEO No. 39/2018 on PPP, the PPP agreement may be unilaterally amended or

terminated by the public partner due to exceptional reasons related to the public interest, provided the following conditions are met: (i) this possibility, including the categories of exceptional reasons relating to the public interest, was 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; (iii) with the prior notification of the private partner and of the project company.

For the purpose of GEO No. 39/2018 on PPP, 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.

GEO No. 39/2018 on PPP 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 awarding documentation and the PPP agreement.

According to Article 221 of Act No. 98/2016 on public procurement, the agreement may be amended without the organizing of a new awarding procedure in several cases set by such law, provided 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 provided them).

According to Article 241 of Act No. 99/2016 on sectorial procurement, the sectorial agreements and frame agreements may be amended without the organizing of a new awarding procedure provided 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 Article 107 of Act No. 100/2016 on work concessions and services concessions, the agreement may be amended without the organizing of a new awarding procedure, provided 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.

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

Under the new legislation, according to Article 32 (s) of GEO No. 39/2018 on PPP, the PPP agreement must regulate the mechanisms of profit sharing from refinancing.

27. 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 GEO No. 39/2018 on PPP, 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.

Article 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, Article 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 it does not fulfill its obligations under the contract or towards the financier of the project (if the possibility of replacement was provided in the assignment documentation and in the contract).

28. 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?

There is no debt assumption mechanism regulated under the PPP legislation. However,

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.

For the contributions of the public partner, the Special Fund for the financing of public-private partnership contracts will be established within one year from the coming into force of GEO No. 39/2018 on PPP. The special fund for the financing of public-private partnership contracts will consist of public revenues from fiscal and non-fiscal financial resources, including subsidies, provided for by the normative act establishing this special fund.

29. 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 Article 35 of GEO No. 39/2018 on PPP, 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; (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 assignment documentation and 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.

Article 38(3) of the same regulation provides that upon the 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 will be transferred to the public partner under the conditions stipulated in the PPP contract with the payment of compensation set in relation to the assignment documentation and the PPP contract. 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.

30. 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 Article 155 of Act 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 Article

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 Article 166(2) of Act No. 99/2016 on sectorial procurement.

Act No. 100/2016 on work concessions and services concessions, while regulating the technical and functional requirements, prescribes, at Article 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.

31. Are there tax advantages available to PPP projects?

The Romanian PPP legislation does not provide any specific tax advantages available to PPP projects.

32. What are the other incentives available to PPP projects?

There are no other incentives available to PPP projects, according to the Romanian PPP legislation in force.

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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?**

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)

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.

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.

Student Dormitory of Jeonbuk University and Changwon University development project (BTL)	RFP re-issued March 13, 2018.
Cheon-an City sewage treatment plant modernization project (BTO-a)	RFP issued Nov. 19, 2018.

4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2017?

Materials regarding the status of the PPP projects (including number of projects and investment amounts) implemented in 2017-2018 are not yet available.

Under the 2018 Basic Plan for PPI, PPP projects worth a total of 4.2 trillion Korean Won (approximately 3.7 billion US Dollars, based on private investment cost, 67 projects in total) are scheduled for implementation. More specifically, road projects worth 2.0 trillion Korean Won (17 projects), railroad projects worth 1.0 trillion Korean Won (6 projects), a harbour project worth 0.2 trillion Korean Won (1 project), environmental projects worth 0.6 trillion Korean Won (21 projects), education-related projects worth 0.15 trillion Korean Won (10 projects), national defence related projects worth 0.2 trillion Korean Won (6 projects), and social welfare related projects worth 0.2 trillion Korean Won (6 projects) are scheduled for implementation.

5. Is there an upward, stable, or downward trend in PPP projects?

Generally, we are seeing a downward trend in PPP projects. According to news reports, there has been criticism that the PPP projects are not being justified from a value for money perspective, and many view the Korean PPP market slowly becoming saturated.

LEGISLATION & REGULATION

6. 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.

7. Are there any expected changes or reform of the existing legislation?

In 2017, the PPI Act was amended so that the construction of the central administration building or complex can be carried out as a PPP project, and to allow private companies to make a project proposal under the BTL model.

No changes were made in 2018 to the existing legislation.

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

The Ministry of Economy 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 Economy 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

9. 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”).

10. 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.

11. 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.

12. 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.

- 13.** 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.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) 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.

15. 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 construction¹ 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.

¹ Article 46, Item 3 of the PPI Act.

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.

16. 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) the mandatory laws of the jurisdiction to which all elements of the transaction relate, even if the parties’ choice of law is that of another 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 that (i) *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 operate and manage its project is governed by Korean law.

17. 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.

18. 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 approved².

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

Structured loans, syndicated loans, and project bonds are all available in Korea. In recent years, we have seen investment funds ("collective

² See Article 22, Paragraphs 1 through 3 of the PPI Act.

investment vehicles” as defined under the Financial Investment Services and Capital Markets Act of Korea) provide loan and equity to a PPP project.

As for equity contribution obligations, a project developer must contribute 5% to 15% of the total investment cost as equity for a BTL project. For all other types of PPP models, the project developer must contribute at least 15% of the total investment cost as equity and maintain at least 10% of the remaining value of the operation and maintenance concession rights as equity throughout the operation period.

20. 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 profitability may constitute a non-political force majeure event.

21. 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).

22. 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 guarantees 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.

23. 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.

24. 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.

25. 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.

26. 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.) 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.

27. 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.

28. 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.

29. 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 the 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.

30. 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.

31. 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

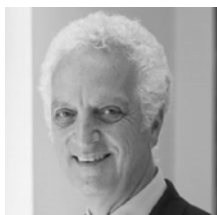
and the concessionaire is permitted to use certain public lands for construction of project facilities. The concessionaire has the right to expropriate land under the PPI Act, and alternatively, the concessionaire may request the government to expropriate land on behalf of the concessionaire.

32. 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.

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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 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:

- (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:

- (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 was applied in 2017 and 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.

4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2017?

According to a recent Budget Speech 2019/2020 by the Minister for Finance and Planning, development expenditure is estimated at 12.25 trillion shillings equivalent to 37% of the total budget. Out of the estimated development funds:

- (a) 2.48 trillion shillings for construction of Standard Gauge Railway;
- (b) 1.44 trillion shillings for construction of Hydroelectric Power Project at Rufiji River;
- (c) 788.80 billion shillings is for Railway, Water and REA Funds;
- (d) 450 billion shillings for Higher Education Students' Loans; and
- (e) 288.50 billion shillings for Fee Free Basic Education.
- (f) In addition, the Government has set aside 600 billion shillings for payment of verified arrears for public servants, service providers and contractors for roads, water, electricity projects.

Areas accorded priority in the release of development funds includes:

- (a) Strengthening and constructing of modern infrastructure in order to enhance the national productive capacity in industries, particularly which utilize locally available raw materials and provide quality services (health, education and water) to the citizens. Those infrastructures will contribute to the increase of domestic, regional and international trade;
- (b) Improving environment for doing business by addressing challenges stipulated in the Blueprint for the Regulatory Reforms to Improve the Business Environment;
- (c) Strengthening agriculture (productivity and markets for crops, livestock, fisheries and forestry) given the importance of the sector in national economy (food, employment, individual income, contribution to the forex earnings and the

linkage of this sector with industrial development); and

- (d) Maintaining national peace and security; and building foundation for economic self-reliance.

The same budget speech has also provided for the development projects that are expected to be implemented in the coming budget year 2019/20 based on National Five Years Development Plan 2016/17 – 2020/21. Priority for 2019/20 will be on Strategic and big projects with public interest such as infrastructure projects, purchase of aircrafts, locomotives, power projects etc.

As per information obtained from the PPP Centre, so far at present there are a number of PPP projects underway at different stages such as:

- (a) Dar Bus Rapid Transit (DART) project phase 1 (going to RFQ).
- (b) Manufacturing of medicines implemented by Medical Stores Department (procurement stage).
- (c) Construction and Maintenance of National Medical Cancer Institute at Mloganzila (concept note stage).
- (d) Construction of students' hostel implemented by the College of Business Education (CBE) (pre-feasibility stage).
- (e) Construction of a five-star hotel at the Julius Kambarage Nyerere International Airport (feasibility stage).

5. Is there an upward, stable, or downward trend in PPP projects?

PPP is recognised as an important instrument for government to attract private investment with a view to providing better public services. PPP projects are improving quickly as steps are

taken to clarify and improve the process and formal relationships between the public and private sectors in a clear regulatory framework.

LEGISLATION & REGULATION

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

The PPP Act came into effect in 2010 (as amended in 2014 and 2018 PPP Amendment Acts) with PPP Regulations 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.

7. Are there any expected changes or reform of the existing legislation?

There have been various subsequent amendments to the PPP Act, the latest in October 2018, and the PPP Regulations were revised in 2015. The PPP Regulations 2015 are now in the process of being reviewed and are expected to be gazetted later in the year 2019.

Under the PPP amendment Act 2018 “Any dispute arising during the course of the agreement shall be resolved through negotiation; or in the case of mediation or arbitration, be adjudicated by judicial bodies or other organs established in the United Republic and in accordance with laws of Tanzania”. This restricts PPP projects to local laws and procedures changing from the previous regime in which even international procedures could be applied.

Also under the PPP amendment Act 2018, the public private partnership project that relates to natural wealth and resources shall take into account the provisions of the Natural Wealth and Resources (Permanent Sovereignty) Act 2017 and the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act. The reference to the new legislations on natural resources aims at ensuring that in all PPP projects that involves natural resources the United Republic is recognised as sovereign state and has permanent sovereignty over all natural wealth and resources hence imposing on the Government the responsibility of ensuring that interests of the People and the United Republic are paramount and protected in any arrangement or agreement which the Government makes or enters in respect of such natural wealth and resources.

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

The Public Procurement Regulatory Authority (“PPRA”) amongst other functions that it has, regulates procurement of consultancies, transaction advisors and private party in respect of public private partnership projects in accordance with the regulations made under the Public Private Partnership Act and guidelines issued by the Authority in collaboration with the PPP Centre and PPP Node.

The PPP Centre has now been transferred from the office of the Prime Minister to the Ministry of Finance and Planning and shall administer PPPs and acts as the general overseer of the PPP projects. Ministry of Finance and Planning is considered to be the Ministry responsible for PPPs in policy, law and regulation. An accounting officer shall submit to the PPP Centre mid-year performance report on the implementation of public private partnership projects in the manner prescribed in the Regulations. The

PPP Centre shall consolidate mid-year performance reports of contracting authorities and submit the report to the Minister.

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 feasibility study report and recommendations of a transactional advisor). 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 concept note and feasibility study report of potential PPP Projects that are in line with the National Development Plans and guidelines accompanied by a preliminary affordability, value for money statement and justification for private sector participation at the beginning of every budget cycle.

The PPP Centre shall analyse projects submitted by contracting authorities within twenty-one working days from the date of receipt and forward projects to the PPP Steering Committee.

The Ministry responsible for PPP undertakes an analysis of fiscal risks, affordability and other financial matters and submits the projects to the PPP Centre within fifteen 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 which is obliged to open a bank account into which shall be kept all moneys constituting the

facilitation fund and the executive director of the PPP Centre shall be the Accounting Officer of the Facilitation Fund.

The **PPP Steering Committee** shall consider and approve PPP projects and agreements.

The PPP Centre shall, after receiving recommendation from the Ministry, within seven working days, submit the projects to the PPP Steering Committee.

Projects submitted to the PPP Technical Committee shall be dealt with and approved within fifteen working days from the date of receipt.

Subject to the recommendation made by the PPP Centre, the PPP Steering Committee must within twenty-one working days, approve feasibility studies, detailed project report and design, selection of preferred bidder agreements and amendment to agreements.

Where a project to be undertaken requires public financing or any other government support or determination of matters of policy, the PPP Steering Committee will refer the matter to the Minister for determination.

The Minister must within twenty-one working days, for matters requiring public financing proceed the matter in the manner prescribed under the Government Loans, Guarantees and Grants Act and for matters requiring any government support of determination of matters of policy make determination and direct the PPP Steering Committee accordingly.

The Minister shall, then notify the general public of approved projects in the official government *Gazette*.

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.

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 Steering Committee and vetted by the Office of the Attorney General.

PPP Node is the Node created in the Ministry responsible for local government designed to support Public Partnership Projects in the local governments. The PPP Node scrutinises the projects submitted by the local governments and forwards the selected projects to the PPP Centre for recommendations and the PPP Centre analyses and resubmits the recommendations to the PPP Node within thirty working days. PPP Node is in charge of small scale PPP projects which are PPP projects of an amount not exceeding USD 20 million with a maximum duration not exceeding fifteen years. Once approved by the PPP Node, small scale PPP projects prefeasibility and feasibility studies are sent to the PPP Centre and Ministry responsible for PPP for recommendations.

9. 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.

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.

For **solicited projects**, at the beginning of the budget cycle, each contracting authority will submit to the PPP Centre, concept note and prefeasibility study of potential projects to be undertaken in partnership with the private sector. 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 of audited and verified costs incurred in undertaking the feasibility study within thirty days after signing the PPP agreement.

The Minister may exempt procurement of an unsolicited project from competitive bidding process where it meets the following criteria:

- (a) The project is of priority to the Government at the time and broadly consistent with the government strategic objectives;
- (b) the private proponent does not require government guarantee or any form of financial support from the government;
- (c) the project shall have unique attributes that justify departing from competitive tender process;
- (d) the project is of significant size, scope and requires substantial financing as per conditions provided in the regulations;
- (e) the project shall demonstrate value for money, affordability and shall transfer significant risks to the private proponent;
- (f) the project has wide social economic benefits including improved services, employment and taxation; and
- (g) the proponent commits to bear cost of undertaking a feasibility study.

Upon approval of project concept for unsolicited proposals, the private proponent shall make a commitment to undertake the project by depositing a refundable amount of not exceeding 3% of the estimated cost of the project.

There are specific regulations for the local government authorities' small-scale PPPs, whose total project value does not exceed USD 20 million and which entail an agreement not exceeding a maximum duration of fifteen years.

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;
- (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.

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 % of affected households.

10. 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 and the overall duration shall be provided for in the agreement and shall not be extended unless:

- (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;
- (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 five years.

11. 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.

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.

12. 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:

- (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.

13. 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:

- (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.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) 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.

15. 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.

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.

16. 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; or in case of mediation or arbitration be adjudicated by judicial bodies or other organs established in the United Republic of Tanzania. The PPP (Amendment) Act 2018 has amended the law to restrict Arbitration for dispute settlement to be resolved by judicial bodies or other organs established in United Republic of Tanzania and in accordance with the laws of Tanzania

The PPP agreement shall be governed and construed in accordance with the laws of mainland Tanzania. But other project agreements, including lenders' agreements, can

be governed by other laws, subject to agreement with the counterparties, such as the contracting authorities.

17. 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.

18. 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.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

No project finance models are provided in the PPP legislation. Any requirements for equity contribution obligations from sponsors are usually set out in the project documents such as the RFQs and RFPs.

20. 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 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.

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.

There is no specified inflation and/or foreign exchange protection.

21. 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.

22. 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 Question 23 below).

The PPP agreement will provide for:

- (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.

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.

23. 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 Question 22 above, any guarantee or fiscal obligations for PPP projects shall be subject to the relevant laws relating to loans, guarantees, and grants.

For an unsolicited project, the contracting authority is prohibited to conduct a procurement process that requires:

- (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.

24. 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.

25. 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 PPP Steering Committee 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.

26. 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 and Planning. The Ministry of Finance and Planning shall develop guidelines and regulations for monitoring, evaluating, and managing all fiscal risks, debts, contingent liabilities, and other financial matters.

27. 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.

28. 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. The reasons and compensation for termination shall be as set out in the PPP agreement.

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.

Upon termination of the agreement, the contracting authority may engage another private partner to implement the project.

29. 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 Question 28 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.

30. 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. The Minister responsible for PPPs is empowered to make regulations on the manner in which the empowerment of citizens of Tanzania may be implemented including provision of goods and services by Tanzanian entrepreneurs, training and technology transfer, employment of Tanzanians and corporate social responsibility

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").

TIC has a number of incentives from the establishment of the entities, obtaining licenses and permits and some limited tax exemptions. However, under PPP Act such incentives under TIC do not apply to tax incentives.

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.

31. Are there tax advantages available to PPP projects?

All PPP projects are monitored and regulated by the Ministry, Sector Ministries, Government 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.

A project undertaken through project company registered with TIC ought to qualify for benefits granted to similar investment under the Tanzania Investment Act, shall be entitled to such benefits granted under that TIC Act. Such benefits shall not apply to tax incentives.

Tax incentives are limited for PPP projects because they are not similar to those registered under the TIC. Project company may have other relevant arrangement in place including

tax advantages with the government. 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.

Also for larger projects, they can benefit from advantages as a "strategic investor" determined as such under the Tanzania Investment Act.

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 and Planning, 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.

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.

32. What are the other incentives available to PPP projects?

There are no other specific incentives available to PPP projects. However, the new PPP (Amendment) Act 2018 proposes that the Minister shall, for the purpose of ensuring investment in PPP projects and in consultation with the Minister responsible for investment, prepare programmes for development and maintenance of favourable environment for investment through public private partnership arrangement.

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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 ¹ dated May 2018 (“**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 the end of the year 2017, as follows:

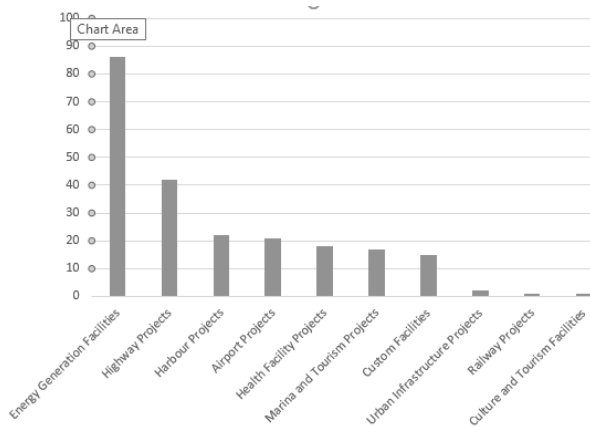
Model	Number of Projects	Percentage
BOT	106	47%
BO	5	2%
BLT	21	9%
TOR	8793	42%
Total:	225	100%

Out of 225 total projects, 34 projects are at the construction stage or financial closing stage and 191 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 the end of the year 2017 was as follows:

¹ <http://www.sbb.gov.tr/wp-content/uploads/2018/10/D%C3%BCnyada-ve-T%C3%BCrkiyede-Kamu-%C3%96zel-%C4%B0%C5%9Fbirli%C4%9Fi-Uygulamalar%C4%B1na-%C4%B0li%C5%9Fkin-Geli%C5%9Fmeler-2017.pdf>



3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model was applied in 2017 and is planned to be applied in the near future?

As of the end of the year 2017, 6 motorway projects, 1 airport project, 17 health campus projects, 5 marina projects, 1 sea port projects, 2 customs gate projects, 1 motorway service facility 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 Ministers², more PPPs are planned to be developed. These PPPs include the following sectors and projects:

Health Sector:

- Denizli City Hospital
- Aydın City Hospital
- Antalya City Hospital
- Diyarbakır Kayapınar Hospital
- Ordu City Hospital
- Samsun City Hospital
- Trabzon City Hospital

² Published in the Official Gazette No. 30224 dated 28 October 2017 (Repeated).

Transportation Sector:

- Aydın-Denizli Motorway Project
- Karaman Airport Project

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.

4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2017?

As explained in Question 1 above, according to the PPP Report, there are 191 PPP projects currently in operation and 34 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 135 billion as of the end of the year 2017.

5. Is there an upward, stable, or downward trend in PPP projects?

In accordance with the Mid-Term Fiscal Plan (2019-2021)³, the projects that are not tendered yet and the projects that are tendered but that the construction works have not been initiated yet will be suspended for a period, due to the necessity to reduce public expenditures. The duration of the suspension is not explicitly mentioned but such statement can be interpreted as there is a downward trend in the PPP projects. However, the 2019 Program of the Turkish Presidency does not mention such a suspension; it makes reference to the continuation of the tenders and the projects, but underlines that the PPP model will be preferred for the projects where the cost efficiency is satisfied.

³ Published in the Official Gazette No. 30541 dated 20 September 2018 (2nd Repeated).

LEGISLATION & REGULATION**6. 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 and its Implementing Regulation; and
- Decree No. 652 on the Establishment and Duties of the Ministry of National Education.

7. 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.

8. 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 and Infrastructure;
- The Privatization Administration;
- General Directorate of State Airports;
- General Directorate of Highways; and
- General Directorate of State Railways.

9. 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 and transportation 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 the end of the year 2017, there are 79 bilateral investment treaties in force to which Turkey is party.

10. 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, without prejudice to any extensions to construction periods that may be necessary due to the relevant public authorities’ variation orders and/or additional works, the long-stop period usually varied from six to twelve 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.

11. 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.

12. 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.

13. 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 or the direct agreements signed between the public authority, the project company and the lenders 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.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) 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.

15. 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.

16. 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 and/or established practice requires the use of Turkish law, such as the healthcare and transportation sectors. In practice, public entities in Turkey generally tend to have Turkish law as the governing law of the project agreements.

17. 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 five years in order to determine the supplier who will provide the services in the most favorable manner. Such period can be extended up to

ten years for the volume-based voluntary medical support services. 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.

18. 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 and transportation 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.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk, etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

The most commonly used finance model in Turkish PPP financing is structured loan, based on the potential income that the relevant project company will generate from the operation of the project. This model requires the sponsors (the shareholders of the project company) to make an equity contribution up to 20% of the total investment amount of the project.

20. 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 only against inflation. In motorway PPP projects, on the other hand, toll fees are protected against both inflation and foreign exchange risks.

21. 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.

22. 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 whereas project companies benefit from a traffic guarantee in transportation PPP projects), (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.

23. 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 as follows: (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.

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

In health PPP projects, 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 health 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.

25. 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 for variations in 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 (in health PPP projects) are limited to 10% of the service payments during the operation period.

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

In health PPP projects, the gains resulting from the refinancing of PPP projects are required to be shared with the relevant public authority. To be more specific, 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.

27. 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.

28. 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 Treasury⁴, 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.

29. 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 case of termination of the PPP project agreements, the authority usually pays sponsors/project company the equity invested in the project; however, in certain cases (such as transportation PPP projects), this is conditional that termination is not attributable to a project company default. In health PPPs, loss of profit of the project company is also

⁴ Published in the Official Gazette No. 28977 dated 19 April 2014.

payable if termination is not caused by a default of the project company.

The termination payments may also be made directly to the lenders if the direct agreement or project agreement so provides.

Upon termination, the authority also pays the lenders the loan and usually the financing costs as explained in Question 28 above.

30. 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.

31. 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. On the other hand, stamp

tax and duty exemptions have also been provided for the transfer of funding obtained from the capital market instruments issued by a special purpose company established abroad, based on the incomes of a PPP project undertaken by the PPP concessionaire in Turkey.

32. 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.

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TURKMENISTAN



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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?

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 was applied in 2018 is planned to be applied in the near future?

N/a.

4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2017?

We are not aware of any PPP projects developed in 2017-2018. 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.

5. Is there an upward, stable, or downward trend in PPP projects?

Due to lack of PPP projects in Turkmenistan in the last years, it is hard to reveal any trends in the industry development.

LEGISLATION & REGULATION

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) recognized in the project agreements?

Not regulated under Turkmen laws.

15. 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.

16. 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.

17. 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.

18. 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.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

The practice of PPP financing is undeveloped in Turkmenistan.

In lack of the relevant practice, we offer to analyze the project finance models used in government supported projects. As a matter of practice such projects are financed under structured loan offered by international and intergovernmental financial institutions. Usually there is no equity contribution requirements for the involved parties.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. 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.

30. 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.

31. Are there tax advantages available to PPP projects?

This matter is not addressed in Turkmen laws.

32. What are the other incentives available to PPP projects?

This matter is not addressed in Turkmen laws.

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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?**

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;
- development and operation of roads, railways, airports, and ports infrastructure;
- machinery-production;
- collection, refining, and distribution of water;
- health care;

- tourism, recreation, culture, and sport;
- irrigation and draining;
- waste treatment, excluding collection and transportation;
- production and distribution of power;
- 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 was applied in 2017–2018 and is planned to be applied in the near future?

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.

In 2018, several laws were amended to establish legal framework for toll roads. The Ministry expects that the amendments made road concessions of the Build-Operate-Transfer type attractive for investors. Two pilot road concession projects are

contemplated. It includes a part of E40 road at the Polish–Ukrainian border, which repeatedly attempted to attract private partners in the past. The other pilot road project is a part of E95 road near Kyiv, which is expected to improve transportation between the Baltic region and the Black Sea.

4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2017–2018?

At the beginning of 2017 the Ministry of Infrastructure of Ukraine reported 186 agreements for joint public-private projects. It became 192 agreements by the middle of 2018. But only 66 of the latter were reported as active. They are concession and joint venture from various sectors:

- collection, cleaning and distribution of water (47.0%);
- production, transportation and supply of heat (12.1%);
- waste treatment (10.6%);
- construction and/or management of roads and infrastructure, as well as airport, railroad, and seaport infrastructure (10.6%);
- real estate management (6.1%);
- power production, distribution, and supply (4.5%);
- minerals research and mining (1.5%);
- health care (1.5%);
- other (6.1%).

There are three pilot PPP projects initiated for sea ports, and two more are expected for road development concession.

The amount of investments is being estimated.

5. Is there an upward, stable, or downward trend in PPP projects?

The trend in PPP projects quantity is slightly upward. The level of attention to PPP projects and expectations demonstrate upward trends while the potential for PPP projects does not decline and the necessity of PPP becomes more recognized.

LEGISLATION & REGULATION

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

The Laws of Ukraine “On Public-Private Partnership”, dated 1 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.

7. Are there any expected changes or reform of the existing legislation?

The Law of Ukraine “On Amendments to Certain Laws of Ukraine on Construction and Operation of Automobile Roads”, dated 27 February 2018, No. 2304-VIII, reintroduced toll roads and generally excluded existing roads from the scope of road concession legislation. The concessionaire determines the toll. The Cabinet of Ministers still determines the maximum toll, but the new law introduces compensation for concessioner in case the revenue is less than planned. The regulation determining the procedure for paying the compensation is expected from the Cabinet of Ministers.

8. 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.

9. 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.

10. 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 fifty 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.

11. 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.

12. 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.

13. 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.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) 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”.

15. 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.

16. 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.

17. 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.

18. 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 construction and architecture authorities may verify information in the developer's application on completion of complex construction.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

The PPP law does not limit PPP financing sources and does not restrict finance models. The PPP projects are usually financed by loans from foreign banks and international financial institutions. Other public-private projects are usually financed by the private partner.

20. 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, is usually acceptable as a stabilization 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.

21. 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.

The road concessionaire is entitled to compensation of up to 15% of the planned revenue if the revenue is less than determined in the agreement.

22. 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. If PPP project targets municipal property, the municipal authorities may decide to provide guarantees. We note that the guarantees are rather uncommon so far.

23. 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.

24. 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.

25. 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.

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

There is no such requirement.

27. 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.

28. 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.

29. 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.

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

The legislation does not provide for material origin incentives or requirements for PPP projects anymore. The Law “On Concessions”

still require the concessionaire to use technology, materials and equipment produced in Ukraine, unless the concession agreement specifies differently. However, the rule lacks mechanism for enforcement and is usually ignored. 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.

31. Are there tax advantages available to PPP projects?

No.

32. 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 easements, as well as buy-out of land from private owners for public needs. The state partner also assists with obtaining necessary licenses and permits. Some incentives which are not specific to PPP may also apply like in case of concession in fuel and energy sector.

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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) are used?**

Yes, PPP models have been commonly used to develop infrastructure. A wide range of types of PPP models have been used, but the most common are variants of Design-Build-Finance-Operate (DBFO)/Design-Build-Finance-Maintain (DBFM) models.

The UK government's standard form approach to PPP (in England) until the recent 2018 Budget was to procure PPP through its Private Finance Initiative (PFI) model (and its later, updated PF2 model). At the 2018 Budget, it was announced that no further projects would be procured using the PF2 model.

The Welsh government has a standard form Mutual Investment Model (MIM) standard form, whilst the Scottish government has also previously procured infrastructure development through its Non Profit Distributing Model (NPD), though (as with PFI/PF2) this model is no longer being used for procurements.

Other forms of PPP, such as regulated asset base (RAB) structures and direct procurement are in use, but this chapter (unless explicitly stated otherwise) focuses on PFI/PF2 as (previously) the key PPP model in the UK.

The UK government has recently (March 2019) released an "Infrastructure Finance Review" consultation (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785546/infrastructure_finance_review_consultation_web_version.pdf) on the future of infrastructure finance in the United Kingdom, and whilst it is clear that the RAB model will continue to be a key model for monopolistic/oligopolistic infrastructure sectors such as water and airports, and that the Contracts for Difference (CfD) subsidy/support scheme will also continue to play a key role in the future development of renewable/low carbon infrastructure, it is not clear what the preferred model will be for other forms of infrastructure (such as social infrastructure). In the context of continuing austerity within government spending and the government's stated projection that around half of an estimated GBP 600 billion of infrastructure spending over the next ten years will need to be privately financed, it is clear that there will be infrastructure requirements that cannot be supported by existing investment models (such as RAB and CfDs), but will still need to be privately financed.

Whilst initiatives such as the UK Guarantees Scheme (UKGS) – whereby the government provides a payment guarantee for nationally significant infrastructure projects where an infrastructure borrower is unable to pay a loan – will continue, there remain questions as to how future infrastructure investment will be de-risked (and “crowded in” to the investment market), including with the EIB being unlikely to have any (significant) role in new infrastructure funding in the UK after any exit from the European Union (generally known as “Brexit”).

The UK government has also set up infrastructure investment funds for supporting specific technological infrastructure sector developments, such as the Digital Infrastructure Investment Fund (broadly for investment in upgrading internet cabling infrastructure) and a Charging Infrastructure Investment Fund (for investment in electric vehicle charging infrastructure). However, whilst these initiatives are to be welcomed, and are perhaps suggestive of a growing trend in the introduction of increased competitive tension (such as auction-based and co-investment models) in the allocation of (limited) government resources – which may suggest the potential direction of any future preferred PPP model, existing initiatives such as the UKGS and these investment funds are relatively small-scale comparative to the value of infrastructure investment required and there is a significant gap that will need to be filled by any new preferred PPP model.

Taxpayer funded infrastructure (as opposed to user charge funded infrastructure) is unlikely to be procured in the UK going forwards unless value for money can be clearly demonstrated.

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

Though not an exhaustive list, the following sectors have used PPP models:

- social infrastructure: including schools, libraries, university accommodation,

prisons, healthcare and hospitals;

- defence infrastructure, including accommodation and equipment;
- transport, including roads;
- water and waste management;
- street lighting; and
- energy, including transmission.

Whilst some forms of water, transport (e.g. airports) and energy infrastructure investment will continue under existing models, a new preferred PPP model (replacing PF2) is likely to be needed to make future infrastructure investment viable in other sectors which have previously applied a PPP model, including hybrid projects such as direct procurement models in the utility sector (for example, CATOs, OFTOs and water infrastructure projects).

3. Is there any new PPP project in the pipeline of the government? Is there any new sector to which the PPP model was applied in 2017 and is planned to be applied in the near future?

The UK government had previously announced that a number of roads (namely the A303 bypass and Lower Thames Crossing through Highways England) and one or more prisons would be procured by PF2, whilst there was also a suggestion of the model’s use for a number of defence estate projects. It is not, as yet, clear whether these projects will be undertaken using public finance, will be suspended/cancelled, or will be privately financed (under a new preferred PPP model).

Whilst there is a large and increasing requirement for infrastructure development in the UK and the UK government has suggested that a significant part of planned infrastructure development will be privately financed (suggested as around half of GBP 600 billion of infrastructure investment to 2028

referenced in the 2018 Budget), it is not yet certain what PPP model will be used to procure such infrastructure.

4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction in 2017?

According to the UK government, as of 31 March 2017 there were 715 “current (PPP) projects” rolled out across the UK. Government statistics attribute an aggregate capital value of GBP 59 billion for all of these projects. These figures can be viewed at: <https://www.gov.uk/government/publications/private-finance-initiative-and-private-finance-2-projects-2017-summary-data>.

Further to the 2018 budget announcement, the UK government will cease to use PF2 for new projects. Those PFI and PF2 projects that are already in existence as of the date of the announcement will continue to run.

5. Is there an upward, stable, or downward trend in PPP projects?

There has been a downward trend in (greenfield/brownfield) PFI/PF2 projects in the UK over the last four to five years, though the market for refinancing of projects is currently very strong (reflecting in part a previous strong secondary market in project equity).

Subject to the general trend referred to above, there are specific sectors, such as offshore wind electricity generation, digital infrastructure and electric vehicle infrastructure which have a strong medium term upward trend. However, the UK government settling on a new preferred model for PPP procurement and providing a pipeline of sufficient scale and certainty will largely dictate the timing of any future upward trend in PPP projects more generally.

LEGISLATION & REGULATION

6. What are the principal laws and regulations? Is there a framework PPP law?

In the UK there is no specific PPP framework law, unlike in many other jurisdictions outlined in this guide. UK PPP projects are promoted under the general legislative powers of government and public bodies. However, the Treasury has issued overarching guidance in relation to PF2 (Standardisation of PF2 Contracts (“**SoPC**”), the latest version being version 4). Whilst the PF2 scheme has now been discontinued for future PPP projects, we anticipate that it is likely that significant parts of this guidance will continue to have relevance to any future model brought forward by the UK government.

There is, however, substantial and important legislation that must be considered in relation to various aspects of PPP projects (depending on the sector and public sector counterparty). For example, the Local Government (Contracts) Act 1997 provides for certification that (certain) contracting with a local government body is within that body’s powers and will be binding on that body, the NHS Act 2006 which (consolidating the relevant provisions of the NHS (Residual Liabilities) Act 1996) in practice requires central government to meet the residual liabilities of “Special Health Authorities” which cease to exist, and the Infrastructure (Financial Assistance) Act 2012 – which is the legislation basis for the UK Guarantee Scheme (see further the text at question 13 below).

By way of further example, the procurement of works, goods and service contracts by public bodies in the UK is governed by the Public Contracts Directive 2014/24/EU, as implemented in UK law in the Public Contracts Regulations 2015. Directives such as the Concessions Contracts Directive 2014/23/EU (implemented by the Concession

Contract Regulations 2016) and Defence and Security Directive 2009/81/EC may also apply in specific circumstances.

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

As mentioned above, the UK government has cancelled future use of the PF2 model and it is anticipated that the government may in due course (there is currently no timetable), and potential after the closure of its current “Infrastructure Finance Review” consultation, bring forward a new preferred PPP model.

8. What are the principal regulatory bodies for PPP? Is there a centralized PPP authority?

There is no single centralised PPP authority, but the following are the principal institutions responsible for the regulation of PPP in the UK:

- (a) European Commission – sets the regulatory framework for public procurement in the EU. Post-Brexit much of the existing framework will remain in UK law but the extent of future application of EU rules is yet to be determined;
- (b) HM Treasury – controls public spending and sets the general direction and policy on PPP;
- (c) Cabinet Office – oversees the standards and efficiency of government functions and procurement and approves procurement structures;
- (d) Infrastructure and Projects Authority (“IPA”) (a joint HM Treasury/Cabinet Office body) – helps translate long-term planning into successful projects. The IPA publishes National Infrastructure Delivery Plans to cover infrastructure policy over a five-year period; and
- (e) National Infrastructure Commission – works with HM Treasury to provide the government with impartial advice relating

to long-term infrastructure decisions (see further www.nic.org.uk/).

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

There are no restrictions on foreign ownership of PPPs (i.e. through ownership of the project company which is contracting with the public body) in itself. However, the project agreement (and likely the senior debt agreements also) will restrict changes of control in the project company (including during a post-construction lock-in period), and not allow for unsuitable third parties (broadly those with substantial interests in tobacco products, alcohol and/or pornography).

Further, as a matter of public policy the government can block acquisitions of interests in a project (including by foreign individuals or corporations) where these may cause a national security concern (which may include, without limitation, large-scale energy generation).

The UK government has recently (July 2018) released a white paper consultation report on national security and foreign investment (see further https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728310/20180723_-_National_security_and_investment_-_final_version_for_printing_1_.pdf), and we generally expect to see an upward trend in the short to medium-term as to investments/acquisitions being subject to such review.

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

Yes, project agreements are likely to contain a long-stop date for completion of construction. This long-stop may also be ‘stepped-down’ into the senior debt and construction sub-contract. Failure to meet any long-stop date in the project agreement is likely to be a termination event (though the long-stop itself

should be subject to relief events available to the project company under the project agreement).

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

The PF2 model, which as of the October 2018 budget ceased to be utilised for new projects, provided for three categories of “Supervening Event”:

- (a) Compensation Events – risk events for which the project company is entitled to receive financial compensation from the public authority should the event materialise and the project company suffer adverse financial effects;
- (b) Relief Events – events for which if the risk occurs the project company is given (time) relief from termination for failure to perform the contract but is not relieved of liability for the financial impact of delays; and
- (c) Force Majeure Events – a limited set of events arising at neither party’s fault. These relieve the affected party from liability for breach of the contractual obligations. The event may relieve the affected party from its (relevant) obligations, but there is likely to be a longstop date from when the unaffected party can terminate the agreement (though provisions should also be included as to how the parties should act to attempt to progress the agreements).

“Force Majeure Event” is specifically defined as the occurrence after the date of the project agreement of:

- (a) war, civil war, armed conflict and terrorism;
- (b) nuclear, chemical or biological contamination unless the source of contamination is the result of the actions of or breach by the Contractor or its sub-contractors; 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 the Contract.

Where a Force Majeure Event takes place, it may be in the parties’ collective interests to negotiate the continuance of the project, for instance by discussing the manner in which it can be reinstated where destroyed or severely damaged. Whether this will be done may turn on the terms of the project agreement and whether investing into the project’s reinstatement is mandatory, given the likely capital intensive nature of pursuing this.

An appropriate way to cover the financial burden of a Force Majeure Event may be for the project company and subsidiary Contractors to take out loss of profit or business interruption insurance in order to provide replacement revenue streams that may support a project’s continuance.

Both parties should retain the capacity to terminate the agreement for a prolonged force majeure, generally in the six-month range. Where this takes place, the project company will be entitled to a termination amount from the public authority calculated on the basis that the force majeure is outside the control of either party meaning the risk of the occurrence should be shared. As a result, compensation for prolonged force majeure does not tend to account for lost profits.

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

The expropriation, sequestration or requisition of a material part of the project, its assets or shares in the project company by the public authority or other Relevant public authority is defined as an “Authority Default”. The private party, i.e. the project company, will gain the

option to terminate the contract and demand damages on a default basis. The public authority will often retain the right to step into the contract in an emergency in order to discharge a statutory duty or in circumstances where a serious risk is posed to the health and safety of persons, property or the environment.

‘General’ changes in law are those changes that are not ‘discriminatory’ or ‘specific’ (i.e. they do not discriminate against a particular project or the project company, or do not specifically discriminate against the type of services being provided by the project company or the holding or shares in companies similar to the project company).

Where not addressed specifically under the terms of the agreement, changes in law are typically dealt with through the reimbursement of costs by the public authority as opposed to the provision of termination rights (except where such change was foreseeable at the point of contracting or where there are general changes of law during the operations period which do not involve capex, for both of which the project company is generally expected to bear such risk).

13. 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?

PF2 guidance highlights that a project economic test (whereby senior lenders would have the option to appropriate insurance proceeds instead of allowing reinstatement if the test showed that reinstatement would not allow the senior lenders to recover their senior debt in full) was not default practice and should only be considered where there is a low risk of total destruction. Preferable mechanisms highlighted for addressing this issue include ensuring that start-up/business interruption insurances are of sufficient value and that there is sufficient budgetary

contingency to deal with this risk, rather than resorting to a reinstatement test.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) recognized in the project agreements?

PFI/PF2 contains the concept of “uninsurability” where insurance that is a Required Insurance is no longer available or not available at premiums that are ‘commercially viable’. If uninsurability occurs then the parties should consider how else the risk can be managed or shared, otherwise liability for the risk reverts to the public authority and the amount of the premium previously paid should be removed from the Unitary Charge.

15. 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 legislation that achieves step-in or substitution, but most (if not all) PFI/PF2 projects provide for contractual step-in for funders through direct agreements where the project company defaults. Generally, the project agreement direct agreement will be structured such that the lender will have an opportunity, provided that it rectifies defaults of project company obligations to the public authority under the project agreement, to step-in and/or substitute the project company before the public authority can terminate the project agreement.

There are also usually direct agreements with the principal sub-contractors (and other material contract parties) to allow the lender to resolve defaults of the project company as against counterparties to principal contracts prior to these counterparties being able to terminate their contracts/suspend performance of their obligations.

Under SoPC, there is also a contractual right for the public authority to step-in in an emergency.

16. 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?

Whilst possible to have international arbitration as a method of dispute resolution (and foreign law as the governing law), we would generally expect that dispute resolution mechanisms would be through the courts, with the governing law being the relevant law (England & Wales, Scotland or Northern Ireland). We are not aware of any other governing law being used in a project in the UK.

17. 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, PFI/PF2 agreements generally contain market testing provisions for 'soft' services (e.g. non-building related services such as cleaning and catering), though one of the amendments made by PF2 was to encourage the removal of soft services from the scope of project agreements. Any replacement model for PF2 is likely to encourage the exclusion of soft services from the scope of projects, and that public authorities procure such services directly.

18. 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 done solely by the public authority?

There is generally an independent technical advisor (often referred to as an independent certifier) who certifies that the facilities have been constructed in accordance with the relevant project document.

It is unlikely that a party or a contractor owing duties to one party only will be appointed to confirm/certify acceptance of facilities, the certifier will instead owe duties to a number of parties including the public authority, funders and project company.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

There is a significant variety of models used to finance projects in the UK. Recent trends mean that the market has increasingly shifted away from long-term loans from traditional commercial banks and towards financing coming from insurance companies, pension funds and other financial institutions (though some commercial banks do remain in the market).

Finance is often provided by these institutions by way of subscription for project bonds, such bonds having fixed pricing and yield protection provisions. There is also a monoline insurer in the UK, such insurance product 'wrapping' the bond and thereby effectively substituting the credit risk of the project company with the credit risk of the insurer, though most public bond projects are not insured in this way.

There is no standard form of equity contributions in PPP contracts, but most projects have equity subscription agreements whereby shareholders agree to subscribe for specified equity (and commonly also for subordinated debt in proportion to their equity holding). The equity subscription agreement will typically set out the amount and timing of such subscription obligations, and whether any

collateral support is required for these obligations.

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

UK PPP does not generally involve the project company taking demand risk (though this may not be the case for toll road projects).

The payment mechanism will be included in the project agreement (usually by way of a schedule) and will be subject to non-performance and non-availability deductions (as applicable). Key principles of such (standard form) payment mechanisms include:

- no monthly payment until project is completed (no service/no fee);
- regular monthly payments if project company meets certain standards; and
- deductions are made against regular monthly payments where there is a failure to meet key performance indicators (KPIs).

There is no legislation that provides for foreign exchange protection, and it is uncommon. However, in the defence sector where equipment is procured overseas, then there may be some sharing of foreign exchange risk to mitigate the risk of inflation to project cash flows.

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

Subject to the following paragraph, under (English) PFI/PF2 there is neither a guaranteed rate of return, nor a cap on the rate of return for the project company/sponsors. Under the (Welsh) MIM and (Scottish) NPD models there is no guaranteed rate of return, but there is a cap on the rate of return.

Where the project agreement is terminated for public authority default/public authority voluntary termination, the compensation may reference the public authority paying a specified IRR to equity sponsors.

In practice, rates of return may be curtailed by benchmarking/market testing provisions in the project agreement, transparent accounting provisions, and/or refinancing gain share mechanisms (noting that recent Eurostat guidance) may impact on how refinancing gains are structured/shared when any new UK model – to replace PF2 – is produced by the government).

There is also a likelihood that any new model of PPP in the UK will seek to address potential ‘windfall’ gains to the project company brought about by changes in law (such as the reduction in corporation tax levels in the UK).

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

No, there is generally no payment guarantee provided by the relevant public authority for PPP projects. However, there are exceptions for large/key infrastructure projects. For example, the Mersey Gateway Bridge PPP project benefited from a UK Guarantees Scheme guarantee, where the principal and interest payments on infrastructure debt are guaranteed by the Treasury.

Further, the Thames Tideway Tunnel project has a government department (the Department for the Environment and Rural Affairs (Defra)) support package in the event of certain low-probability/high impact risks (which cannot, or cannot at an acceptable cost, be risks assumed by the private sector). This package includes (without limitation) insurance risks where cover limit is not considered sufficient/insurances become unavailable, temporary liquidity facilities in the event of

debt market disruption, and contingent government equity for certain cost overruns – such package being structured to reflect the high-risk/complex nature of this particular project.

23. 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 public sector organisations in the UK are relatively complex, and significantly depend on whether the public authority is a central government institution or not.

The State has an inherent common law capacity to enter contracts, as does the relevant Secretary of State on behalf of a central government department. Unless expressly prohibited they also have all powers necessarily incidental to performance of their functions (i.e. financing in the case of the Treasury), and the obligations of the relevant public authority would, in effect, be obligations of the State.

In the case of PFI credits, these are provided by the Treasury/relevant central government department to local government public authorities and such credits are only for the purpose of funding the relevant PPP project. There is no separate guarantee to the concessionaire or the lenders. The ultimate position is the same for other non-central government public authorities in that there is no inherent statutory recourse to the State or guarantee from the Treasury.

Whether this will be an important distinction going forwards depends on whether the new PPP model brought forward in due course by the government concentrates on a model where PPP infrastructure is centrally procured or not. Recently, procurement of PPPs has been increasingly centralised, and we would anticipate that the forthcoming model would concentrate on centrally procured PPP projects.

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

Whilst there is no universal cap on deductions from the service and availability payments for UK PPP projects, and the parties are theoretically free to make deductions up to 100% of the payments (e.g. the full Unitary Charge for a given month), the interaction of deductions with the relevant default limbs providing for termination if certain agreed threshold deduction levels are met or exceeded needs to be considered (including from a bankability perspective).

If deductions are too high, there is likely to be an inability for the project company to meet its obligations (including debt payment and obligations to sub-contractors), so an appropriate commercial arrangement will need to be agreed as to how, when and why deductions are made and what levels of deductions allow the public authority to terminate the project agreement (and the lender to terminate the credit agreement, on a step-down basis), and for the project company to terminate any material sub-contract.

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

No, under PFI/PF2 variations that the public authority may request at the construction and operation stages are not subject to a cap (unless commercially agreed otherwise). The public authority will be liable under the project agreement and/or building contract to cover the cost of changes which are requested. As such, it is unlikely that a cap will be put in place from the project company side, whilst the public authority is unlikely to constrain itself regarding the form and extent of those changes that may be necessary. The public authority will cover these costs either through the payment of a lump sum or the adjustment of the public authority's unitary charge.

When requested during the service period, the variations will typically require a lump sum payment in order to fund any necessary capital expenditure with a change to the unitary charge typically covering any changes in services.

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

Yes. Standard form PF2 contracts included model provisions for the sharing of refinancing gains as required drafting. The public authority will generally have the right to approve any refinancing, and provisions are likely to be included in the contract to allow the public authority to share in any qualifying refinancing gains achieved through refinancing. The public authority may also, in certain circumstances, have the contractual right to call for a refinancing.

Eurostat guidance (http://www.eib.org/attachments/thematic/epec_eurostat_statistical_guide_en.pdf) has suggested that any public sector refinancing gain share is likely to be significant in determining whether a PPP project is determined to be on the public sector's balance sheet. Such guidance also states that where the public sector share of a refinancing gain was more than one third, this will automatically lead to on balance sheet classification.

27. 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. Lenders (usually via a facility agent or a security agent) typically enter into a direct agreement whereby, usually subject to the remediation of outstanding defaults (including payment obligations), or an agreement to do so within a specified time period, there is an ability for the lenders (or their nominee) to step-into a project and/or novate the project documents to a substitute project company (subject to certain

consents). During any step-in, the party stepping in has joint and several liability for obligations to the contractual counterparty.

The lenders will also typically have direct agreements with material sub-contractors/key contract counterparties which prevent such sub-contractors/counterparties terminating the relevant contracts.

28. 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 contemplated in PFI/PF2, MIM or NPD, and we do not anticipate such a mechanism in any further UK preferred model.

Where the public authority has to pay a compensation amount which covers debt costs, the public authority may have a right whereby it can elect (at its choice) to pay any debt amount in instalments (potentially aiding the authority's affordability considerations, but also potentially creating value for money issues from interest that would continue to accrue).

29. 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 for early termination by the public authority will depend upon the contractual terms of the project agreement, with English law granting parties substantial freedom to decide these matters for themselves.

The PF2 guidance envisages the following termination scenarios:

- Voluntary Authority Termination;
- Authority Default;
- Force Majeure;
- Corrupt Gifts and Fraud;
- Breach of the Refinancing Provisions.

The model provisions in the PF2 guidance state that the objective of compensation in the event of termination for authority default is to ensure that the project company and its financiers are fully compensated (i.e. no worse off than if the project agreement had proceeded as expected). Authority voluntary termination would usually be compensated as if it was an Authority default.

For situations of project company default, a 'market value' approach will be adopted as to what the residual value of the asset(s) being transferred is (whether value by the retendering or no retendering procedure). This approach may encourage lender step-in if the senior debt will not be made whole by any compensation on termination, whilst also preventing the transfer of asset(s) being determined to be an (unenforceable) penalty.

Where there is termination for force majeure, the compensation provisions should reflect that inherently the force majeure is neither party's fault and any 'pain' should be shared (i.e. the project company should not get full debt and equity 'make whole' payments).

Where there is termination for corrupt gifts and/or fraud, to gain a termination right, the Authority will (broadly) pay out outstanding senior debt principal and interest (and hedging break costs), less any claims/credit balances the project company has. This level of compensation will be the same for breach of the refinancing provisions.

We would anticipate that any new UK PPP model would take a broadly similar approach to compensation on termination.

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

There are no specific incentives for the domestic manufacturing of equipment or material used in construction of PPP projects, but the use of equipment/materials imported from the EU may carry a tax advantage (with no import taxes applying to equipment and materials imported from the EU), depending on the duty arrangements with alternative locations to import equipment/materials from. Whilst the UK has voted to leave the EU, it appears likely (at the time of writing in December 2018) that the trade arrangements for importing/exporting equipment and materials between the UK and EU will remain broadly the same/similar into the medium term.

In terms of other advantages for domestic manufacturing of equipment/materials, whilst transportation costs may be inherently lower, the government is likely to be inclined to support projects that manufacture in the UK and provide employment opportunities, including to its 'Midlands Engine' and 'Northern Powerhouse' initiatives (subject to such support being within State Aid rules (whether EU or WTO rules) – which are highly likely to continue to apply notwithstanding Brexit).

31. Are there tax advantages available to PPP projects?

There are no tax reliefs/benefits available to a project in the UK specifically and solely as a result of that project being procured using a PPP model.

32. What are the other incentives available to PPP projects?

There are no other incentives available to a project in the UK specifically and solely as a result of that project being procured using a PPP model.

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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 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.

By the end of 2018, PPP bids have been called for several projects in different areas including: prisons (1 project), roadways (7 projects), railways (2 projects) and early childhood and other educational centres (4 projects). Most of these have been awarded and are under construction.

Regarding the projects in progress, it is worth highlighting the one called "Central Railway" involving the construction, rehabilitation and maintenance of 273 kilometres of railways under an eighteen year PPP agreement awarded by the Ministry of Transport and Public Works of Uruguay. The total project costs amount to approximately USD 1 billion and it is the biggest contract awarded in recent years by the Uruguayan Government.

- 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 was applied in 2017 and 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 still at their initial stages of preparation, specifically in the public initiative stage (the first stage in the PPP process).

It is noteworthy that the first private initiative for a PPP project was tendered by the Government during 2018, in this case a roadway project.

4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2017?

In the 2014-2015 period, the Government invested USD 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 included: (i) a group of seven projects for the rehabilitation of national roadways, with an estimated investment of USD 800 million, all of which have been tendered by the end of 2018; (ii) investment in the railway sector through two PPP projects with an investment of approximately USD 1.1 billion; (iii) a package of projects for early childhood centres and other educational centres, with an estimated investment of USD 300 million, which were launched in 2017 and 2018; and (iv) housing infrastructure, which is at a very initial stage of preparation, with an investment of approximately USD 35 million.

In July 2018, the Executive Branch presented its Rendering of Accounts for the aforementioned five-year infrastructure budget plan with an analysis of the progress made in 2017. In summary, the Rendering of Accounts document states that during 2017 the execution of investments foreseen in the 2015-2019 National Infrastructure Investment Plan reached USD 2,134 million. Thus, in the 2015-2017 three-year period infrastructure investments totaled USD 6,934 million, which means 56% progress on the 5-year plan foreseen, for USD 12,370 million. At the sector level, investments in telecommunications infrastructure progressed most, followed by port investments, and the energy sector. On the other hand, investments in railway, social, water and sewage, and roadway infrastructure had moved forward more slowly at the end of 2017.

5. Is there an upward, stable, or downward trend in PPP projects?

The launching of PPP projects by the Public Administration has grown in recent years, highlighting the launch of the Central Railway PPP project in December 2017.

2019 is expected to be a year of important realization, progress and completion of several of the initiatives launched in recent years. The pipeline of PPP projects for the next presidential term (years 2020-2024) is still not clear but it is likely that PPP contracts will continue to play an important role.

LEGISLATION & REGULATION

6. 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.

Regulatory Decree No. 313/017, approved in November 2017, establishes certain mechanisms for making the PPP contracting procedure faster at the final award stage.

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.
- Decree No. 35/018, issued in February 2018, establishes a beneficial tax regime for transfer of shares of special purpose vehicles established in compliance with the PPP regime, and is applicable provided –among other assumptions– that the final beneficiaries of the alienating entity and the acquiring entity are the same. The share transfer must take place within one year from the date of signature of the PPP contract and has to be approved in advance by the Public Administration.
- Recommended Best Practices Guides prepared by the National Development Corporation, for entities participating in PPP contract formalization processes. These Guides recently included: a) methodology for estimating contingent liabilities for PPP projects at December 2017; and b) methodological guide for determining money value at August 2018.
- 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.

7. 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.

8. 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. The 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.

9. 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.

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

Yes. Typically, the construction phase of the projects must be completed within the first three years following the execution of the PPP contract.

Furthermore, the PPP rules set a maximum time limit of thirty-five years for PPP agreements, including extensions.

Most PPP projects tendered in Uruguay have established contracting terms ranging between eighteen and twenty-five years (including the initial construction phase).

11. 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 29 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.

12. 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.
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 specific authorizations and permits, with greater flexibility for the contractor.

Likewise, in 2017 and 2018 other changes were introduced in relation to the transfer of risks due to labor conflicts with broader flexibility for the contractor. For example, in relation to labor conflict risks, for these projects it was established that the Public Administration would assume the risks deriving from time overruns due to general or sector-specific work stoppages or strikes called by Uruguay's federation of trade unions PIT-CNT or by the branch's union, provided that same are not exclusively against the particular work, the contractor or subcontractors, with the time overrun ranging from ten to thirty days in one year, depending on the PPP project in question.

13. 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 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.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) 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 to 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 PPP projects have provided that the contractor must obtain, prior to the commencement of contract performance and during the term of effectiveness of the contract, all-risk insurance for an amount similar to that of the contract. Likewise, some PPP projects have stated that this insurance must continue for up to approximately four years following termination of the PPP contract. Policies must be approved by the contracting Public Administration.

15. 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.

16. 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 the 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.

17. 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.

18. 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 most 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.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

All PPP projects have established minimum equity contribution obligations for sponsors. These obligations include setting the corporate capital of the special purpose vehicle that will be the PPP contract holder as the equivalent to 10%-15% (depending on the project) of the investment estimated by the sponsor in its economic offer. Typically, 25% of such corporate capital must be paid in before final award of the PPP contract, and the remaining 75% must be subscribed. PPP projects have established the possibility in certain circumstances for sponsors to withdraw the paid-in capital, but a percentage must be maintained until termination of the PPP contract, which in general has been set at 10%.

Regarding the debt side, most projects have resorted to a long-term project finance with multilateral agencies or investment trusts funded by local pension funds. Multilaterals may involve funds of international commercial banks but the participation of these has been marginal so far.

In the context of long term project finance loans, sponsors have been required to cover equity in the amount of 20% or more of the total project cost plus typical cost overruns and other contingencies.

20. 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 all tendered projects so far, the revenue for the contractors has been defined solely by availability payments from the contracting Public Administration, without other income such as tolls.

In the first few PPP bids the participants were expected to quote –and collect their revenue– in Uruguayan legal currency at the quotation of the Indexed Unit (“UI”) on the payment date. The UI is a unit of value that is readjusted

based on Uruguayan inflation, measured by the Consumer Price Index (“IPC”), and 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.

Notwithstanding the above, PPP projects tendered in recent years accept part of the quote to be made in foreign currency (such as US Dollars or Euros). In these cases, the payments to the contractors is then made respecting the quoted currencies.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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%.

26. 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.

27. 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.

28. 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.

29. 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.

30. 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 1 July 2015.

Since the date of approval of the decree PPP projects have included this incentive.

31. 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.

Furthermore, Decree No. 35/018, issued in February 2018, establishes a beneficial tax regime for transfers of shares of special purpose vehicles organized in compliance with the PPP system, which is applicable provided that –among other assumptions- the final beneficiaries of the alienating entity and the acquiring entity are the same. The share transfer must take place within one year from signature of the PPP contract and must be approved in advance by the Public Administration.

32. What are the other incentives available to PPP projects?

No additional incentives are available beyond those indicated in Questions 30 and 31 above.

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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 Uzbekistan the PPP model is not yet commonly used to develop infrastructure projects. The Uzbekistan government is taking the first steps to implement the PPP model in the country by launching pilot projects as described below.

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

Currently: Energy, transportation 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 was applied in 2018 and is planned to be applied in the near future?

In 2018, 2 PPP projects were launched in Uzbekistan: (i) a project on construction of 200MW solar photovoltaic plant in Samarkand

region and (ii) a project on modernization of water supply and sewage system.

4. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2018?

The PPP projects launched in 2018 are focusing on two areas – alternative energy and modernization of utilization system. The investment amount of the project remains unknown. It was officially published however that the capital cost of the project on modernization of water supply and sewage system is USD 450 million.

5. Is there an upward, stable, or downward trend in PPP projects?

The recently proposed PPP project initiatives are concentrated mainly in energy and infrastructure projects.

LEGISLATION & REGULATION

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

The framework PPP law was recently adopted in Uzbekistan. The Law “On public-private partnership” was approved by the President of

Uzbekistan on 10 May 2019 and entered into force on 12 June 2019.

The law defines the general regulation applicable to PPP projects, provides definition for its key actors (public partner and private partner). A public-private partnership is defined as a “legally arranged cooperation of public partner and private partner for a definite period based on pooling their resources for implementation of a public-private partnership project”.

7. Are there any expected changes or reform of the existing legislation?

Although there are no public statements on this matter, it is expected that certain legislative acts in fields of state budgeting, civil law, regulations on limited liability companies and joint stock companies, and tax code will be amended and revised to comply with provisions of the Law “On public-private partnership”. In addition, Uzbek government will need to issue at least 20 sub-legislative acts that will implement the working mechanism of the Law “On public-private partnership” and it is expected to occur during 2020.

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

The Law “On public-private partnership” defines the Agency on Development of Public-Private Partnership in Uzbekistan (the PPP Agency) under the Ministry of Finance, as a main state authority responsible for implementation of the PPP projects. Responsibilities of the PPP Agency include preparation of PPP guidelines and a model PPP contract, approval of tender documentation, and the monitoring of the implementation of PPP projects. The PPP Agency also shall maintain a publicly available list of all announced PPP projects.

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

The new law provides for no specific restrictions for foreign investors to develop/operate PPP projects.

10. 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.

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

Since PPP law does not include definition of “force majeure events”, 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. Similarly, what events to include into force majeure and what are the consequences of force majeure occurrences are subject to negotiation between the parties within the PPP projects.

12. 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 “On private-public partnership” introduces the provision on stability of the legislation for ten years from the date of the PPP agreement is stipulated. Private partner

has a right to apply regulatory provisions that improve PPP project investment conditions or not to apply them.

Since the Law “On private-public partnership” does not provide for regulation on political risks, 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 PPP agreement, violation of or annulment or revocation of Governmental and Presidential Decrees issued with respect to the specific PPP project (if any).

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.

13. 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.

14. Is the concept of “uninsurability” (unavailability of the relevant insurance coverage) recognized in the project agreements?

Not regulated under Uzbek laws.

15. 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 regulated under the Law “On private-public partnership”. 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.

16. 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.

17. 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?

Not regulated under the Law “On private-public partnership”. Uzbek laws of general application envisage a testing procedure to procurement services to be provided by the state company.

18. 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.

FINANCING & INCENTIVES

19. What types of project finance models (such as structured loan, syndicated loan, project bonds, sukuk etc.) are commonly used in the most recent PPP projects developed in your jurisdiction? Are there any equity contribution obligations set out for the sponsors?

The practice of PPP financing is yet to be developed in Uzbekistan.

In lack of the relevant practice, we offer to analyze the project finance models used in government supported projects. As a matter of practice such projects are financed under structured loan offered by international and intergovernmental financial institutions. Usually there is no equity contribution requirements for the involved parties.

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

The Law “On private – public partnership” defines that the public and private partners are entitled to define the payment mechanism in the PPP agreement. It defines two major sources of payments: user based payments and availability payments.

Matters related to inflation and/or foreign exchange protection are not regulated under Uzbek laws.

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

Not regulated under Uzbek laws.

- 22. 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.)?**

Pursuant to the Law “On private – public partnership”, the private partner is entitled to receive the usage cost and availability payment. The terms and mechanism for such payment shall be defined in the PPP agreement.

- 23. 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?**

This matter is not regulated under Uzbek laws.

Pursuant to the Law “On private – public partnership”, the functions of the PPP Agency do not qualify as state obligations.

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

This matter is not regulated under Uzbek laws.

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

This matter is not regulated under Uzbek laws.

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

The Law “On private – public partnership” provides for no such requirement.

- 27. 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 functions of the PPP Agency do not include entering into direct agreement with

lenders for financing of PPP projects. Participants of PPP projects are expected to enter into direct agreements with the relevant financial institutions.

- 28. 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. Such matters shall be regulated by PPP agreement between public and private partners.

- 29. 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. Such matters shall be regulated by PPP agreement between public and private partners.

- 30. 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.

31. Are there tax advantages available to PPP projects?

There are no tax advantages available to PPP projects. However, each project shall be evaluated separately and if tax exemptions are required by the project's feasibility, these may be sought after in a form of presidential resolution. This, however, is addressed on case by case basis.

32. What are the other incentives available to PPP projects?

There are no incentives specified by Uzbek law available for PPP projects.

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