THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

SEVENTH EDITION

Editors
Patrick Mitchell and Matthew Job

THE LAWREVIEWS

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PREFACE

We are very pleased to present the seventh edition of *The Public-Private Partnership Law Review*. Since the publication of the previous edition, there have been considerable developments in the design and use of public-private partnerships (PPPs) throughout the world, and the purpose of this volume is chiefly to report on those.

PPPs have been under examination in a number of jurisdictions, particularly in countries that have long-established and relatively mature relationships with PPPs. Questions have been asked over the past few years about significant issues including value for money, flexibility and, not least, the validity of the fundamental element of partnership within that model. In addition, attention has been given in many places to the most appropriate contractual model for PPPs and industry consultations have been undertaken as to the extent to which those models remain best suited for the purpose.

Of course, one topic dominated the news agenda during 2020 (and continues to do so during 2021), namely the covid-19 pandemic. The pandemic had significant and immediate effects on PPPs throughout the world and will continue to have an effect in terms of the use – or otherwise – of PPPs as affected countries seek to recalibrate their economies and transition from crisis mode to economic recovery.

Covid had an immediate impact on many construction phase projects, affecting availability of labour and materials. The issues were chiefly caused by social distancing on construction sites and facilities for the production of materials, the closure of hotels and other workers' accommodation, and the closure or curtailment of public transport to bring workers to site. Such factors inevitably resulted in additional time and costs. Throughout the world, there have been mixed responses by the public sector. Some jurisdictions provided for enhanced definitions of force majeure to provide additional relief to contractors. This was seen, for instance in certain states in the US, the Czech Republic and the UK (in Wales). In addition, France provided additional subsidies, relief remedies and state guarantees. Taiwan specifically provided for temporary relief from obligations to make land payments under PPP contracts. The Infrastructure and Projects Authority in the UK issued guidance providing that the provision of services under PPPs was to be viewed as the provision of essential public services, thereby giving contractors some protection in continuing their activities through lockdown and asking their employees to continue to come to work.

In a number of jurisdictions, the consequences of covid-19 were particularly pronounced. For instance, in Argentina, financing difficulties caused by the pandemic led to the cancellation of a number of PPP projects, with the suggestion that non-PPP models will be used more in the future. Mexico, likewise, saw a number of PPPs cancelled because of the financial impact of covid.

As regards operational PPPs, clearly the most severely affected by the covid-19 pandemic were those in the transport sector, in particular aviation and passenger rail. Projects with usage or demand risk, such as toll roads or some user-pay public transport infrastructure, have seen revenues fall materially as a result of reduced public use. In many cases the popular view is that this is unlikely to continue beyond the period of the pandemic as travel restrictions lift; however in other cases the impact on usage (and so on revenue) is likely to be longer lasting. In countries like the United Kingdom, which has a well-established record of PPPs and collaboration in passenger rail, the future structure of the passenger rail industry is uncertain, so badly has it been impacted by covid. At the time of writing, publication of the Williams Report on the future of the GB passenger rail industry is awaited. It is anticipated that the Williams Report will recommend wide-ranging reform. The long-term prospects for regional airports and some airlines are similarly uncertain.

Generally, however, PPPs have appeared resilient, indeed robust, throughout the pandemic. There seems to have been sufficient goodwill and pragmatism on all sides to enable the public sector and the private sector to continue fulfilling their obligations.

That is one of the more gratifying notes from 2020.

As you will see from the following chapters of this book, many governments intend to use PPPs to drive their economies out of the economic crisis caused by the covid-19 pandemic. Many governments see infrastructure as an absolute cornerstone of recovery and, at a time when public finances are stretched, PPP offers a way to stimulate the economy in the short term while deferring the cost of new infrastructure to its operating phase.

Turning from covid to more 'business as usual' developments, we have seen continued and, indeed, increased use of PPPs in many jurisdictions. Active jurisdictions since the previous edition include France, Australia, Norway, Slovakia, the Czech Republic, certain states of the US, Thailand and Pakistan. Poland appeared to have turned its back on PPP for major road procurements during 2020, but there are recent reports that PPP is now back under consideration. We have also seen the expansion of PPPs out of what might be called classical or core infrastructure into new sectors and sub-sectors; of particular note is the increased use of PPPs in areas such as district heating, broadband, cable and fibre communications, renewables, water and, more recently, electric vehicle charging. This diversification of PPP has brought with it new revenue models and technologies, with a consequent evolution of the traditional PPP risk profile. We anticipate that this is a trend that will continue and, indeed, grow apace in coming years.

We have also seen certain oil-rich states using PPPs not just to enhance investment in infrastructure but also to diversify their economies. Subject to the prevailing oil price, we again anticipate that this is a trend that will continue.

A further significant development in 2020 was the increasing introduction of foreign direct investment (FDI) regimes. These FDI measures typically give a government body the ability to intervene in and, ultimately, block acquisitions of interests in critical infrastructure. Such intervention is typically exercised on the grounds of national security or some other national interest test. We have seen measures introduced in the past year or so, partly in response to covid (to protect nationally critical infrastructure at a time when countries were particularly vulnerable and also when the relevant assets could be viewed as being particularly 'cheap' to acquire) but also, in the longer term, on the basis of geopolitical considerations. Such measures have existed for some time in a number of jurisdictions, including Australia (which strengthened its own tests during 2020), but have now been or are being introduced in the United Kingdom and also at a pan-European Union level.

As we note above, the use of PPPs and their relative structures were under review in a number of jurisdictions before the covid-19 crisis commenced. For instance, the UK government had previously indicated its intention to cease using PFI and PF2. That was confirmed formally with the publication of the National Infrastructure Investment Strategy in November 2020. The government has not committed to a specific replacement for PFI and PF2, but it is important to note that, while PFI and PF2 have been consigned to history, there is no suggestion that PPPs in their wider sense will not continue to be used significantly. Indeed, the government has noted the possible use of the Regulatory Asset Base model (the model used to provide for an appropriate return on capital to investors in regulated utilities and currently being used for the first time in a major greenfield project on the Tideway Super Sewer) in other projects, including civil nuclear. In addition, the Contract for Difference model is likely to see application outside its traditional sector of renewable power generation.

A number of jurisdictions have continued to promote and encourage the use of unsolicited proposals, where the private sector is encouraged to design and come forward with schemes for new infrastructure. Such proposals have been used extensively in Australia and, increasingly, in some of the states in the US. During 2020, the Italian government brought forward new regulations to provide for institutional investors to develop unsolicited proposals. Likewise, Pakistan is developing a new law to accommodate unsolicited proposals. Unsolicited proposals are also seen in emerging market jurisdictions, where there is a high demand for new infrastructure and governments may not have the bandwidth to prepare extensive pipelines of PPP tenders.

Various jurisdictions, including Italy and South Africa, have taken measures either to develop further model form PPP contracts (in Italy, effectively by a DBOT concession) or to create more unified, single PPP frameworks (in the case of South Africa). Other jurisdictions that have subjected their PPP regimes to detailed examination include the Netherlands, where a study was undertaken into the efficacy and value for money of the DBFM model, concluding that it has proved efficient where it has been used.

As legal practitioners with more than 50 years' combined experience working with PPPs, we continue to believe that PPPs are and, where used appropriately, will remain, an important tool for creating the most financially advantageous development, financing, operation and maintenance of infrastructure assets.

The use of the PPP model, in addition to financial benefits, imports additional scrutiny, rigor and arm's-length contracting practice, which ultimately benefit both the public and private sector and, most importantly, the consumer and taxpayer.

In this, the seventh edition of *The Public-Private Partnership Law Review*, our contributors are drawn from the most renowned firms working in the PPP field in their jurisdictions.

We hope that you will enjoy and find useful this seventh edition of *The Public-Private Partnership Law Review*. We look forward to hearing any thoughts or comments that you may have on this edition and any thoughts for the content of future editions.

Patrick Mitchell and Matthew Job
Herbert Smith Freehills LLP
London
March 2021

Chapter 16

SPAIN

Manuel Vélez Fraga and Ana María Sabiote Ortiz[1]

I OVERVIEW

PPP projects are an opportunity to foster investment in public infrastructures as the financing is mainly assumed by the sponsor and the public expense is prorated along the project life. In short, PPP can help the authorities overcome short-term budget constraints by making the most of the PPP advantages available, such as whole-life cost management and payment tied to service delivery, not asset provision.

There is a general conviction that infrastructure development contributes towards economic growth, and privately financed PPPs could be an option to deliver key infrastructure as they limit short-term pressure on both debt and deficit.

According to a report by A T Kearney regarding priority areas for sustainable investment in infrastructures in Spain, the country is in a good position with regard to certain infrastructures (namely high-capacity roads, high-speed railways, airports and ports), but it has deficiencies in the maintenance of current infrastructures, the transport of goods, accessibility and urban mobility, as well as secondary nets. In its analysis, A T Kearney recommends investment in eight priority areas: water; energy; social care; transport; environment; IT; urbanism (smart cities, mobility and urban integration); and infrastructure maintenance. PPP schemes are a way of obtaining that investment in view of limited public funds. In February 2020, the European Commission urged Spain to comply with the requirements of the European legislation on the treatment of urban wastewater, which confirms that water infrastructure in Spain is still insufficient.

PPP projects continue to be an opportunity to foster investment in public infrastructures, especially after the covid-19 pandemic.

II THE YEAR IN REVIEW

Royal decree 463/2020, dated 14 March 2020, declared the first state of emergency to address the covid-19 health crisis in Spain. On its basis, a lockdown was approved and the hardest measures were adopted to deal with the infection. Currently, Spain is under a second state of emergency that shall be in force until 9 May 2021 (Royal Decree 926/2020, dated 25 October 2020, and subsequent extensions).

The covid-19 pandemic has considerably affected Spain and the Spanish economy. Its impact has been seen in public contracts, including PPPs, as in almost every other economic area. The government has enacted some regulations to deal with that impact on existing public

1 Manuel Vélez Fraga is a partner and Ana María Sabiote Ortiz is an associate at Uría Menéndez.

contracts. Some measures were specifically addressed to PPP projects in order to provide some kind of compensation to certain PPP contractors affected by the pandemic and activity limits (road transport, for instance). Article 34 of Royal Decree-Law 8/2020 of 17 March on urgent and extraordinary measures to address the economic and social impact of covid-19 approved 'measures to ease the consequences of COVID-19 in public procurement matters'. Paragraph 4 of Article 34 regulates a rebalancing in existing PPP contracts, such as works and service concessions, provided the contracting body deems that contract performance is totally or partially impossible as a result of the pandemic. This provision is applicable only to effects arising from the pandemic. For other events, general regulations on rebalancing as foreseen in the contracts at stake apply. Royal Decree-Law 26/2020, dated 7 July 2020, on economy reactivation measures to address the impact of covid-19 includes the developing of the provisions of Article 34.4 of Royal Decree-Law 8/2020 on the extension of rebalancing.

In a nutshell, during 2020, in addition to measures to deal with covid-19's impact on existing public contracts, the number of new typical public contracts fell, and public procurement procedures were suspended during the first state of alarm (14 March to 21 June 2020). Emergency public contracts to deal with sanitary needs took place all throughout 2020 instead of ordinary public contracts to address general needs.

Despite the above, the outlook for 2021 appears encouraging for PPP. Public-private cooperation is foreseen as one of the most effective ways to foster the economy and to achieve environmental and digital objectives in Spain. The Spanish Parliament has enacted some amendments to the public sector contract law to ease the procurement rules. Most importantly, the government has approved Royal Decree-Law 36/2020 of 30 December 2020, establishing urgent measures to modernise the public administration and implement the government's recovery, transformation and resilience plan (RDL 36/2020).

RDL 36/2020 sets out the rules to distribute and manage projects that shall benefit from NextGenerationEU (a €750 billion temporary recovery instrument to help repair the immediate economic and social damage brought about by the coronavirus pandemic); namely, from the European Recovery and Resilience Facility (the centrepiece of NextGenerationEU with €672.5 billion in loans and grants available to support reforms and investments undertaken by European Union Member States).

Spain shall receive €140 billion to implement its national recovery and resilience plan from 2021 until 2026. The national plan is currently under preparation before being sent to the European Commission for approval. The plan must specify the kind of projects to benefit from the funds, with a focus on the digital and environmental transformation of the economy together with territorial, economic and social cohesion. Government ministries are currently gathering private initiatives that may serve as market surveys of the projects that may benefit from the funds. The main objective of the whole initiative is to boost private investment and strengthen the economy quickly.

PPP shall be a centrepiece of the national recovery and resilience plan and, in general, of public policy for the next few years. RDL 36/2020 has created a new mechanism for public-private cooperation called PERTE (Strategic Projects for the Economy Recovery and Transformation). The government shall approve these projects under certain flexible conditions set up in RDL 36/2020 provided they are projects with innovate components and are relevant enough to create employment, improve competence and boost the market. RDL 36/2020 includes some management and procedural rules for entering into public

contracts funded by the resilience facilities, and it foresees the incorporation of consortia and companies participated by both public and private parties. Works and service concessions may be directly awarded to public-private companies.

The wording of RDL 36/2020 proves PPP is conceived as a key instrument for the recovery. The main part of the funds must be implemented before 2023. Therefore, it is reasonable to expect a wide range of investment opportunities through PPP in the short term.

III GENERAL FRAMEWORK

i Types of public-private partnership

In the Spanish market, PPP is not a legal concept strictly speaking, but a type of public policy or management method that entails collaboration between a public entity and a private partner. This collaboration aims to implement, finance and manage public infrastructures in broad terms, including facilities, services and utilities. This clarification serves to avoid misidentifying PPP in general, with a specific and single contract form under the Spanish Public Procurement Law.

Under the Spanish Public Procurement Law in force until 9 March 2018,[2] there were three main types of PPP contracts: public works concession contracts; public service management contracts; and partnership agreements between the public and the private sector. The Spanish Public Procurement Law (Law 9/2017) in force since March 2018 changed this classification. Despite that, many PPP types of contract that were executed under the former legislation are still in force. Therefore, categories under the previous and current legislation must be considered.

Public works concession contracts

Traditionally, public works concession contracts are conceived under Spanish law as a contract under which the concessionaire develops a public works project and is remunerated for it through the right to operate the project (by collecting a fee or toll from users), at its own risk, during the term of the concession.

This type of contract keeps its main characteristics under the new Law on public sector contracts and is the most commonly used in practice for new categories of projects such as:

a projects that require the involvement of the private contractor in defining the project;

b projects in which the contractor does not manage the public infrastructure or facility directly for private individuals, but for the public entity, which uses the infrastructure as a physical base for the provision of public services to citizens, which are provided by the public authority itself (using its own resources); and

c projects in which the contractor is not remunerated directly by users, but by the public entity (either based on the number of users using the infrastructure (payment for demand) or on the conditions under which it is made available to the public authority (payment for availability)).

2 Namely, Royal Legislative Decree 3/2011 of 14 November approving the Consolidated Public Sector Contracts Law.

This broad concept of public works concession is firmly accepted under Spanish law. Currently, public works concession contracts can be executed for the following reasons according to Spanish law:

a the concessionaire may also be in charge of preparing the relevant project on the basis of the preliminary plan or study approved by the contracting government department;

b the purpose of the public works concession contract includes not only the construction of new infrastructure, but also the renovation and repair of existing constructions, as well as the preservation and maintenance of the constructed elements. This broadens the potential use of this contract, which can now cover not only new infrastructures but also the operation of existing ones that require a significant investment with regard to renovation or maintenance; and

c they also include agreements under which the concessionaire uses the public infrastructure to make it available to the public entity (or to an indirect operator) so that it can use it to provide a public service. In this case, use consists of operating the infrastructure. The operation must be undertaken in accordance with its particular nature and purpose. Since the concession involves a public infrastructure, its nature determines that it must be established as an instrumental support to perform different activities and services of public interest, or for general use or enjoyment, in exchange for remuneration fixed through one of the mechanisms provided by law.

Public service management contracts

The public service management contract is an agreement under which the public entity entrusts a third party to manage a public service on its behalf.

The new Law on public sector contracts envisages important changes to the public service management contract, mainly to define the public concession as the contract where a service is provided to the contracting body or the citizens at the concessionaire's risk. Therefore, a concession contract exists even if the concessionaire does not render a service to the citizens but directly to the contracting body, provided the concessionaire assumes the risks arising from the contract.

Despite the changes in the Law currently in force, standard public service management contracts are still classified as follows mainly in the case of local entities:

a Public service management concession. A contract under which the public authority – responsible for a public service – awards the management of such service to a private entity to operate it at its own risk. The private entity may be paid by the users, the public entity or both.

b Special agreement. This is another subcategory of the public service management contract. It is characterised by the fact that the public entity awards the management of the service to an individual or legal entity that already provides similar services to the relevant public service. It is common in the education and health sectors.

c Public service management by a semi-public company. The semi-public company is a type of institutionalised PPP under which a company is incorporated through a contract between private and public capital, to then become a public contractor with the characteristic rights and obligations of a concessionaire. Semi-public companies have a long tradition under Spanish law in managing local public services.

d There is also a fourth subcategory of public service management contract under the Spanish Public Procurement Law: stakeholder management, under which the public entity and the company share the operating profits of the service in the proportion agreed in the contract.

These categories have been widely modified under the new Law, and only the service concession type of contract remains as a PPP scheme for public services. The special agreement, public service management by a semi-public company and stakeholder management disappear as general schemes (although the semi-public company can still be used by local entities under certain circumstances, and special agreements are still feasible under sectoral regulations). The service concession differentiates from the simple service contract in the risk assumed by the contractor. Whenever there is a transfer of the operation risk to the contractor, the Law considers it as a concession agreement. Regarding the contract, if there is not a transfer of risk, the contract will be considered a service agreement, not a concession one.

Other types of partnership agreements between the public and the private sector

As mentioned in Section II, RDL 36/2020, established to foster the economy after the covid-19 pandemic, created the PERTE as a project with participation from both public and private parties, funded by public bodies, or even executed by public-private companies or consortia, which give place to a wide bunch of public-private structures.

ii The authorities

Spain is a regional state, which means it is a decentralised state formed of 17 regions with their own regional authorities. In addition to the national and regional governments, the Spanish Constitution gives local authorities some administrative authority.

Therefore, Spanish authorities are mainly arranged at three institutional levels: the national government and its corresponding public entities, regional governments and their corresponding public entities, and local governments and their corresponding public entities.

The three levels have different but concurrent and coordinated powers. Each authority level can exercise these powers through PPP projects. For instance, the national government has authority over transport and can exercise its powers through PPP on transport infrastructures. Regional governments have authority over health and social care and may develop hospital infrastructures through PPP. Local governments have authority over local services such as water and waste collection, and may implement these services through PPP projects.

Any department of public authority on one of these three levels may enter into PPP contracts in their specific field. For instance, the Environment Department may call a procedure for the construction of water infrastructures under a PPP project. However, at the national level, there are two main ministries involved in PPP projects: the Ministry of Infrastructure, as it has authority over all transport involving public works; and the Ministry of Finance and Public Administration, which administers the state budget and expenses – an important role because of public debt restrictions – and analyses the impact of PPP projects on public accounting.

There is currently no specific authority in charge of PPP projects in Spain. The last regulations on public contracts have incorporated the Independent Office for Regulating

and Supervising Procurement and the National Evaluation Office. Both new public offices address the issue of improving the quality of the investments made by public authorities, and best practices in public contracts.

The National Evaluation Office assesses the feasibility of public projects under public contracts, taking into account the rules governing budgetary balance. The National Evaluation Office may also assist regional and local governments.

According to its regulations, the Independent Office for Regulating and Supervising Procurement has a specific section for concession contracts and it is entitled to approve studies and guides for this type of contract to promote good practices in them. Concessions are the most typical contracts to undertake PPP in Spain. For the time being, this new Office for Regulating and Supervising Procurement has not published any study or guide on concessions or PPP in general. On 17 December 2020, the Office published its second Annual Public Procurement Supervision Report in relation to 2019.[3]

During 2020, the Independent Office for Regulating and Supervising Procurement published several reports on the use of emergency procedures to contract under the state of emergency, keeping a close eye on the abuse of emergency procedures and providing for some recommendations. The Office has also published dynamic reports to systematise covid-19 regulations that had to do with public contracts, and some guidelines to reactive public procurements suspended during the hardest phase of the pandemic.

Apart from the national, regional and local authorities, there are other public entities mainly governed by private law, such as the Railway Infrastructure Administrator or the Port Authorities. These entities often enter into contracts to construct and operate public infrastructures and facilities that include some of the characteristics set out for the types of PPP contracts described in Section III.i. However, although their names and legal frameworks may coincide, totally or in part, with the provisions for PPP contracts governed by the Public Procurement Law and the new Law on public sector contracts, the effects and termination of these contracts are governed by private law. The general regime for PPP described in this chapter only applies to contracts entered into by other public entities when such entities so decide in the contract in question.

iii General requirements for PPP contracts

Public authorities must meet a series of internal requirements and approvals to enter into a specific PPP contract. Mainly, public authorities must evidence the need for which the PPP is to be executed and prove the advantages of using a PPP contract to cover that need over other types of contracts, or over the public authority implementing it directly. In addition, the public entity must make sure that there are sufficient funds to pay for the PPP contract before calling a public tender under a specific procedure. Likewise, the new National Evaluation Office must analyse the financial sustainability of the public works and public service, for example, whenever the price will be assumed totally or partially by the contracting authorities, not by the users.

In addition, prior to calling the public tender, the contracting authority must undertake to carry out a feasibility study that analyses the economic–financial basis for the contract. This study must provide an estimate of use demands and profitability of the contract, operational

3 Spain's 2020 Annual Public Procurement Oversight Report (hacienda.gob.es).

and technological risks in the construction and operation phases, as well as an estimate of investment costs and the potential financing system to perform the work. This feasibility study constitutes the value-for-money assessment by the public authority.

Once the feasibility study has been prepared, and at all times prior to calling the public tender, the contracting authority must prepare the administrative and technical bidding terms that will govern the relationship with the awardee. These terms must be approved by the legal and technical advisers of the contracting body.

Once the internal requirements have been met and the bidding terms have been approved, the public entity can start the tender procedure.

Public works and public service concessions are subject to temporal limits established by law. Therefore, the term of the contract must be justified in the contract itself, taking into account the need to be satisfied and the recovery of the investment, but at all times in accordance with statutory limits, which, under the new Law on public sector contracts are:

a 40 years for public work concessions and for service concessions that include works;

b 25 years for service concessions not including health services; or

c 10 years if the service concession refers to healthcare services with no construction works.

In principle, there are no other general restrictions on the use of PPP to cover a public need. In any case, services that involve exercising public powers cannot be managed by third parties and therefore cannot be entrusted to a contractor through a PPP project. They must be exercised by the public authority directly.

RDL 36/2020 intends to simplify some of the legal requirements to approve a PPP contract when the PPP is funded by NextGenerationEU funds. Contracts under RDL 36/2020 benefit from urgent procedures and some budget simplifications.

IV BIDDING AND AWARD PROCEDURE

The Public Procurement Law mainly regulates four types of procedures to select and award the public contracts included under the PPP category (see Section III.i): open procedure, restricted procedure, negotiated procedure (with and without publicity) and competitive dialogue. The Public Procurement Law currently in force rules an additional procedure (association for innovation) that can be used when intellectual rights are an important part of the contract.

The open and restricted procedures are called ordinary procedures because they can generally be used by the contracting authorities. Negotiated and competitive dialogue as well as association for innovation procedures can only be used under certain circumstances, such as if the matter is especially complex, in the case of competitive dialogue, or if the preliminary open or restricted procedure has been declared null, in the case of a negotiated procedure.

In practice, the two main PPP contracts (public works and public service concessions) are awarded through open procedures, and rarely through restricted procedures. The preference for open procedures is because of the restrictions existing for using other procedures, the higher complexity of the other procedures and the aim of allowing as many participants as possible.

The open procedure results in mainly standardised PPP contracts, as the rights and obligations under the contract are mainly governed by standardised administrative and bidding terms. The bidding terms are not negotiable so they cannot be modified by the tenderers.

Our observations in the following subsections refer to the two most commonly used procedures (open and restricted) in PPP contracting in Spain.

Additionally, rules in RDL 36/2020 for the PPP funded by NextGenerationEU must be taken into account. For instance, participation in a PERTE (the main type of project to drive recovery funds after the covid-19 pandemic) requires enrolment in a specific registry under the terms that shall be defined in a royal decree pending approval, and there may be ad hoc standard bidding terms for contracts under RDL 36/2020.

i Expressions of interest

The Public Procurement Law does not rule a specific procedure for the awarding body to request information from interested parties. However, this request and assessment of interest could be channelled through the public hearings in preparing the PPP contract: in particular, the public hearing of the feasibility study, which must last a minimum of one month, and the public hearing that may take place in certain complex public projects regarding the construction project. Under Article 115 of the Law on public sector contracts, the contracting authorities may undertake market studies and consultancies to the operators to define correctly the necessities to be covered in the future contract and inform the operators of the future contracting plans and the requirements to be complied with. The Law does not prevent public entities from organising other hearings or consultations to obtain feedback from the market before calling a public tender.

Additionally, according to Spanish law, private third parties may submit feasibility studies on themselves to invite the public entity to cover a specific need through a public concession. Once the feasibility study has been submitted, the authority decides whether to proceed. If a public tender is called following a feasibility study, and the contract is awarded to another private party, the promoter of the feasibility study must be compensated for the expenses it incurred to promote such study plus 5 per cent. Despite this legal provision, private initiatives in submitting feasibility studies have been practically non-existent in Spain. The new Law on public sector contracts adds that the promoter will obtain five extra points during the awarding procedure. If the promoter is not finally the awardee, the general compensation applies.

ii Requests for proposals and unsolicited proposals

Once the public entities approve the file to enter into a specific PPP, they can launch the public tender procedure. The procedure starts with an advertisement in the Official State Gazette and the Official Journal of the European Union, or in the Official Gazette of the autonomous community or municipality in question. This advertisement is particularly important because it is the start of the term to submit offers.

Under the open procedure, any third party may submit an offer. Submitting an offer implies the unconditional acceptance of the bidding terms, and the terms of the contract cannot be negotiated.

Between the call and the submission of offers, any interested party may request clarifications from the awarding authority. The queries made and answers provided during this phase must be generally available to all interested parties.

Unlike the open procedure, the restricted procedure is structured in two phases, during which a shortlist of offers is made. The existence of a preliminary selection phase means that, when preparing the contract (before its tendering), the contracting body defines the objective

criteria of solvency in accordance with which it will choose the candidates (generally no fewer than five) that it will invite to submit proposals. These criteria are available from the moment the tender is announced. Only the pre-selected candidates may submit proposals.

iii Assessment of the offer and granting of the award

Beyond the preliminary contract preparation phase during which the content of the contract is defined, its content cannot be altered or specified by negotiation under either the open procedure or the restricted procedure. Submitting a proposal entails that the tenderer accepts the bidding terms in full.

Once the proposals have been filed, both the Public Procurement Law and the new Law on public sector contracts establish the procedure to open and analyse the proposals under transparency and parity criteria. The awarding criteria in PPP projects usually include both economic and technical assessments and must be previously defined in the bidding terms in accordance with the purpose of the contract. The criteria that cannot be assessed using an automatic formula will be scored before those subject to automatic criteria to ensure parity.

The contract will be awarded to the bidder with the highest score, and will come into force once both parties enter into the formal agreement. This formal agreement is usually short and merely restates the main obligations that are defined in the bidding terms and the bidder's proposal.

V THE CONTRACT

i Payment

The standard two methods of payment are suitable for PPP projects: by the contracting authority itself or by the users. However, payment can also be a combination of both methods. Therefore, the difference between the types of PPP contracts does not depend on who pays for the service provided by the sponsor. Direct payment by the users is usually regulated and capped by the contracting authority.

Likewise, payments made by the public entity may depend on the demand or level of use of the infrastructures (as in the case of shadow tolls), or on the availability of the infrastructure for the public entity measured in view of certain service standards or indicators.

There has been some debate over whether payment based on the availability of the public infrastructure to the public entity (payment for availability) is compatible with the existence of a risk for the concessionaire. Whenever the formulas for availability are defined in a clearly aggressive way to ensure that the concessionaire actually assumes the effects of inadequate performance of the contract, it can be said that the concessionaire assumes a real risk.

In practice, the misgivings regarding payment for availability have been precisely owing to the establishment of insufficiently sensitive parameters of availability, which, as a result, significantly reduce the risk for the concessionaire.

The remuneration resulting from the operation of the infrastructure may be accompanied by a price paid by the public entity, and by other public contributions to the construction and operation of the infrastructure, making the system of concessionaire remuneration quite flexible.

ii State guarantees

Traditionally, public entities have been considered trustworthy and guarantees have not been required to secure payment. Because of the recent economic crisis, some public entities have had payment problems. This situation has been addressed by tightening the regulations to control public expenses and investments. Likewise, the state has implemented measures to support regional and local authorities in their obligations, but the Public Procurement Law has not been modified to introduce a scheme of guarantees to ensure payments by public contractors. The amendments have focused on a stricter control of the existence of funds and the economic feasibility of the contract before it is executed.

In connection with the above, the Public Procurement Law has been amended to introduce the following limits to public contributions and securities:

a public contributions and any type of security, guarantee and other measures to finance the project must necessarily be stipulated in the bidding terms and their amount must be determined in the award procedure. This amendment does away with the possibility of contributions being made at the end of the concession and the contribution being increased after the award resolution;

b bidders will determine the exact amount of public contributions in their offers within the maximums established in the bidding terms; and

c the bidding terms must state any reduction of the public contributions as an evaluation criterion for awarding the contract.

iii Distribution of risk

A key element in public concessions is the construction and operation of infrastructures by the concessionaire at its own risk. According to this principle, the concessionaire must assume the consequences, in financial terms, that may arise from performing the contract.

Under Spanish law, the principle that the contractor assumes its own risk is compatible with the guarantee to restore the financial–economic balance when the contract's economic imbalance is caused by the public authorities, either by exercising their prerogative to modify the contract, or because of decisions of the contracting administration or other public authorities (including regulatory risk in general).

The risk principle is also compatible with restoring the concession's economic balance when that balance is disrupted by risks unrelated to actions not only of the concessionaire, but also of the public authorities. This is the case in force majeure and unexpected risk events. Both the Public Procurement Law and the new Law on public sector contracts expressly regulate the former. If force majeure has a significant disruptive effect on the economic side of the contract, it gives rise to a right to restore its economic balance and, if the contract can no longer be performed, to its termination in such a way that the recovery of the concessionaire's investment is guaranteed. However, the concept of force majeure under Spanish law is applied very restrictively and has traditionally been complemented with the concept of unexpected risk. Under unexpected risk, economic imbalances arising during the performance of a contract as a result of the emergence of a risk that could not have been foreseen when the contract was executed can be corrected. This is the case if the risk in question significantly disrupts the conditions to perform the contract, to the extent that providing the agreed service has become much more burdensome than anticipated for one of the parties. Although the doctrine of unexpected risk is currently quite prevalent, it is not actually referred to in legislation.

In addition to those described above, there is another group of risks that must be determined in the bidding terms as it is not established by either legislation or case law.

In the specific case of financing, the risk known as financial closure risk is particularly important. This risk is assumed by the concessionaire and worsens in times of credit market crisis.

Financial closure risk can be defined as the fluctuation in the cost of financing required by the concessionaire to perform the contract, from the time the bid is awarded to the time when the financing is definitively confirmed after being awarded the contract. Generally, unless the bidding terms state otherwise, the tenderers assume the financial closure risk in such a way that any differences between the financing conditions foreseen when the bid is submitted and the conditions secured when the financing is finalised after the contract is awarded are assumed by the tenderer, who is not allowed to pass on a higher financing cost than that offered in the financial–economic plan. In practice, the tenderers have attempted to cover this risk by negotiating derivatives of the main financing contract to cover exchange and interest rates. However, the coverage only comes into effect once the contract is awarded, and thus, until then, the risk continues to be assumed entirely by the tenderer.

iv Adjustment and revision

Public authorities have special prerogatives over the contractor, basically consisting of the power to:

a construe the terms and conditions of the contract;
b unilaterally modify the contract for public interest reasons;
c impose penalties; and
d unilaterally terminate the contract under certain circumstances set out by law and in the contract, and establish the effects of this termination.

Therefore, according to these prerogatives, the contracting authority will retain its right to modify aspects of the contract for new and compelling public interest reasons, provided that the contractor is paid compensation. This legal prerogative can be challenged in court when it does not fulfil the relevant mandatory provisions.

The grantor modifying the concession is one of the events that triggers the contractor's right to rebalance the financial terms of a contract, provided that the amendment affects the economic balance of the contract when it was awarded to the detriment of the concessionaire (beyond a mere reduction in the expected profits). The concessionaire can request the grantor to rebalance the financial situation by evidencing the unbalancing event and its actual effects on the existing financial plan approved as part of the contract. The rebalancing can be implemented by modifying any financial condition of the contract. The terms of the tender may limit when this financial rebalancing can be done.

The compensation to the concessionaire must be paid within the term set out in the bidding terms, which must not exceed the maximum legal term established by law, which is currently 30 days following the grantor's approval of the service rendered. Late payment triggers default interest. When late payment exceeds a joint period, the contractor may suspend the contract, or even request its termination as explained in Section V.vi.

The review or update of the compensation under public contracts also depend on the bidding terms that cannot be contrary to the legal requirements. The review of the price in public contracts has recently been modified by Law 2/2015 of 30 March and further

implemented for public contracts by Royal Decree 55/2017 of 3 February. Under these new regulations, the review can only take place when the investment return exceeds five years, and subject to the strict conditions set out in the regulations.

v Ownership of underlying assets

Assets in PPP contracts are owned by the public authority. Because of its connection to a public work or service, the public entity does not lose its right *in rem* over the assets during the contract, but the concessionaire is empowered to use them for the proper rendering of the service or the operation of the public works. At the end of concession contracts, the facilities must be returned to the grantor in adequate working condition to continue providing the services. To this end, the grantor may inspect the facilities to make sure that the grantor is complying with its obligations under the contracts.

Empowerment to use the assets to properly render the service or operation of the public works implies that the contractor can dispose of the assets with the assistance of the public entity, when necessary, to that end, and that the contractor may mortgage the concession itself in accordance with the mortgage legislation, and with the prior authorisation of the contracting authority. The mortgage cannot be used to secure obligations under contracts other than the relevant PPP.

According to both the Public Procurement Law and the new Law on public sector contracts, the contract itself cannot be assigned without the grantor's prior authorisation. Spanish public procurement law has traditionally regulated the assignment of the contract. When the contract is silent, the transfer of the contractor's shares does not require the grantor's prior authorisation, except when the transfer may be considered equivalent to assigning the contract. Transferring shares may be considered an assignment when it only relates to a company whose sole object is to operate public concessions and the transfer of shares entails a change in the person who controls the holder of the concession.

vi Early termination

The public authority can terminate the concession early under certain circumstances set out by law and in the contract, and establish the effects of this termination. The effects (compensation) of early termination vary depending on the specific termination event.

The Public Procurement Law and the new Law on public sector contracts establish the following main early termination events for public concessions:

a the concessionaire loses its legal personality;
b the contractor enters into a creditors' agreement or files for insolvency;
c foreclosing the concession mortgage is unfeasible;
d mutual agreement between the public authority and the contractor;
e the concession has been seized by the authority for longer than the agreed maximum term;
f payment delays by the public authority for over six months;
g the contract is revoked by the public authorities at their discretion (this unilateral termination is not connected to the concessionaire's management);
h the exploitation of the public infrastructure or the public service is cancelled for public interest reasons;
i the infrastructure cannot be operated because of the contracting authority's decisions after the contract was executed; or
j the concessionaire fails to comply with essential contractual obligations.

If the concession is terminated for public interest reasons, adequate compensation must be paid. According to case law, public interest is an abstract notion that can only be determined and defined on a case-by-case basis and taking into account the characteristics and circumstances of a particular contract as a whole, such as its subject matter, purpose and nature. The grantor must justify its decision on public interest reasons, which can be challenged in court.

Among other consequences, rights arising for the contractor from an early termination event include the equity value of the investment usually, albeit inappropriately, referred to as the pecuniary liability of the public authority (RPA).

The method of calculating RPA was modified in 2015. Following the modification of 2015, the provisions on RPA distinguish two calculation methods:

a for cases involving a termination not attributable to the public authority, the RPA is determined in a new award process for the concession; and

b in cases of termination not attributable to the concessionaire, the regulation on compensation for investments is similar, but specifies that straight line depreciation will be used.

Termination is not automatic. The contracting authority must undergo a procedure in which the concessionaire is heard.

VI FINANCE

The private funds involved in a PPP project may come from two sources: tenderers (usually as capital of the special purpose vehicle responsible for carrying out the project) or third-party financers.

Financing PPP contracts in Spain usually follows the traditional scheme of bank financing. This scheme relies chiefly on pledges and, in some cases, assignment to the financer of both the credit rights arising from the normal operation of the infrastructure (periodic cash inflows from the operation of the public works or services) and the credit rights arising from the early termination of the contract (the equity value of the investment or RPA, as explained above).

The financing is normally granted in the form of credit, which the concessionaire can obtain upon completing the project phases. The syndication mechanism is a response to the need to distribute the operating risks when they are too high to be assumed by a single entity. In the past few years we have seen growth in particular of uninsured or 'club deal' syndicated loans, under which each institution of the syndicate guarantees only its share, as opposed to other types where one or more institutions undertake to contribute all of the financing if they are unable to find enough institutions that wish to participate in the financing project.

Syndication of financing involves the execution of a contract by creditors including all the institutions in the syndicate that regulates, among other matters, the majorities required to adopt decisions related to financing and the rules to distribute the amounts obtained from the concessionaire company. Unless other debt and creditors' seniority is established, loan repayments are usually distributed in proportion to each institution's share in the financing.

To facilitate the operational management of the financing, one of the financial institutions assumes the role of agent bank. As such, it is responsible for delivering the funds to the company, distributing the repayments among all the financial institutions and channelling communications in each direction.

Given that the tendering procedure generally adopted to award concessions is a standardised one (open or restricted), negotiations with financial institutions begin in the phase prior to the contract, since the tenderer has to include the main characteristics of the financing that it will be able to secure in its financial bid. However, credit negotiations are only finalised *a posteriori*, once the tenderer is awarded the contract. At this time, the concessionaire's negotiating position is very much influenced by the urgency of the financing to fulfil the contractual obligations it has assumed with regard to the public authority. Moreover, the added cost with which the financing may be finally secured will generally, but not always, be assumed by the concessionaire, who has little chance of passing it on to the public authority.

Guarantees play a fundamental role in bank financing. In fact, the granting of financing is generally conditional upon the prior or simultaneous granting of guarantees over the different assets, goods and rights that constitute the equity of the concessionaire company.

On the other hand, the Public Procurement Law and the new Law on public sector contracts expressly regulate the issue of bonds by concessionaires, as well as the securitisation of credit rights arising from the concession. Given that the concessionaire generally has no revenue other than these credit rights, the bonds and securities that could potentially be issued would essentially be those resulting from securitisation. The issue of these securities will require prior administrative authorisation from the contracting authority, which can only be denied if this is justified by the successful outcome of the concession or another factor of public interest.

VII RECENT DECISIONS

The main recent relevant jurisprudence relating to PPP has concerned public concessions for the construction and operation of ring roads in Madrid. However, this case law, mainly related to expropriation costs and the calculation of damages for early termination events, varies depending on the specific circumstances of the case at stake and is limited to exceptional circumstances that may not apply on a general basis. There has not been an established line of case law to strengthen or weaken the PPP model, which is a popular scheme in Spain, through the concession model.

VIII OUTLOOK

Traditionally, investing in infrastructure has contributed to fostering the economy through the improvement of the country's competitiveness and citizens' welfare. Despite the high level of transport infrastructures, there is still a significant investment deficit in Spain in other priority sectors such as infrastructure maintenance, transportation of goods, social care (health and education), water and digital infrastructures.

The covid-19 pandemic has increased public debt considerably. PPPs may work as a way to reach public investment aims with no additional costs for public debt in a post-pandemic scenario with a high stress on the public budget. Private initiatives shall be used to implement public policies to strengthen the economy after the pandemic. PPPs are a perfect channel for that. Additionally, the authorities are aware of the necessary cooperation of private parties. RDL 36/2020 will drive the Spanish national recovery and resilience plan with the creation of new public-private structures, evidencing the importance of PPP in the coming years to make Spain's digital and environmental transformation real and to create a competitive

economy with stronger innovations than those of the pre-pandemic one. In addition, the covid-19 pandemic has revealed a clear need to strengthen Spain's health and social care (elderly care home) infrastructures.

There is a clear window for PPPs in Spain in upcoming years.

Appendix 1

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