The Public–Private Partnership Law Review

Ninth Edition

Editors
Matthew Job and Tom Marshall

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THE PUBLIC–PRIVATE PARTNERSHIP LAW REVIEW

NINTH EDITION

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Matthew Job and Tom Marshall

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CONTENTS

PREFACE......v
Matthew Job and Tom Marshall

Chapter 1 ARGENTINA......1
María Inés Corrá and Marina Wagmaister

Chapter 2 AUSTRALIA......11
Andrew Griffiths and Nicholas Carney

Chapter 3 FRANCE......21
François-Guilhem Vaissier, Alain Chan Hon, Sacha Ruffié and Lisa Gehin

Chapter 4 INDONESIA......36
Donke Ridhon Kahfi

Chapter 5 ITALY......51
Simone Egidi

Chapter 6 MEXICO......65
Alejandro de la Borbolla, Bernardo Martínez-Negrete, Antonio Borja Charles and Octavio Roldán Montijo

Chapter 7 NETHERLANDS......77
Jessica Terpstra, Michel Klijn and Sander van den Boogaart

Chapter 8 PAKISTAN......86
Daud Munir

Chapter 9 PORTUGAL......100
Manuel Protásio and Catarina Coimbra

Chapter 10 SOUTH AFRICA......113
Brigette Baillie and Biddy Faber

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Chapter 11 SPAIN 125
Manuel Vélez Fraga and Ana María Sabiote Ortiz

Chapter 12 THAILAND 140
Weerawong Chittmittrapap and Jirapat Thammavaranucupt

Chapter 13 UNITED ARAB EMIRATES 151
Phil Hanson, Charles Oliver, Amro Al-Ahmar, Rohy Alsaad and Rania Mostafa

Chapter 14 UNITED KINGDOM 163
Tom Marshall, Helen Beatty, Sam Cundall and Michael Edwards

Chapter 15 UZBEKISTAN 180
Nail Hassanov and Jakhongir Olimjonov

Appendix 1 ABOUT THE AUTHORS 193
Appendix 2 CONTRIBUTORS' CONTACT DETAILS 205

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PREFACE

It has been a privilege to contribute to and edit *The Public–Private Partnership Law Review* over the past three years and we are very pleased to present this ninth edition. Doing so has provided an insight into how public–private partnerships (PPPs) are used and perceived around the world and has introduced us to people and opportunities that would otherwise not have arisen for us. Since the publication of the eighth edition a year ago, there have been significant developments in the design and use of PPPs in some parts of the world, while in other parts little has changed. The purpose of this volume is chiefly to report the current state of PPP across a range of jurisdictions around the world.

Twelve months ago the world was finally beginning to look beyond the impact of the covid-19 pandemic and we speculated that PPP might have a role to play in the economic recovery that was then anticipated. In practice, the past year has been dominated by fallout from the war in Ukraine. While the conflict may be geographically limited, the economic consequences have been felt around the world.

Many international businesses have closed down their operations in Russia and most of Europe has been forced to move its supply of natural gas from Russia, resulting in an energy price spike and fears about energy security. Russia's blockade of Ukrainian food exports has resulted in food shortages and higher food prices across the globe. Energy and food prices have triggered global inflation, which many commentators felt was always a latent but inevitable consequence of quantitative easing and covid lockdown support measures. Higher inflation has led to fiscal tightening and higher interest rates, finally calling time on the low (often virtually zero) interest rate environment that has prevailed since the financial crisis in 2008. All in all, the economic background for PPPs could hardly be more different than it was a year ago.

Against that backdrop, PPP continues to be a key procurement tool for both national and local infrastructure projects in a diverse range of countries such as Australia, France, Italy, Pakistan, Saudi Arabia, South Africa, Thailand, the United Arab Emirates and Uzbekistan. PPP legislation has been bolstered in Indonesia and Italy, following on from the new PPP laws that we saw in 2021 in Senegal and Uzbekistan. Indonesia continues to have an ambitious PPP pipeline although progress to implement its national development plan has been slow. Perhaps the most impressive national performance for PPP has been in Uzbekistan – in a year that our contributors describe in Chapter 15 as 'truly pivotal', Uzbekistan has signed 178 PPP projects with a total capital value estimated at US$4.5 billion.

Meanwhile, PPPs continue to be under examination in a number of jurisdictions, particularly in European countries that have long-established and relatively mature relationships with PPPs (such as the United Kingdom, the Netherlands and Portugal), but also in Latin American countries such as Argentina and Mexico (where some large projects

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that were previously slated to be PPPs have been restructured as traditional public works contracts). As ever, the principal case against PPP is the embedding of a private sector cost of capital in place of cheaper sovereign borrowing and the assertion that this makes it an expensive procurement model whatever the benefits in terms of risk transfer and private sector procurement expertise.

Climate change and energy transition has been a global trend for several years, but arguably it has been concerns about energy security as a result of the Ukraine war that have accelerated a push towards new privately financed energy transition projects in Europe, particularly in the United Kingdom and France, which have seen new revenue models and legal structures for new nuclear power, carbon capture and storage and hydrogen projects. PPP projects for renewable energy and grid stability to support renewable energy have also been seen in Australia and South Africa.

So where does this leave the outlook for PPP during 2023 and beyond? Concerns regarding value for money, flexibility and, not least, the validity of the fundamental element of partnership within the PPP model remain. 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. However, the inclination of many governments to invest in new infrastructure is arguably stronger than at any time in the past 50 years; energy transition alone will require huge infrastructure investment that is largely incremental. The question for those in the industry is how PPP can evolve in order to respond to this opportunity and we are already seeing evidence of this in the United Kingdom in particular.

Furthermore, the advent of inflation and higher interest rates is squeezing growth in many countries, but in particular in Europe. This comes on top of ruinously expensive covid support schemes that have pushed national debt above GDP in many cases and make it less attractive to finance new infrastructure on the national balance sheet. The role that PPP could play in alleviating this remains unclear. In countries such as Germany and, to a lesser extent, the Netherlands and Portugal, there are still concerns as to the suitability of traditional PPP and whether it represents value for money. This has been a particular issue during the past 15 years of very low-cost borrowing for governments and it remains to be seen whether the return of a higher cost of government borrowing will dilute the incremental cost of private sector borrowing in a PPP when compared with sovereign debt.

Meanwhile there is an expectation that infrastructure development will benefit PPP and PPP-like structures in other countries such as Italy, France and the United Kingdom (in those 'consumer pay' sectors where private sector investment in infrastructure is prevalent). In these jurisdictions the prospect of stimulating the economy and delivering new infrastructure, without an immediate cost to the public purse, may be more attractive than ever – especially in sectors where the costs can be routed directly to consumers rather than being a burden on taxpayers and the public finances.

In the United Kingdom we are now seeing the cycle of private finance initiative (PFI) projects from the 1990s turning to hand-back on contract expiry. Although the number of early projects reaching expiry in 2023 will only be in single digits, it rises steadily into double digits over the next two or three years and then continues to rise to a peak of 80 projects scheduled to expire in 2037 alone. Inevitably this begs the question of what will come next and how the government will wish to handle facilities management and refurbishments on a fleet of ageing projects as the existing arrangements come to an end.

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Perhaps the most important characteristic of PPP in 2023 and beyond will be its adaptability. PPP in countries as diverse as Argentina, Indonesia and Uzbekistan has never followed the mould of UK 1990s PFI. Elsewhere we have seen the PPP model adapting, for example, in countries such as Norway and the Netherlands where public sector capital contributions on completion reduce the impact of private sector cost of capital over the life of the project, while preserving typical PPP risk transfer and efficiencies during construction. In the United Kingdom and Australia, we have seen the advent of price adjustments and risk sharing based on how the outturn construction cost compares to a target cost; in parallel, the regulated utility model that was traditionally reserved for established operating monopoly networks is increasingly being used to procure new greenfield infrastructure assets.

At Herbert Smith Freehills we are proud of having a long and successful history working within the PPP industry for more than 30 years. We were at the forefront of the market when the PFI model was introduced in the mid-1990s and have followed its evolution around the globe since that time. We continue to believe that PPPs, where used appropriately, are and 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 added scrutiny, rigour and arm's-length contracting practice, which ultimately benefit both the public and private sectors and, most importantly, the consumer and taxpayer. This may prove to be all the more important following the economic shocks of the covid pandemic and the Ukraine war.

In this, the ninth 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 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.

Matthew Job and Tom Marshall
Herbert Smith Freehills LLP
London
March 2023

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Chapter 11

SPAIN

Manuel Vélez Fraga and Ana María Sabiote Ortiz[1]

I OVERVIEW

PPP projects are an opportunity to foster investment in public infrastructure 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 infrastructure in Spain, the country is in a good position with regard to certain infrastructure (namely high-capacity roads, high-speed railways, airports and ports), but it has deficiencies in the maintenance of current infrastructure, 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. Additionally, the covid-19 pandemic has especially stressed the importance of strengthening social and healthcare infrastructure.

PPP projects continue to be an opportunity to foster investment in public infrastructure, especially following the covid-19 pandemic. The Spanish Recovery and Resilience Plan approved by the European Council on 6 July 2021 (Spanish Recovery Plan) highlights PPP as a key element to channel the investment funded by the European Recovery and Resilience Facility to deal with the effects of the pandemic.

II THE YEAR IN REVIEW

It was predicted that 2022 would be the first year free of covid-19. After an increase in covid-19 cases late in December 2021, 2022 was expected to be the year for a full economic recovery.

The covid-19 pandemic affected Spain and the Spanish economy considerably. Its impact was mainly felt during 2020. The government enacted some regulations to deal with

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that impact on existing public contracts. Some measures were specifically addressed to PPP projects to provide some 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 that the contracting body deems that a contract's performance is totally or partially impossible as a result of the pandemic. This provision was applicable only to effects arising from the pandemic during the first state of emergency (which ended on 21 June 2020). For other events, general regulations on rebalancing as foreseen in the contracts at stake apply. The rebalancing of a good number of concessions based on these regulations is still under review by the courts.

The year 2021 initiated the way to recovery. Even if the pandemic was still present within society, no general lockdowns were imposed during 2021 in Spain, and the macroeconomic data seem to confirm the country's recovery.[2] The recovery was mainly channelled through the Spanish Recovery Plan proposed by the government and approved by the European Council in July 2021. The recovery and resilience plans submitted by the European Member States are a key element of the European Recovery and Resilience Facility. The European Recovery Fund, called NextGenerationEU, was approved by the European bodies to prevent a collapse of the economy due to the pandemic and to create the right conditions for the rapid implementation of investment projects, particularly in infrastructure.

As stated in the Spanish Recovery Plan, covid-19 has had a substantial impact on the Spanish economy due to the significant relative importance of the economic sectors most affected by the decline in mobility and demand, as well as the stringency of the containment measures necessary to curb the spread of the virus. The major drop in GDP, more than 10 per cent for 2020, constituted an unprecedented challenge in our recent history and gave rise to an economic policy response that is very different from that of previous crises, both at the national and at the European and global levels.

The Spanish Recovery Plan foresees implementing €69.5 billion in public investment until 2026, mainly in the first phase of NextGenerationEU, covering the 2021–2023 period, in order to boost recovery and achieve the greatest possible countercyclical impact.

To that purpose, the Plan is based on four pillars (green transition, digital transformation, social and territorial cohesion, and gender equality). The four pillars are divided into 10 lever policies (including resilient infrastructure (lever policy II), and the modernisation and digitalisation of industry and small and medium-sized enterprises, entrepreneurship and business environment, recovery and transformation of tourism and other strategic sectors (lever policy V)). The 10 lever policies are further developed into 30 specific components. These components are then developed in reforms and investments. PPP is mentioned as a key element in several investments. The government started implementation of the Spanish Plan during the last semester of 2021, with much room for investments seen during 2022.

Consequently, 2022 was meant to show the beginning of a full recovery. However, war in Ukraine, the increase of the price of energy and subsequent general inflation disrupted that expectation. Despite that, Spanish GDP increased more than 5 per cent in 2022. The

2 Increase of GDP of 5.5 per cent in 2021.

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government approved a number of rules to face the inflation effects seen in the transport sector, including PPP on roads, among other things, and approved Royal Decree-Law 3/2022 of 1 March 2022, to allow an increase of the prices in certain public works contracts.

During 2022, NextGenerationEU funds have started to reach the economy. Digital infrastructure (5G), digital infrastructure in the train network, as well as renewable energy have received a relevant part of such funds. However, PPP projects have not seen yet a score of this first part of the funds.

The main part of the funds must be implemented not later than 2023. As such, 2023 should be a key year for the implementation of the Spanish Recovery Plan funded by the EU. 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. Therefore, it is reasonable to expect a wide range of investment opportunities through PPPs 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 infrastructure 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,[3] 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

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

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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)).

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 infrastructure 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 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:

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.

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.

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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.

Stakeholder management

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

The Parliament has enacted some amendments to the public sector contract law to ease the procurement rules. Most importantly, the government 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 through the Spanish Recovery Plan.

RDL 36/2020 created a new mechanism for public–private cooperation called PERTE (Strategic Projects for the Economy Recovery and Transformation). The government has approved 12 of these projects under certain flexible conditions set out in RDL 36/2020.[4] 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 in by both public and private parties. Works and service concessions may be directly awarded to public–private companies.[5]

ii The authorities

Spain 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.

4 PERTE on electric vehicle, on health, on renewable energy, on space air, on hydraulic infrastructures, etc. (see https://planderecuperacion.gob.es/como-acceder-a-los-fondos/pertes).

5 To date, the government has approved three PERTE. See https://planderecuperacion.gob.es/como-acceder-a-los-fondos/pertes.

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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 infrastructure. Regional governments have authority over health and social care and may develop hospital infrastructure 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 infrastructure 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. In September 2021, the Office updated its Guide to the Spanish Recovery Plan regarding measures in public contract law dealing with the implementation of the Plan.[6] On 22 December 2021, the Office published the Annual Public Procurement Supervision Report regarding 2021.[7]

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 were 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 and the Port Authorities. These entities often enter into contracts to construct and operate public infrastructure and facilities that include some of the characteristics set out for the types of

6 Guía básica Plan de Recuperación, Transformación y Resiliencia (hacienda.gob.es).

7 https://www.hacienda.gob.es/RSC/OIReScon/informe-anual-supervision-2021/ias-2021.pdf.

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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 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.

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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.

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.

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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 Evaluation and grant

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 infrastructure (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.

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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 infrastructure 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.

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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

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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;

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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, 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

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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.

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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 infrastructure, 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 infrastructure.

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, as the Spanish Recovery Plan so states. The authorities are aware of the necessary cooperation of private parties. The year 2023 is central for the implementation of the European Funds in Spain (€69.5 billion to invest not later than the end of 2023) project. PPP will be a key element 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) infrastructure.

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

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Appendix 1

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Manuel is a partner in the Madrid office of Uría Menéndez. He joined the firm in 2003 and is a member of the public and environmental law practice areas.

He has experience in all areas of public law, but especially in the regulated sectors, such as the securities markets, and the financial, energy, security and defence, prevention of money laundering and competition law sectors. He also advises on public procurement law and liability of public authorities.

Manuel focuses his practice on litigation regarding administrative and constitutional matters and regularly advises in sanctioning proceedings before the CNMV, the Bank of Spain and the Commission for the prevention of money laundering. He has vast experience in due diligence processes involving regulatory matters.

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