

THE PUBLIC-PRIVATE
PARTNERSHIP
LAW REVIEW

SEVENTH EDITION

Editors

Patrick Mitchell and Matthew Job

THE LAWREVIEWS

THE PUBLIC-PRIVATE
PARTNERSHIP
LAW REVIEW

SEVENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors

Patrick Mitchell and Matthew Job

THE LAWREVIEWS

PUBLISHER

Clare Bolton

HEAD OF BUSINESS DEVELOPMENT

Nick Barette

TEAM LEADERS

Jack Bagnall, Joel Woods

BUSINESS DEVELOPMENT MANAGERS

Katie Hodgetts, Rebecca Mogridge

BUSINESS DEVELOPMENT EXECUTIVE

Olivia Budd

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Hannah Higgins

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITOR

Anne Borthwick

SUBEDITOR

Orla Cura

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

© 2021 Law Business Research Ltd

www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at March 2021, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-83862-819-2

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ASAR – AL RUWAYEH & PARTNERS

AXIS LAW CHAMBERS

BOMCHIL

HENGELER MUELLER PARTNERSCHAFT VON RECHTSANWÄLTEN MBB

HERBERT SMITH FREEHILLS LLP

HOUDA LAW FIRM

HOUTHOFF

JPM JANKOVIC POPOVIC MITIC

LEE AND LI

NADER, HAYAUX Y GOEBEL, SC

RAISIN GMBH

URÍA MENÉNDEZ

VIEIRA DE ALMEIDA

WEERAWONG, CHINNAVAT & PARTNERS LTD

WHITE & CASE LLP

YOON & YANG LLC

CONTENTS

PREFACE.....	v
<i>Patrick Mitchell and Matthew Job</i>	
Chapter 1	ARGENTINA..... 1
<i>María Inés Corrá and Magdalena Carbó</i>	
Chapter 2	AUSTRALIA..... 10
<i>Andrew Griffiths, Nicholas Carney and Aggie Goss</i>	
Chapter 3	FRANCE..... 20
<i>François-Guilhem Vaissier, Louis-Jérôme Laisney, Olivier Le Bars and Sacha Ruffié</i>	
Chapter 4	GERMANY..... 44
<i>Jan Bonhage and Marc Roberts</i>	
Chapter 5	ITALY 57
<i>Simone Egidi, Andrea Leonforte and Vanessa Nobile</i>	
Chapter 6	KUWAIT..... 69
<i>Ibrahim Sattout and Akusa Batwala</i>	
Chapter 7	MEXICO 86
<i>Alejandro Rojas V and Benjamin Torrero G</i>	
Chapter 8	NETHERLANDS 98
<i>Jessica Terpstra, Michel Klijn and Sander van den Boogaart</i>	
Chapter 9	PAKISTAN..... 106
<i>Daud Munir</i>	
Chapter 10	PORTUGAL..... 120
<i>Manuel Protásio and Catarina Coimbra</i>	

Contents

Chapter 11	RUSSIA	132
	<i>Olga Revzina, Roman Churakov and Lola Shamirzayeva</i>	
Chapter 12	SENEGAL.....	147
	<i>Khaled Abou El Houda</i>	
Chapter 13	SERBIA	156
	<i>Jelena Gazivoda</i>	
Chapter 14	SOUTH AFRICA	171
	<i>Brigette Baillie and Biddy Faber</i>	
Chapter 15	SOUTH KOREA	182
	<i>Soongki Yi, Young Woo Park and Pilwoon Oh</i>	
Chapter 16	SPAIN.....	190
	<i>Manuel Vélez Fraga and Ana María Sabiote Ortiz</i>	
Chapter 17	TAIWAN.....	205
	<i>Pauline Wang and Yung-Ching Huang</i>	
Chapter 18	THAILAND	218
	<i>Weerawong Chittmitrapap, Jirapat Thammavaranucupt and Praewa Wang-ngam</i>	
Chapter 19	UNITED ARAB EMIRATES	227
	<i>Anthony Ellis, Phil Hanson, Samer Mahjoub, Charles Oliver and Amro Al-Ahmar</i>	
Chapter 20	UNITED KINGDOM	238
	<i>Tom Marshall, Helen Beatty and Sam Cundall</i>	
Chapter 21	UNITED STATES	260
	<i>Dolly Mirchandani and Armando Rivera Jacobo</i>	
Appendix 1	ABOUT THE AUTHORS.....	273
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	289

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

FRANCE

François-Guilhem Vaissier, Louis-Jérôme Laisney, Olivier Le Bars and Sacha Ruffié¹

I OVERVIEW

In France, public-private partnerships (PPPs) are implemented in many economic sectors (e.g., transport, health, justice, education, urban equipment, environment, energy efficiency, telecommunications and culture) for around €100 billion of activity each year.

The French PPP legal framework was reshaped a few years ago through the transposition of the European directives pertaining to public procurement and concession agreements under Ordinance No. 2015-899, dated 23 July 2015,² relating to public procurement and partnership agreements (Partnership Contract Ordinance) and its implementing Decree No. 2016-360, dated 25 March 2016, and Ordinance No. 2016-65, dated 29 January 2016,³ relating to concession agreements and its implementing Decree No. 2016-86, dated 1 February 2016.

Even though the transposition of the European directives and the enforcement of the aforementioned ordinances and decrees were aimed at clarifying and modernising the French legal framework, the legal rules governing public procurement agreements (including partnership contracts) and concession agreements remained scattered throughout about 30 different texts. Therefore, in 2018, it was decided to carry out the adoption of a Public Procurement and Concession Agreements Code (PPP Code). The main purpose of this codification project is to gather in one single document all rules related to public procurement and concession agreements so as to offer all companies better access to it, with a focus on small and medium-sized companies (i.e., there are no major changes on the substance of the legal provisions).

The PPP Code was finally enacted at the end of 2018 through Ordinance No. 2018-1074, dated 26 November 2018, Decree No. 2018-1075, dated 3 December 2018 and Decree No. 2018-1225, dated 24 December 2018. The new PPP Code entered into force on 1 April 2019.

In this chapter we will focus on the two main forms of PPP implemented in France: concession agreements and partnership contracts, as regulated by the PPP Code.

1 François-Guilhem Vaissier is a partner and Louis-Jérôme Laisney, Olivier Le Bars and Sacha Ruffié are associates at White & Case.

2 Ratified under Article 39 of Law No. 2016-1691, dated 9 December 2016.

3 Ratified under Article 40 of Law No. 2016-1691, dated 9 December 2016.

II THE YEAR IN REVIEW

Despite the covid-19 crisis (which led to the cancellation of several projects⁴), the French PPP market remained dynamic.

In particular, major projects related to the Grand Paris Express (i.e., new rapid transit lines being built in the Île-de-France region of France for a total of €35.2 billion) have been launched or pursued, or both, even though most of them are standard public procurement, meaning that their financing is essentially borne by the public contracting authority.

The Grand Paris Express still includes several PPP projects. On 27 July 2020, the bid submission deadline regarding the Grand Paris Express broadband concession was reached while the bid review phase has started. This project consists of a 25-year concession agreement to design, build, finance, operate and maintain a broadband network to provide high-speed fibre access to metro users across the entire network (approximately €370 million).

It should also be noted that the rolling stock and rail operation concession agreement (approximately €300 million) regarding the Paris–CDG Express (€1.8 billion rail line project) has been awarded to Keolis and RATP Dev, with a financial close reached on 18 July 2019.

However, on 6 May 2020, the French Defence Ministry moved the next round of bids for a military accommodation concession agreement to year-end as a result of the covid-19 emergency (€1.5 billion).

To revitalise its economy, France launched an exceptional €100 billion recovery plan, France Relance, on 3 September 2020. €40 billion of the €100 billion is coming from the European Union. These sums will be spent over two years and will notably result in tax cuts, investments, research support mechanisms or training for companies. This plan concerns many sectors of activity, including energy renovation, infrastructures, digital, renewables energies and green technologies: for instance, the French recovery plan includes a €7 billion hydrogen investment strategy.

With respect to renewable energies, Article 225 of the Finance Law for 2021 No. 2020-1721 dated 29 December 2020 (2021 Finance Law) provides for the renegotiation of the feed-in tariffs of approximately 800 photovoltaic power purchase agreements (PPAs) entered into between 2006 and 2010. This renegotiation will only apply to the PPAs based on the tariff orders of 10 July 2006, 12 January 2010 and 31 August 2010 and with an installed capacity of more than 250kw (peak power). While the 2021 Finance Law sets out the main principles for the feed-in tariffs revision, it refers to an implementing decree and an implementing ministerial order that will specify the detailed terms and conditions. As for now, no information regarding the issuance date of the said implementing decree and order has been provided.

The government expects to achieve savings of between €350 and €400 million thanks to this measure. It has also argued that the renegotiation of the PPAs was justified because of their illegality, which would be due to the state's failure to notify the European Commission that the aid granted to producers was in breach of Article 108 Section 3 of the Treaty on the Functioning of the European Union.

4 On 5 January 2021, the Ile-de-France region announced the cancellation of a PPP regarding public schools with an overall capex of €400 million. Similarly, in July 2020, the city of Paris cancelled a €200 million PPP regarding energy efficiency improvements for 21 high schools across the Paris metropolitan area. In addition, the €886 million East Rouen motorway concession project and the €8 billion Roissy Airport terminal construction project have also been abandoned.

Nonetheless, these motives have been the subject of debates at the National Assembly, with MPs expressing regret at the state's disregard for its own words, the absence of an impact study to evaluate the amount of expected savings, the lack of consideration for the cost of litigation likely to be initiated by producers and the lack of consultation with the concerned stakeholders.

In particular, affected producers could be tempted to challenge the implementation of the 2021 Finance Law on the grounds of its potential non-compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms (including with regard to Article 1 of the first additional protocol related to protection of property) and with international investment treaties, such as the Energy Charter Treaty, in order to claim damages for loss of future profits.

Three major renewable energy projects should be highlighted as they further developed during 2020.

First, on 2 June 2020, financial closing was reached regarding the Fécamp wind farm with a capacity of 498MW, which is being developed by EDF, Enbridge and WPD (approximately €2.44 billion).

Secondly, on 5 December 2020, the government announced that it has selected an area in Normandy to build a new offshore wind farm (with a capacity of about 1GW) in 2022. The competitive bidding process has already been launched.

Thirdly, a 250MW floating wind farm is also scheduled for 2022, bringing to 750MW the volume of floating wind tenders to be awarded over 2021 and 2022.

During 2020, French public local authorities kept up a high level of activity and launched multiple PPP projects in several industry sectors, including in particular the following.

i Fibre-to-home network

On 6 March 2020, financial close was reached for the Loiret fibre-to-home (FTTH) broadband PPP under a 25-year concession agreement (approximately €500 million) procured by the department of Loiret.

On 18 May 2020, bidders have resubmitted prequalification documents for a broadband PPP in eastern France's Haute-Saône department, after a previous tender was cancelled last quarter in order to review and expand the scope of the project (approximately €800 million). The project is part of France's Plan Très Haut Débit, a governmental initiative launched in 2013 to provide access to superfast broadband to all areas of France by 2022.

On 7 July 2020, financial close was reached regarding the Loire-Atlantique FTTH broadband concession agreement (valued in terms of potential revenues at close to €1 billion, with a capex of €200 million) procured by the department of Loire-Atlantique.

ii Heating networks

The city of Paris is currently procuring a district heating concession agreement worth €2.4 billion, with an estimated capex of €780 million. The pre-qualified bidders were selected on 16 December 2019.

On 6 November 2020, the city of Strasbourg relaunched a tender for a €500 district heating network concession in the city centre, after scrapping a previous tender last year.

iii Railway network

On 27 February 2020, the Provence-Alpes-Côte d'Azur region launched the tender procedure regarding the procurement of a 10-year concession agreement to operate urban and interurban trains along the Marseille-Toulon-Nice axis, a route currently run by state-owned rail group SNCF. Bidders are required to supply new rolling stock. The concession agreement, starting in 2025, has a value of €870 million. It also involves building and operating a maintenance depot in Nice-Ville, the main railway station in Nice. The project, which is expected to be partly funded by the European Union, includes an option to extend service operations to the Ventimiglia train station at the border between France and Italy.

On 12 November 2020, the bid submission deadline regarding the concession agreement for the supply of rail and road passenger transport services on the Nancy-Contrexeville line, in the Grand Est region, was reached (€319 million) while the bid review phase has started. The contract also involves maintenance of rolling stock and financing the redevelopment of a portion of the railway line between the communes of Jarville and Vittel. This concession agreement is expected to be the first private rail concession of a service previously operated by national rail company SNCF. The concession, which should start in 2025, could be eligible for getting funds from the European Union.

On 12 November 2020, the bid submission deadline regarding the concession agreement for the supply of rail and road passenger transport services on the Bruche-Piémont-Vosges line, in the Grand Est region, was reached (€903 million) while the bid review phase has started. The contract also involves maintenance of rolling stock and financing the redevelopment of portions of the railway line between the communes of Arches and St-Dié-des-Vosges. The rail service, currently not in operation, was previously operated by national rail company SNCF. The concession, due to commence in 2025, could be eligible for funding from the European Union.

iv Ports and airports

On 7 October 2020, the city of Cannes launched a concession for the redevelopment of its port and marina infrastructure (approximately €525 million).

On 11 December 2020, the region of Occitanie selected a consortium comprising Euroports, EPICo, DEME, Qair and the Aude Chamber of Commerce to develop a major port under a concession agreement (Port-La Nouvelle), with a required cash injection of €400 million. The port specialises in grain exports and hydrocarbon imports. The region of Occitanie will also invest €230 million in the asset's development. Financial close is due in first half of 2021.

v Motorways

On 20 May 2020, pre-qualified bidders were selected regarding the Toulouse-Castres motorway concession agreement (approximately €400 million with significant public subsidies totalling €115 million). The project is listed in a 2018 government-commissioned report as one of the country's transport priorities.

On 15 March 2020, the motorway concession agreement to expand a section of the Route Center-Europe Atlantique (RCEA)/RN79 in France was concluded with a consortium comprising Eiffage and its motorway subsidiary Autoroutes Paris-Rhin-Rhône (approximately €548 million).

From the point of view of foreign investments, the French market took a further step toward increased control by public authorities in limited areas but also toward greater transparency and accessibility.

In this regard, it should first be highlighted that Regulation (EU) 2019/452 of the European Parliament and of the Council, dated 19 March 2019, establishing a framework for the screening of foreign direct investments into the European Union came into force on 11 October 2020. In particular, this Regulation provides for a cooperation mechanism under which the Member States and the European Commission can exchange information and share their risk analysis related to investment projects to be carried out on European territory. A Member State is therefore able to communicate information and issue opinions on a foreign investment in another EU Member State.⁵

France, which initiated the Regulation along with Germany and Italy, anticipated these changes by ensuring greater protection of its strategic assets as early as 2018. The last major French reform was adopted on 31 December 2019 through Decree No. 2019-1590 dated 31 December 2019 and an order dated 31 December 2019. The new provisions apply to requests for prior authorisation submitted to the minister in charge of the economy as of 1 April 2020. This reform's goal is to meet the expectations of foreign investors by making the legal framework, which has been amended in successive rounds over the past few years, more intelligible and effective. It also aims at ensuring that France retains control over strategic sectors.

This reform introduces three key modifications regarding the lowering of control thresholds, the extension of the definition of foreign investor and the extension of the sectors subject to public authorities' control.

First, before the 2019 reform, the control of investments made in France by non-European investors applied in the event that a threshold of 33.33 per cent of the share capital or voting rights of a French company operating a sensitive activity was exceeded. The reform of 31 December 2019 broadened the control of investors from non-EU countries by reducing this control threshold to 25 per cent. Nevertheless, as a result of the covid-19 crisis, this control threshold was temporarily (i.e., until 31 December 2020) lowered to 10 per cent for investments from non-EU countries in French listed companies by Decree No. 2020-892 dated 22 July 2020 and an order dated 22 July 2020. The new provisions also provide for a simplified procedure, with an exemption for the investor to request the authorisation of the minister in charge of the economy⁶) if the investment project has been previously notified to the Minister without the latter objecting within 10 days and if the transaction is carried out within six months following the said notification.

Secondly, in accordance with EU standards, new sectors are now within the scope of public authorities' control (e.g., energy storage, quantum technologies, cybersecurity, artificial intelligence, robotics, semiconductors).

Thirdly, this reform extended the definition of foreign investor. The notion of foreign investor is not limited to the direct investor acquiring control of the French target; it encompasses the entire chain of control. The reform adopts a more pragmatic approach,

5 Article 6 and 7 of Regulation (EU) 2019/452 of the European Parliament and of the Council.

6 Article R.151-7 of the French Monetary and Financial Code (created by Article 1 of Decree No. 2019-1590 dated 31 December 2019 and amended by Article 3 of Decree No. 2020-892 dated 22 July 2020).

enabling the French public authorities to extend their monitoring to situations of economic or operational control,⁷ and not only to situations of control through the holding of capital or voting rights.⁸

In addition, several simplification measures regarding the French PPP legal framework were implemented in the past year to tackle the covid-19 pandemic crisis.

Law No. 2020-289 and Law No. 2020 dated 23 March 2020 were implemented in particular by Decree No. 2020-293 dated 23 March 2020 and Order No. ECOT2008090A dated 23 March 2020. As a result of this new legal framework, the state provides companies and employees with a total of €45 billion of immediate subsidies and relief measures, and implements a €300 billion state guarantee mechanism for loans issued by credit institutions.

Ordinance No. 2020-319 dated 25 March 2020, as amended by Article 20 of Ordinance No. 2020-460 dated 22 April 2020, and Ordinance No. 2020-738 dated 17 June 2020, were issued to enable contracting authorities and economic operators to cope with the covid-19 crisis thanks to a wide array of measures (e.g., simplification of the tendering procedures, extension of contracts' duration, non-application of delay penalties, authorisations for companies subject to insolvency proceedings to submit bids). The said measures are applicable to all contracts executed on 23 July 2020 at the latest.

To take into account the extended impact of covid-19 on the French PPP economy, Law No. 2020-1525 on accelerating and simplifying public action was adopted on 7 December 2020. Three main provisions should be highlighted about the aforementioned Law:

- a* temporarily sets higher thresholds under which exemption from tendering procedures for public works contracts are granted (up to €100,000 before tax) until 31 December 2022;⁹
- b* modifies the PPP Code by incorporating the public interest reason into the list of motives justifying contracts being concluded without a tendering procedure under specific conditions.¹⁰ The PPP Code now provides that the purchaser may award a contract without a tendering procedure when, in particular due to the existence of a first unsuccessful procedure, a particular urgency, or the project's subject matter or its estimated value, compliance with such a procedure is useless, impossible or manifestly contrary to the interests of the purchaser or to a reason of general interest. This provision is applicable to all public contracts; and
- c* creates new provisions allowing the government to issue decrees that temporarily relax the general legal framework applicable to PPPs through pre-defined measures (e.g., extension of contracts' duration, non-application of delay penalties) in the case of exceptional circumstances.¹¹

7 Article L 430-1, III of the Commercial Code: according to this Article, control may result from 'rights, contracts or other means which, either alone or jointly and depending on factual or legal circumstances, confer the possibility of exercising a decisive influence on the activity of a company, and in particular: rights of ownership or use of all or part of the assets of a company; rights or contracts which confer a decisive influence on the composition, deliberations or decisions of the organs of a company'.

8 Article L 233-3 of the Commercial Code.

9 Article 142 of Law No. 2020-1525 dated 7 December 2020.

10 Article 131 of Law No. 2020-1525 dated 7 December 2020; Articles L 2122-1 and L 2322-1 of the PPP Code.

11 Article 132 of Law No. 2020-1525 dated 7 December 2020.

III GENERAL FRAMEWORK

i Types of public-private partnership

As stated above, there are two types of PPPs that are mainly used in France: concession agreements, which serve to implement major infrastructure projects such as canals, motorways, water distribution systems and toll bridges; and partnership contracts, which can be compared to private finance initiative contracts.

Concession agreements and partnership contracts¹² are both administrative contracts under French law, save for narrow exceptions. This distinction is important as the contractual relationship in an administrative contract is different from that in a private contract. Indeed, the parties are, *de facto*, unequal insofar as the public person benefits from public authority powers.

A concession agreement is defined as an agreement under which a grantor assigns, for a limited period of time, to one or several economic entities, the performance of works or the management of a service, it being specified that:

- a* a risk linked to the operation of such works or service must be transferred to the economic entity in exchange for the right to operate the said works or service;
- b* a fee in favour of the entity can be added to such operation right; and
- c* the risk transfer to the economic entity necessarily implies a real exposure to the market's fluctuation.¹³

A partnership contract is an administrative contract under which a grantor entrusts to a private party, for a period set according to the amortisation of investment or agreed financing terms, a comprehensive project relating to the design, construction or conversion, maintenance, operation or management of works, equipment or intangible assets necessary to the public service, as well as to the total or partial financing of the latter. Dismantling and destruction works, and the management of a public service, can also be transferred to the private party under a partnership contract.¹⁴

The two main PPPs can be differentiated according to their payment terms: under a partnership contract, the grantor pays a rent to the private partner in exchange for the performance of the mission, while under a concession agreement, the compensation of the concessionaire mainly arises from payments made by users of the service.

ii The authorities

In addition to public authorities (the state, local authorities and their public institutions), private entities (entities specially created to satisfy a non-commercial public interest or formed by several public entities to jointly perform certain activities and public undertakings acting as network operators) are allowed to grant concession agreements and partnership contracts.¹⁵

12 Article L 6 of the PPP Code.

13 Article L 1121-1 of the PPP Code.

14 Article L 1112-1 of the PPP Code.

15 Article L 1211-1 of the PPP Code.

In particular, public health facilities, social security bodies and some public or private entities pursuing a public-interest mission and mainly financed by public funds¹⁶ (i.e., public-private joint ventures and state-owned public industrial and commercial institutions) can also do so.

Nevertheless, central administrations other than the state, public health facilities and medical cooperation public structures are, in principle, not able to enter into partnership contracts on their own.¹⁷

For partnership contracts executed by the state, the ministries that are involved in the tendering procedure depend on the subject matter of the particular contract. Moreover, approval by the Minister of the Economy and the Budget is required before signature.¹⁸

Another important actor in the PPP sector in France is the PPP Support Service (FIN INFRA).¹⁹ The FIN INFRA is a dedicated unit within the Ministry of the Economy that assists grantors in the implementation of partnership contracts.²⁰ The FIN INFRA is primarily responsible for the validation of the preliminary evaluations prepared by grantors before launching a tender. The FIN INFRA also assists and advises public authorities in the preparation and negotiation of partnership contracts as well as any other complex public contracts or public contracts implying an innovative financing scheme.

The FIN INFRA is a major actor given that it also has to issue an opinion about the financial sustainability of each partnership contract.²¹ This requirement is an efficient way to avoid the financial difficulties deriving from the implementation of some partnership contracts in France.

iii General requirements for PPP contracts

Requirements to be satisfied to resort to a concession agreement or a partnership contract are different.

Concession agreements must include provisions pertaining to the duration of the contract and the tariffs applicable to service users. They may also include provisions relating to sustainable development and social objectives. Moreover, to optimise cost monitoring, the current concession agreement legal regime aims to increase transparency relating to the performance of concession agreements. As a consequence, concession agreements must specify that the concessionaire will be required to provide an annual report to the grantor and that the grantor will have to annually publish essential data pertaining to the concession (i.e., type of investments and applicable tariffs).

16 As mentioned under Article L 1211-1 of the PPP Code.

17 Article L 2211-1 of the PPP Code.

18 See Article R 2223-1 of the PPP Code stating that a partnership contract may be signed by the state or a state public institution only after approval by the Minister of the Economy and Minister of the Budget. In addition, under Article R 2223-2 of the PPP Code, a public body established by the state must obtain the approval of the minister in charge of its supervision. Such approvals will be presumed if no reply is given within one month from the transmission of the contract. For local authorities, the principle of their free administration exempts them from any requirement for state approval. Thus, such authorisation by the Ministers of the Economy and the Budget is not needed.

19 The FIN INFRA was created by Decree No. 2016-522, dated 27 April 2016.

20 Before 2016, the FIN INFRA was known as the MaPPP, which was created by Decree No. 2004-1119, dated 19 October 2004, and modified by Decree No. 2016-522 of 27 April 2016.

21 Article L 2212-4 of the PPP Code.

Unlike concession agreements, the use of partnership contracts is strictly regulated. First, a preliminary evaluation has to be carried out to evaluate the project's implementation method. Then, a second evaluation must assess the financial sustainability of the project. In light of these evaluations, the grantor must demonstrate that the use of a partnership contract shows better cost-effectiveness than any other type of agreement. Finally the grantor is compelled to submit these evaluations to the FIN INFRA, which is in charge of issuing an opinion on the project's implementation structure.

This preliminary procedure was introduced by the Partnership Contract Ordinance, aiming to simplify the former implementation procedure and answer criticisms raised during the past decade regarding the implementation of partnership contracts.

A partnership contract must include several mandatory provisions, such as the duration of the contract, the conditions for sharing risks between the grantor and its co-contracting party, the performance objectives assigned to the co-contracting party, the payment terms and the consequences of termination of the contract.

Both partnership contracts and concession agreements are thus entered into for a period determined by the depreciation period of the selected investments or financing terms.

IV BIDDING AND AWARD PROCEDURE

Bidding and awarding procedures for partnership contracts are closely regulated.

The PPP Code provides detailed regulation applicable to bidding and award procedures for concessions of a value greater than or equal to €5.350 million, excluding tax.²² This legal framework applicable for concessions remains flexible, with the aim of ensuring effective and non-discriminatory access for all potential bidders (including small and medium-sized companies).

As regards partnership contracts, three main granting procedures can be implemented:

- a* a competitive dialogue²³ in the case of particularly complex projects where grantors are not objectively able to define the technical means or specify the legal or financial aspects of a project;
- b* a negotiated procedure;²⁴ or
- c* a restricted call for tenders.²⁵

We will focus on the rules applicable to the competitive dialogue since it is the most common procedure for the tendering of partnership contracts.

22 Notice relating to the procedural thresholds and the list of central public authorities (JORF No. 0286 dated 10 December 2019).

23 Article L 2124-4 of the PPP Code. The grantor conducts a dialogue with the candidates admitted to the procedure with the aim of developing one or more suitable alternatives capable of meeting the specified requirements.

24 Article L 2124-3 of the PPP Code. The negotiated procedure is defined as the procurement procedure in which 'the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of them'. The negotiation process enables grantors to negotiate the terms of the contract.

25 Article L 2124-2 of the PPP Code.

i Expressions of interest

To allow effective competition among applicants (it being specified that applications can be submitted through a consortium), partnership contracts and concession agreements must be the object of adequate publicity.²⁶

Nevertheless, partnership contracts may only be used in the following cases: if the value exceeds €2 million for immaterial assets or if the contract contains specific targets on performance; if the value exceeds €5 million for network infrastructures; or if it exceeds €10 million in other cases.²⁷

Regarding concession agreements, publication requirements are less strict. The public tender notice has to be published in a newspaper authorised to carry legal advertisements and in a specialised newspaper of the relevant economic sector. The notice must also specify the procedures for the applications' submission and the essential characteristics of the concession agreement, including its purpose and nature. Granting authorities may also require the production of documents from the bidders in support of their applications (i.e., the presentation of sufficient professional and financial guarantees to ensure the continuity of the public service).

In both cases, the publication notice must specify the deadline for applications.

ii Requests for proposals and unsolicited proposals

For both partnership contracts and concession agreements, tendering documents are communicated to shortlisted applicants.²⁸

Regarding concession agreements, the grantor must deliver reference documents to the applicant that define the quantitative and qualitative characteristics of the required benefits and, if applicable, the service pricing conditions applicable to the end user.

Regarding partnership contracts, in a competitive dialogue, the grantor has to define the detailed needs and objectives that the project has to meet in a functional programme that is transmitted to the applicants selected for the dialogue.

The possibility of an unsolicited proposal is contemplated neither for concession agreements nor for partnership contracts under the PPP Code.

iii Evaluation and grant

For partnership contracts, a dialogue is conducted with each candidate to define solutions on the basis of the functional programme. The dialogue typically involves two or three phases, which are normally carried out over a period of nine to 12 months.

At the end of the dialogue period, the procuring authority invites the candidates to submit a tender based on the considered solutions. After analysis of the tenders, a partnership contract is awarded to the candidate with the most economically advantageous tender in accordance with the criteria set out in the contract notice or in the tender procedure. The awarding criteria must include the overall cost of the tender and performance objectives

26 Articles L 2131-1 and L 3122-1 of the PPP Code.

27 Articles L 2211-5 and R. 2211-1 of the PPP Code.

28 Under Article L 3123-18 of the PPP Code, in the case of a tendering procedure relating to a concession agreement, the public authority lists applicants admitted to tender after consideration of their professional and financial guarantees and their ability to ensure the continuity of public service and equality of service users.

defined according to the purpose of the contract.²⁹ As soon as the preferred bidder is selected, the contracting authority must inform the unsuccessful candidates that their tender was rejected. A standstill period of at least 16 days is required between the date of notification of the decision and the date of execution of the contract³⁰ to allow for any eliminated candidate to initiate a summary proceedings challenge on grounds of a breach of the relevant procurement rules.³¹

For sole partnership contracts to be entered into by the state or entities linked to the state, the FIN INFRA must assess the impact on public finances and the fiscal sustainability of such agreement before its execution.

For all partnership contracts, once they have been signed, the procuring authority is required to send an executed copy of the partnership contract to the FIN INFRA.

At the end of the awarding procedure, a notification must be sent within 30 days to the European Union Official Journal.

Regarding concession agreements, before the negotiation phase, the grantor selects the potential bidders based on their capacities and abilities in accordance with the criteria set out in the publication notice.³² Once they have been selected, applicants have to submit tenders that are freely negotiated with the contracting authority. At the end of these negotiations a concessionaire is chosen and the applicants who have had their offers rejected are notified thereof. A similar standstill period, however, must be respected.³³

V THE CONTRACT

i Payment

Concession agreements and partnership contracts can be differentiated according to their payment terms.

Under a concession agreement, the operating risk is transferred to the concessionaire and this transfer necessarily implies a real exposure to the market's fluctuations. As such, the compensation of the concessionaire is linked to the results of such operation. Therefore, the concessionaire's compensation mainly arises from service users.

However, this requirement does not prevent the payment of subsidies by the procuring authority. Given the requirements that could be imposed by the concession agreement, maintaining the financial viability and economic balance of the concession agreement is necessary so that the concessionaire does not apply very high rates to service users. For example, significant financial contributions are paid in concession projects related to railway infrastructure (high-speed railway) or motorways. Local authorities usually subsidise public transport or school catering concessions.

Apart from the revenue collected from service users and subsidies granted by public authorities, the concessionaire may also earn additional revenues (e.g., proceeds from side activities such as advertising and fines).

29 Article R 2152-8 of the PPP Code.

30 The duration is either 11 days (when the decision has been electronically transmitted to the rejected bidders) or 16 days.

31 Article L 551-1 of the Administrative Justice Code.

32 Articles R3123-11 and R 3123-12 of the PPP Code.

33 Article R 3125-2 of the PPP Code.

Unlike concession agreements, partnership contracts are characterised by a regular payment from the grantor to the private partner throughout the term of the contract. This remuneration is determined for the services provided by the private partner (works, intangible investments, supplies and services) and is divided into several parts. One part represents the compensation of the partner for the supply of equipment and the cover costs for servicing the loans contracted to carry out the investment, financing costs, taxes and fees that the partner pays on its investments. The compensation also takes into account the services provided by the private partner. Finally, the compensation of the partner must cover the maintenance costs and expenses for major maintenance and the renewal of certain infrastructures.

The partnership contract must define the terms of the calculation and disbursement of the payment to be made by the grantor. Such payment may be monthly, quarterly or half-yearly.

Under partnership contracts, the compensation is not necessarily fixed as it can take into account:

- a* the completion of performance objectives: the compensation of the private partner may depend on performance targets set in the partnership contract. Premiums or bonuses may be paid (e.g., if the works are completed before the date specified in the contract). Likewise, penalties (e.g., in the case of a delay in completion) may reduce the amount of the rent to be paid by the grantor; and
- b* the collection of ancillary revenues:³⁴ the private partner may develop structures and equipment to benefit from complementary incomes.

Should a partnership contract include the transfer of the management of a public service, the contractor could receive direct payments from service users on behalf of the public authority responsible for this public service. As such, the cash flows of each of the parties have to be expressly distinguished to avoid any confusion with the legal framework applicable to concessions.

ii State guarantees

There are no state guarantees per se issued for PPPs in France.

However, in early 2009, the state established a guarantee system for priority PPP projects in response to the financial crisis, which was affecting a number of very large PPPs. The FIN INFRA³⁵ examined four projects worth a total of over €13 billion, but only one project – under a concession agreement scheme – was selected to benefit from the guarantee: the high-speed railway, Sud Europe Atlantique, which was the biggest rail PPP ever launched in Europe (financing of €7.8 billion). This concession agreement was granted by Réseau Ferré de France to a consortium led by VINCI, and the state guaranteed a €1.06 billion senior secured debt to the lenders.

Unlike the state, local authorities may guarantee loans subscribed by the project company under a concession agreement or a partnership contract.

34 The collection of ancillary revenues serves as a financial incentive for the partner, but also for the public party. Indeed, the rent paid by the public body may be reduced depending on ancillary revenues collected by the partner.

35 At this time, the name of the FIN INFRA was MaPPP. The MaPPP was replaced by the FIN INFRA in 2016.

Moreover, the contracting authority (including the state) may enter into direct agreements with the private party and its lenders to cover specific issues (cancellation or nullity of the concession agreement or the partnership contract) and preserve the lenders' interests.

iii Distribution of risk

PPPs rely on a clear allocation of the risks between the public and private entities. This allocation of risks is negotiated by the parties and is usually the object of a risk matrix. Except for the risk of use of the works, the risk matrix is fairly similar for concession agreements and partnership contracts.³⁶

Risks relating to the performance of the contract (e.g., delays in the completion and delivery of the works, archaeological discoveries and design risk) are generally transferred to the private entity.

In France, particular attention is given to public authority powers (i.e., powers to unilaterally amend or terminate the contract on public interest grounds) as the contract provisions may define the financial consequences of the use of public authority powers by the grantor.

iv Adjustment and revision

Being long-term agreements, PPPs often include specific clauses for the review of contractual terms, such as tariff-variation clauses, indexation clauses³⁷ and meeting clauses.

Amendments can also be entered into, but only if the overall structure of the contract is not materially altered. Should the grantor be a public authority, the PPP contract can, as a principle, be unilaterally modified by it. The PPP Code establishes such possibility for the public authority to unilaterally amend the contract for reasons of general interest. However, the power of amendment is regulated so that the modification cannot result in a disruption of the overall structure of the contract. Embodying the protection offered by administrative case law, the PPP Code protects the co-contracting party of the administration: the economic balance of the contract must be maintained, and the private co-contracting party must be adequately compensated for the damage suffered.³⁸

Similarly, administrative case law regarding hardship³⁹ has been codified in the PPP Code and is applicable to both concession agreements and partnership contracts. Thus, the private party is entitled to an indemnity to be paid by the grantor when an unforeseen event beyond the control of parties temporarily disrupts the balance of the contract.⁴⁰

The legal framework applicable to both partnership contracts and concession agreements strictly regulates their amendments by stating six limitative alternative cases under which modifications are acceptable.⁴¹

36 Under concession agreements, the risk of the works being used by the end user is borne by the concessionaire.

37 These clauses must comply with Articles L 112-1 to L 112-3 of the Monetary and Financial Code that prohibit, with certain exceptions, indices based on overall inflation and requires the use of indices related to the obligations whose price is indexed.

38 Article L 6 of the PPP Code.

39 Supreme Administrative Court, 9 December 1932, No. 89655.

40 Article L 6 of the PPP Code.

41 Articles L 2194-1 and L 3135-1 of the PPP Code.

The provisions of the PPP Code pertaining to the modification of concession agreements apply even for contracts entered into before 1 April 2016.⁴² This improvement clarifies the legal regime and provides for greater flexibility in the implementation of concession agreements. However, no such provision exists for partnership contracts.

v Ownership of underlying assets

The legal regime applicable to concession agreements where the grantor is a public authority is organised around a classification distinguishing three types of assets:⁴³

- a* assets of compulsory reversion that must revert to the public authority automatically once the contract ends. Because they are crucial to the provision of the public service, these assets are considered, when the contract does not address this issue,⁴⁴ as the property of the public authority *ab initio*, that is to say, from the moment the concessionaire acquires an asset or completes specific works. Assets of compulsory reversion must necessarily return free of charge to the public authority at the end of the contract;
- b* assets of optional reversion, which are useful to the provision of the public service but are not necessary to ensure its continuity. The concessionaire is the owner of such assets for the duration of the concession agreement and they only become the property of the public authority if the public authority exercises its recovery right at the end of the concession agreement. The terms of payment of such assets are specified in the contract; and
- c* assets that belong to the concessionaire. They are not subject to being returned to or eventually recovered by the public authority as they do not aim to ensure the continuity of public service.

Regarding partnership contracts, the private partner is the owner of the assets. The private partner sets up a financing that covers the acquisition of assets, the cost of the works and the cost of maintenance and renewal. Consequently, by paying rents to the private partner, the contracting authority pays for the acquisition of proprietary interests in certain assets. At the end of the partnership contract the partner transfers the assets to the contracting authority.

Assets that are not integrated in the financing base (i.e., not acquired by the grantor through the rent) can remain the property of the private partner. However, they may be subject to a contractual provision providing for their transfer against payment to the public authority at the end of the contract.

42 Article 20, II, of the Ordinance No. 2018-1074 dated 26 November 2018.

43 Article L 3132-4 of the PPP Code.

44 The contract may assign (1) ownership of the works to the concessionaire for the duration of the contract, which, although necessary for the operation of public service, are not established as the property of a grantor; or (2) rights on such property (Supreme Administrative Court, 21 December 2012, commune of Douai, No. 342788). At the end of the contract, if assets of compulsory reversion are not fully amortised, the co-contracting party is entitled to a payment equal to the net book value shown on the balance sheet if the depreciation period of the assets involved is less than or equal to the duration of the contract, or the net book value resulting from the depreciation of these assets over the term of the contract when the term of the agreement is less than the normal depreciation period of the assets.

vi Early termination

The provisions for early terminations are the same for partnership contracts and concession agreements. Specific legal frameworks exist for several types of termination.

Termination on the grounds of general interest

Should the grantor be a public entity, it cannot waive its unilateral right to terminate a public law contract on the grounds of general interest. The quantum of the indemnity owed to the private entity is the highest of all termination cases.

Termination for a public authority's contractual breach

Should the grantor be a public entity, termination for contractual breach by the grantor cannot be a contractual ground under which the concessionaire may require the termination of a concession agreement.

To terminate a concession agreement on the basis of a contractual breach by the grantor, the concessionaire must request such termination before the relevant administrative jurisdiction. The concessionaire would then be entitled to be indemnified in accordance with the principles established by administrative case law, namely to be indemnified in respect of losses suffered, as well as in respect of the loss of profits. Recent case law has confirmed the possibility of including in a contract not related to the performance of the public service a provision allowing the partner to terminate the contract for a contractual breach by the public authority.⁴⁵ Consequently, certain partnership contracts not related to the performance of the public service could potentially include such contractual provision.

Termination for failure to fulfil the obligations as determined by the Court of Justice of the European Union

The PPP Code provides that a concession agreement or a partnership contract may be terminated by a grantor if the Court of Justice of the European Union states that a state has committed a serious breach of its European Union obligations relating to markets and if the concession agreement or the partnership contract should not have been awarded because of the said breach.

Termination for force majeure

If a force majeure event or an unforeseen event occurs, the contract may be terminated. The contract usually provides that the private entity will be indemnified on the basis of the useful expenses theory developed by the Supreme Administrative Court.⁴⁶ As it is a jurisprudential theory it is still difficult to determine which costs are deemed to be useful expenses and consequently are to be indemnified. However, financial expenses should be indemnified.⁴⁷

⁴⁵ Supreme Administrative Court, 8 October 2014, No. 370644. It must be noted that the case law did not concern a concession agreement or a partnership contract but there is a reference to administrative contract; and the termination is not automatic. Indeed, the public authority must have the possibility to contest the termination.

⁴⁶ Supreme Administrative Court, 19 April 1974, No. 82518.

⁴⁷ The Supreme Administrative Court has recently held that financial expenses can be considered as useful expenses (Supreme Administrative Court, 7 December 2012, No. 351752). However, it must be specified that in this case, the concession agreement was not terminated on the grounds of force majeure.

Termination for a private contracting party's contractual breach

The grantor may also terminate the contract for breach by the private contracting party, as long as such breach is sufficiently severe.⁴⁸ Such power to terminate the contract exists even when no contractual provisions address such power.

When the contract is so terminated, the private contracting party is not entitled to any compensation.⁴⁹

In addition, the grantor can decide to terminate the contract at the expense and risk of the private contracting party, meaning that the latter will have to bear the additional costs related to the new tendering procedure that the grantor will have to launch to find a new contracting party.

However, doing so requires satisfying two conditions:

- a* the new contract cannot include any new obligations compared to the terminated contract; and
- b* the initial private contracting party must be notified of the new tendering procedure and has a right to monitor its implementation as well as the execution of the new contract to protect its own interests.⁵⁰

Indemnification

One of the major points of the PPP Code is the enshrinement of the principle of indemnification of financial expenses incurred under the partnership contract or the concession agreement in the case of judicial cancellation following a third-party challenge.

Indeed, in such case, private entities can seek indemnification for all expenses incurred in accordance with the concession agreement or the partnership contract, which may include the financial expenses incurred to ensure the performance of the contract, to the extent that the said expenses have been useful to the grantor.⁵¹

However, the indemnification of such financial expenses in particular can only apply when a schedule to the contract specifies the main characteristics of financing to be set up for the purposes of the contract performance.

Finally, the PPP Code provides that, if an indemnification clause is provided under the partnership contract or the concession agreement, then it is deemed separable from the rest of the said agreements.

From a project finance perspective, such express reference to the theory of useful expenses should be reassuring for both sponsors and lenders.

Indeed, the indemnification of useful financial expenses constitutes a major achievement for the lenders and all finance parties involved in a partnership or concession project because it covers the risk of third-party challenge, in particular, should a concession agreement or a partnership contract be held to be void as result of a challenge.

In any case of termination, it is preferable to anticipate at a contractual level the financial consequences and terms of payment of owed indemnities resulting from contract termination.

48 Articles L 2195-3 and L 3136-3 of the PPP Code.

49 Supreme Administrative Court, 20 January 1988, No. 56503; Supreme Administrative Court, 12 November 2015, No. 387660.

50 Supreme Administrative Court, 10 June 1932, *Sieur Bigot*, Rec. p. 572.

51 Articles L 2235-1 and L 3136-7 of the PPP Code.

vii Dispute resolution

As administrative contracts under French law, concession agreements and partnership contracts are traditionally subject to the jurisdiction of French administrative courts.

Indeed, public authorities are in principle forbidden from entering into arbitration agreements under Article 2060 of the Civil Code, except for international matters. Several other narrow exceptions are also provided under Article L 311-6 of the Administrative Justice Code.

However, the PPP Code has brought some clarifications about the possibility to resort to arbitration for disputes arising from the implementation of such agreements and contracts.

In both cases, if such dispute only involves private parties, the said parties can submit their dispute to arbitration.⁵²

Regarding partnership contracts, public and private parties are expressly allowed to submit their dispute to arbitration, provided that the governing law is French law.⁵³

On the contrary, arbitration is forbidden for parties to a concession agreement.⁵⁴

VI FINANCE

In France, PPPs are usually financed under a project finance scheme. The key feature of project financing is that it is an off balance sheet financing for the sponsors.

Project finance generally involves high debt-to-equity ratios depending on the particular project and market. It refers to a limited recourse (or non-recourse) financing structure that does not impose any obligation on the project sponsors to guarantee the repayment of the project debt, should the project revenues not be sufficient to cover the total debt service. Shareholders of the project company are generally only liable up to the extent of their shareholdings.

In respect of the partnership contract, the procuring authority must be informed of any change in the project company shareholding. The partnership contract must contain provisions regarding the procuring of authority information and, as applicable, the proceeds sharing terms in the case of the sale of the project company shares.

The borrowing entity is a project company, namely, a special purpose vehicle (with no previous business or record) that will finance, design, build, operate and maintain the project. In France, project companies are often incorporated as limited liability companies or partnerships.

The repayment of the project loans by the project company relies on the future cash flow projected to be generated from the operation of the project (primarily allocated to operating costs and then to debt service).

One of the main concerns of the lenders is to analyse the bankability of the project, which depends on several factors. For instance, the project's cash flow capacity, the mitigation of the risks between all stakeholders, the project company's contractual documentation and the security package must all be examined to ensure the successful financing of a PPP in France.

52 Articles L 2197-7 and L 3137-5 of the PPP Code.

53 Article L 2236-1 of the PPP Code.

54 Article L 3137-4 of the PPP Code.

Many sources of financing are available, including commercial lenders (banks, insurance companies, credit corporations, etc.), sponsors' equity, public bodies, international (multilateral) agencies, bilateral agencies and bondholders. These financiers might be based in France or abroad.

The PPP Code also contemplates the possibility for a procuring authority to contribute to the financing of the project.

State or local authorities or other public bodies, whether acting as procuring authority or not, are now entitled to take a minority stake in the project company. In this case, the project company bylaws must specify the allocation of risk between the shareholders and the measures implemented to prevent any conflict of interest.⁵⁵

The PPP Code also provides that partnership contracts are eligible for subsidies or other financial contributions. The terms and the payment schedule of the subsidies and other financial contributions can be adapted to the duration of the contract.

In respect of financing adjustment, the procuring authority may provide that financing terms referred to in the final tender can be adjusted, provided that this adjustment does not affect the conditions of the bidding procedure by exempting the procuring authority of the obligation to comply with the principle of selecting the most economically advantageous tender or by allowing the prospective candidate to affect the economic balance of its tender.⁵⁶

In a typical project finance transaction, the lenders provide different types of debt to the project. Senior lenders provide a debt with a right of payment senior to that of the subordinated lenders. Moreover, some lenders might provide a tranche of debt for a specific period of time and with a specific interest rate and an amortisation differing from the tranche provided by other lenders. A wide range of French law debt instruments are also available to issue subordinated, high-yield or convertible bonds.

The standard types of project finance credit agreements may notably include:

- a* the term sheet: an initial agreement between the project company (in its capacity as future borrower) and the lenders outlining the key terms and conditions of the financing;
- b* senior facility agreements: agreements between the lenders and the project company (in its capacity as borrower) setting out the rights and obligations of each party regarding the senior debt;
- c* a common terms agreement: an agreement entered into by the financing parties and the project company that defines the terms and conditions that are common to all the financing instruments and the relationship between the parties (for instance, definitions, events of default, order of drawdowns, project accounts, permitted investments, voting process for waivers and amendments, undertakings, covenants, representations and warranties). Such agreement ensures that all the finance parties have a common understanding of the key definitions and critical events;
- d* subordinated loan agreements: loan agreements whereby subordinated creditors agree not to be paid until the senior creditors have been repaid. These loans are usually provided by the project sponsors or by third-party investors such as investment funds;

55 Articles L 2213-4 to L 2213-7 of the PPP Code.

56 Article L 2222-1 of the PPP Code.

- e* a shareholders' agreement: an agreement that sets forth the rights and liabilities of each project company shareholder especially with respect to capital contributions, transfers, conflicts of interest and restrictions on competition;
- f* an intercreditor agreement: an agreement between the project company and the lenders (senior lenders, mezzanine lenders, hedging counterparties, loan noteholders and intra-group lenders, etc.), which regulates the creditors' rights to receive payments (such as principal, interest and fees), notably in the event of default;
- g* hedging agreements: agreements that enable the project company to fix the interest rate on all or part of its debt or to limit its exposure to exchange rate risks;
- h* a direct agreement between the lenders and the project company under which the lenders will be entitled to take over the project (step in) regarding the key project agreements should the project company default under certain circumstances;
- i* sponsor support and third-party guarantee: senior lenders will often require sponsors or third parties to put in place certain credit-enhancement measures (parent guarantee, letter of credit, comfort letter);
- j* public sector support: public sector support instruments may also be set up (e.g., direct funding support by way of public sector capital contributions);
- k* contingent support or guarantees by the public sector or other private sector participants involving specific risks that cannot otherwise be effectively controlled by the project company or other private sector participants (e.g., minimum traffic and revenue guarantees for a toll road); and
- l* EU loan guarantee: an example is the Loan Guarantee for Trans-European Transport Network Projects, which is a credit-enhancement instrument set up and developed jointly by the European Commission and the European Investment Bank, facilitating a larger participation of the private sector involvement in the financing of Trans-European Transport Network infrastructure.

As project finance is carried out on a limited (or non-recourse) basis, it is critical to secure the finance parties through a collateral security package, which also helps to enhance the bankability of the project and the creditworthiness of the project company in its capacity as borrower.

Under French law, a security interest is generally created in favour of the creditors of the secured obligation.

French law recognises the role of security agents. Pursuant to Article 2488-6 of the Civil Code, a security agent may be in charge of setting up, registering, managing and enforcing any security interest for the benefit of the secured creditors.⁵⁷ Indeed, security interests are granted in favour of each lender and not only for the benefit of the security agent, which means that each of the lenders might be entitled to act individually in enforcing its specific security interests rights (subject to any restrictions in the financial documentation). The security agent is thus appointed by the creditors and acts under a power of attorney granted by the lenders.

⁵⁷ The legal regime applicable to the security agent has been modified by Ordinance No. 2017-748, dated 4 May 2017. However, please note that, according to most French practitioners, this modification establishes an incomplete legal regime and does not address many uncertainties.

The most common types of security interests used in PPP project finance transactions in France are:

- a* a pledge over bank accounts (governed by Article 2355 et seq. of the Civil Code);
- b* a pledge over securities accounts (governed by the provisions of Article L211-20 of the Monetary and Financial Code) involving a pledge over shares or other financial securities and a pledge over the bank account on which cash proceeds relating to such shares or financial securities are credited (e.g., dividend);
- c* a pledge over the project company's ongoing business (governed by Article L142-1 et seq. of the Commercial Code) notably involving lease rights, logo and corporate name, goodwill, commercial furniture, equipment and machinery used for the operation of business, and certain intellectual property rights attached thereto;
- d* a pledge over equipment (governed by Article L525-1 et seq. of the Commercial Code or Article 2333 et seq. of the Civil Code);
- e* a pledge over intellectual property rights (governed by Article 2355 et seq. of the Civil Code);
- f* a pledge over receivables – including future receivables, if such receivables are sufficiently identified – (governed by Article 2355 et seq. of the Civil Code);
- g* assignment by way of security over receivables (including contingent or future receivables if such receivables are sufficiently identified). Under French law, receivables are assigned by way of security, which is a simplified form of assignment of receivables for security purposes. It transfers the ownership of a receivable to the relevant secured creditor. Such security interest, which is governed by Article L313-23 et seq. of the Monetary and Financial Code, is only available, provided that:
 - the assignee is a credit institution licensed in France or otherwise licensed to carry out its activities in France through the European Passport, a financing company or, since Ordinance No 2017-1432, dated 4 October 2017 and applicable as of 3 January 2018, an alternative investment fund;
 - the assigned receivables secure a credit granted by a credit institution (the assignee) to the assignor in connection with its business activities; and
 - the assigned receivables relate to business or professional activities;
- h* a trust by way of security (governed by Article 2011 et seq. of the Civil Code) whereby a debtor assigns the ownership of its assets on a temporary basis into a dedicated estate. Such a dedicated estate is managed by a fiduciary specifically appointed for this purpose;⁵⁸
- i* delegation of receivables (governed by Article 1336 et seq. of the Civil Code). A delegation is commonly used to take security over receivables under insurance policies. The debtor (i.e., insurance company) agrees to make payments directly to the secured creditor; and
- j* security interests (mortgage, lender's lien, antichresis) on real property (land, buildings, rights of way and easements). Such security interests must be entered into by way of notarised deed and registered to the relevant land registry to become enforceable against third parties.

58 Although this mechanism appears to be quite akin to the mechanism of trust in common law jurisdictions, it differs from the trust as it is not based on a dismemberment of the right of ownership of the assets transferred into the dedicated estate (i.e., beneficial ownership versus legal ownership).

In addition to the above-mentioned security interests, creditors may require the sponsors to provide personal guarantees, notably independent guarantees such as first-demand guarantees and standby letters of credit.

Article 60 of Law No. 2019-486 dated 22 May 2019, relating to companies' growth and transformation (PACTE Law) has enabled the government to reform French security law through the issuance of ordinances within a period of two years following publication of the PACTE Law. Such ordinances have not yet been published but, based on the preliminary draft Ordinance published in December 2020 as well as on the objectives set forth in the PACTE Law, and insofar as it relates to the security interests listed above, the main changes expected would be:

- a* clarification and better efficiency of guarantees;
- b* harmonisation of publicity rules and formalities;
- c* clarification as to the pledge of receivables;
- d* creation of an ordinary law assignment of receivables by way of security;
- e* creation of a regime for the cash collateral in the French Civil Code;
- f* facilitating the creation of security interests by electronic means; and
- g* amendments of the rules governing security interests within the framework of insolvency procedures.

At the closing date and before any subsequent disbursement of the loan, lenders will require that the borrower first comply with a set of conditions precedent, including (for the first drawdown):

- a* organisation and existence of the project company;
- b* execution and delivery of a facility agreement, and related financing documents;
- c* security interest filings;
- d* availability of funds;
- e* related equity documents;
- f* sponsor support documents;
- g* third-party support documents;
- h* guarantees;
- i* enforceability of project contracts;
- j* permits;
- k* insurance policy endorsements and an insurance report;
- l* real estate surveys and title insurance;
- m* the financial statement of the project company and other project participants;
- n* construction budget and construction drawdown schedule;
- o* revenue and expenses projections;
- p* engineering reports;
- q* consultant reports;
- r* environmental review;
- s* legal opinions;
- t* know-your-customer processes;
- u* no material adverse change;
- v* no defaults; and
- w* no litigation.

VII RECENT DECISIONS

In 2020, a few important rulings were issued by administrative judges regarding the French PPP legal framework.

In a decision dated 27 March 2020,⁵⁹ the French Supreme Administrative Court decided that a taxpayer is allowed to challenge certain provisions of a concession agreement before the French administrative courts, particularly with regard to tariffs, as long as the said taxpayer establishes that the disputed provisions have a significant impact on the community's finances or assets. After referral, the Administrative Court of Appeal of Nancy followed and applied the French Supreme Administrative Court's ruling.⁶⁰

In a decision dated 9 June 2020,⁶¹ the French Supreme Administrative Court stated that the contracting party of a public authority whose contract has been declared void or cancelled may claim reimbursement of its expenses that were useful to the said public authority. In the case of an early-terminated partnership contract, the useful expenses include the financing costs – within the limit of the usual costs of such transaction – arising from the early repayment of the loan and of the interests related thereto between the date of termination and the date on which the public authority has repaid to the contracting party the useful value of the work concerned.

In a decision dated 19 June 2020,⁶² the French Supreme Administrative Court specified that, if a public contracting authority is free to determine the selection criteria applicable to a tendering procedure, it cannot legally retain a weighting that would clearly not allow the most economically advantageous tender to be selected; for example, when it gives a weighting of 90 per cent to the technical component of the tender and 10 per cent to the price component.

In a decision dated 6 November 2020,⁶³ the French Supreme Administrative Court ruled that there is no obligation on a public contracting authority to indicate precisely in the tendering procedure documents the extent and details of the investments that will have to be made by the private contracting party. The granting authority may validly leave to candidates the definition of their own investment programme.

In a decision dated 9 November 2020,⁶⁴ the French Supreme Administrative Court decided that a public authority may validly initiate and conduct a tendering procedure even if it is not yet competent to do so, provided that it does not sign the contract until it becomes competent to do so.

In a decision dated 10 July 2020,⁶⁵ the French Supreme Administrative Court found that, when a public contracting authority's consent to entering into a contract has been obtained through a private contracting party's fraudulent anticompetitive practices, the said public contracting authority may seize the French administrative courts to get the contract cancelled or to get compensated for the tortious conduct of said private contracting party, or both. If the contract gets cancelled, the private contracting party must pay to the public contracting authority all the sums that the private contracting party received from the public

59 Supreme Administrative Court, 27 March 2020, No. 426291.

60 Administrative Court of Appeal of Nancy, 8 December 2020, No. 20NC00843.

61 Supreme Administrative Court, 9 June 2020, No. 420282.

62 Supreme Administrative Court, 19 June 2020, No. 431194.

63 Supreme Administrative Court, 6 November 2020, No. 437946 437975.

64 Supreme Administrative Court, 9 November 2020, No. 436922.

65 Supreme Administrative Court, 10 July 2020, No. 420045.

contracting authority in the context of the implementation of the contract; the private contracting party can, however, be compensated for all its expenses that were useful to the public contracting authority, to the exclusion of any private contracting party's profits.

In another decision dated 10 July 2020,⁶⁶ the French Supreme Administrative Court ruled that there is an exception to the obligation of the public contracting authority to seize the French administrative courts before terminating an administrative contract on the ground of public interest. The public contracting authority may so terminate the administrative contract without seizing the French administrative courts, subject to complying with the general principle of contractual loyalty, when the said contract is affected by an irregularity that could justify its termination or cancellation by the French administrative courts. If such case of termination, the private contracting party may still be compensated for its expenses that were useful to the public contracting authority. In addition, if the said irregularity is partly or wholly attributable to the public contracting authority's fault, the private contracting party may be compensated for the damage it suffered from due to the said public contracting authority's fault.

VIII OUTLOOK

The year 2020 brought changes to the French PPP legal framework in particular through the entry into force of covid-19-related laws and decrees modifying the first comprehensive PPP Code in France.

Even though this new PPP Code does not substantially change the legal rules governing partnership contracts and concession agreements, it definitely clarifies the French PPP legal regime by gathering all the essential legal provisions in a single instrument. In addition, legal principles resulting from existing French and European case law were also codified, provided that such case law was deemed stable.

The PPP Code, comprising around 1,747 articles, undoubtedly simplifies the legal framework governing PPP contracts, to the benefit of public authorities, companies and practitioners. Such changes, along with the renewed support of certain local entities, would normally foster better dynamics concerning PPP projects in several key sectors (e.g., transport, health, education, urban equipment, environment, energy efficiency and telecommunications).

However, the spread of covid-19 throughout the world and in France significantly impacted national PPP activities, which substantially decreased.

This required the French parliament and government to quickly adopt a set of legal instruments to fight and mitigate the consequences of covid-19, including financial aids to companies and the launching of new tendering procedures. Public authorities also showed a renewed focus on the development of national PPP projects in certain sectors. It is expected that French and European political authorities will keep engaging in strong economic revival policies that could translate into additional public subsidies to the benefit of several PPP projects.

66 Supreme Administrative Court, 10 July 2020, No. 430864.

While it seems too soon to infer from the expected decrease of worldwide and national economic activities that the French PPP market will slow down in every sector to a freezing point in the mid to long term, the benefits of such public policies remain to be assessed in the long run.

In any case, 2021 will definitely involve critical developments regarding the legal and economic environment of PPP projects that will have to adapt to the new covid-19-related challenges and ordeals.

ABOUT THE AUTHORS

FRANÇOIS-GUILHEM VAISSIER

White & Case

François-Guilhem Vaissier is a partner in White & Case's Paris office's energy, infrastructure and project finance team. His practice mainly includes private sector participation and all aspects of the structuring, procurement and financing of energy, infrastructure and industrial projects.

An expert in public, construction and energy law, François-Guilhem Vaissier has managed the negotiation and drafting of project documentation relating to large transactions in France (railways, motorways, road tunnels, airport operations, co-generation plants, wind farms), Europe (underwater tunnels, water and wastewater concessions), Africa (hydro-power plants and aluminium smelter projects, coal-fired power plants, cement plants, motorway concessions, mining concessions, free-zone areas, oil production sharing agreements and privatisation of a national air carrier), Asia (first public-private partnership for a metro project in India) and the Middle East (airport BOT, real estate financing).

LOUIS-JERÔME LAISNEY

White & Case

Louis-Jérôme Laisney is an associate in the energy, infrastructure and project finance group of White & Case's Paris office. He advises both sponsors and lenders (French and foreign commercial banks, development finance institutions) as part of energy project financings and infrastructure financings, where he is mainly involved in finance documentation (facility agreements, intercreditor and subordination agreements and security documentation).

OLIVIER LE BARS

White & Case

Olivier Le Bars is an associate in the energy, infrastructure and project finance group of White & Case's Paris office.

He has a sound knowledge of public contractual issues (public service concessions, public works concessions, partnership agreements, PPPs, BOT frameworks, etc.). His practice mainly includes public law, construction law and energy law.

Olivier is essentially involved in all aspects of the structuring and financing of infrastructure, industrial and energy projects, notably by negotiating and drafting PPPs,

back-to-back agreements (engineering, procurement and construction agreements, operation and maintenance agreements, and interface agreements) as well as security documents (direct agreements).

SACHA RUFFIÉ

White & Case

Sacha is an associate in the project development and finance group of White & Case's Paris office.

His main fields of expertise are project finance, public business law, international investment law and international arbitration.

He has a sound knowledge of public contractual issues (public service concessions, public works concessions, partnership agreements, PPPs, BOT frameworks, etc.) and is involved in the negotiation and drafting of infrastructure, industrial and energy project documents, including back-to-back agreements (EPC agreements, O&M agreements and interface agreements) and security documents (direct agreements).

WHITE & CASE LLP

19 Place Vendôme

75001 Paris

France

Tel: +33 155 04 58 19

Fax: +33 155 04 15 16

fgvaissier@whitecase.com

olebars@whitecase.com

louis.jerome.laisney@whitecase.com

sacha.ruffie@whitecase.com

whitecase.com

an LBR business

ISBN 978-1-83862-819-2