

COVID-19 AND PUBLIC-PRIVATE PARTNERSHIPS PRACTICE NOTE

Assessing Operational PPP Portfolios



This note reflects the work of various staff throughout the Infrastructure Finance, PPPs & Guarantees Global Practice (IPG) alongside colleagues in other World Bank departments and IFC. The note was written by Jane Jamieson, Jenny Chao and Jemima Sy with inputs from Mahomed Bashir, Patrick Dougherty, Christina Paul, Dentons LLC and DLA Piper UK LLP under the guidance of Imad Fakhoury (Global Director – IPG) and Fatouma Toure Ibrahima (Practice Manager- PPP Group). Peer reviewers were: Aijaz Ahmed, Lourdes Baclagon, Sungjung Kim, and Vickram Cuttaree. Many more were involved as task team members of the various country assistances. The core team in PPIAF included: Lorena Meco, Philippe Neves, and Merita Salihu.

1. Context and Aim of the Note

The COVID-19 pandemic will continue to impact infrastructure projects around the globe in all sectors as supply chains are disrupted, customer demand falls, and health regulations force a change in the way business is conducted.

Infrastructure projects delivered through public-private partnerships (PPPs) make them more challenging to deal with because of long-term contractual commitments made between counterparties, including third-party lenders and investors. In projects that are entirely publicly funded and operated, governments can unilaterally decide to absorb increased costs or reduced revenues on their balance sheet or adjust service standards and reduce maintenance regimes.

Not so in PPPs, which are long-term partnerships built on key commercial assumptions, explicit performance requirements, and allocation of risks and costs between the public and the private parties under contractual relationships—that did not necessarily anticipate an unprecedented systemic external shock like the COVID-19 pandemic. Therefore, parties to PPP contracts need to come to an agreement on how to deal with the impact of COVID-19 to ensure uninterrupted services to customers and that the project continues to represent value-for-money to the government. Dealing with COVID-19 impacts in PPPs could pose information asymmetry challenges for governments, particularly where contract management and disclosure practices are weak.

This note discusses key operational considerations when trying to maintain services during the COVID-19 crisis and recalibrating the PPP project in the short-term. It builds on early lessons from the pandemic response and provides general guidance that could assist governments when assessing their policy and legal options for addressing COVID-19 impacts on PPP projects that are already underway¹.

The impact of the pandemic is evolving; therefore, this note only captures information and actions taken by different countries to date. It will be updated as more practices and lessons are collected.

This note focuses only on a process for assessing individual PPP projects that are in the operational stage. Similar practice notes are being developed to provide insights into the impact of COVID-19 on other aspects of PPPs².

2. Channels and Potential Impacts of COVID-19 on PPPs in Operation

Many countries have taken actions to limit the virus spread through social distancing policies, limiting work to only essential activities, closing schools, and restricting movements. Approximately 90 percent of the world's population has faced travel restrictions amid the COVID-19 pandemic. A sharp global economic downturn is ongoing. The year 2020 has already had a significant impact on the private infrastructure market with investment commitments in the first half of 2020 declining by 56 percent compared to the same period in 2019³.

The main channels of COVID-19 impact on infrastructure PPP projects are:

- Low growth and macro-economic volatility
- Declines in demand
- Supply disruptions
- Added health and safety regulations and the need for a change in operations
- Government policy or sector decisions to implement stimulus or social safety nets (such as funding employee furlough schemes or emergency loan programs to private businesses)

These, in turn, can lead to important secondary consequences that result in increased costs and lower revenues to the Project Company. User-fee concessions (including roads, airports, ports, ferries, etc.) are facing stress due to reduced demand, while availability fee-based projects may come under pressure as the public sector faces additional fiscal limitations due to competing demands on public spending during the pandemic.

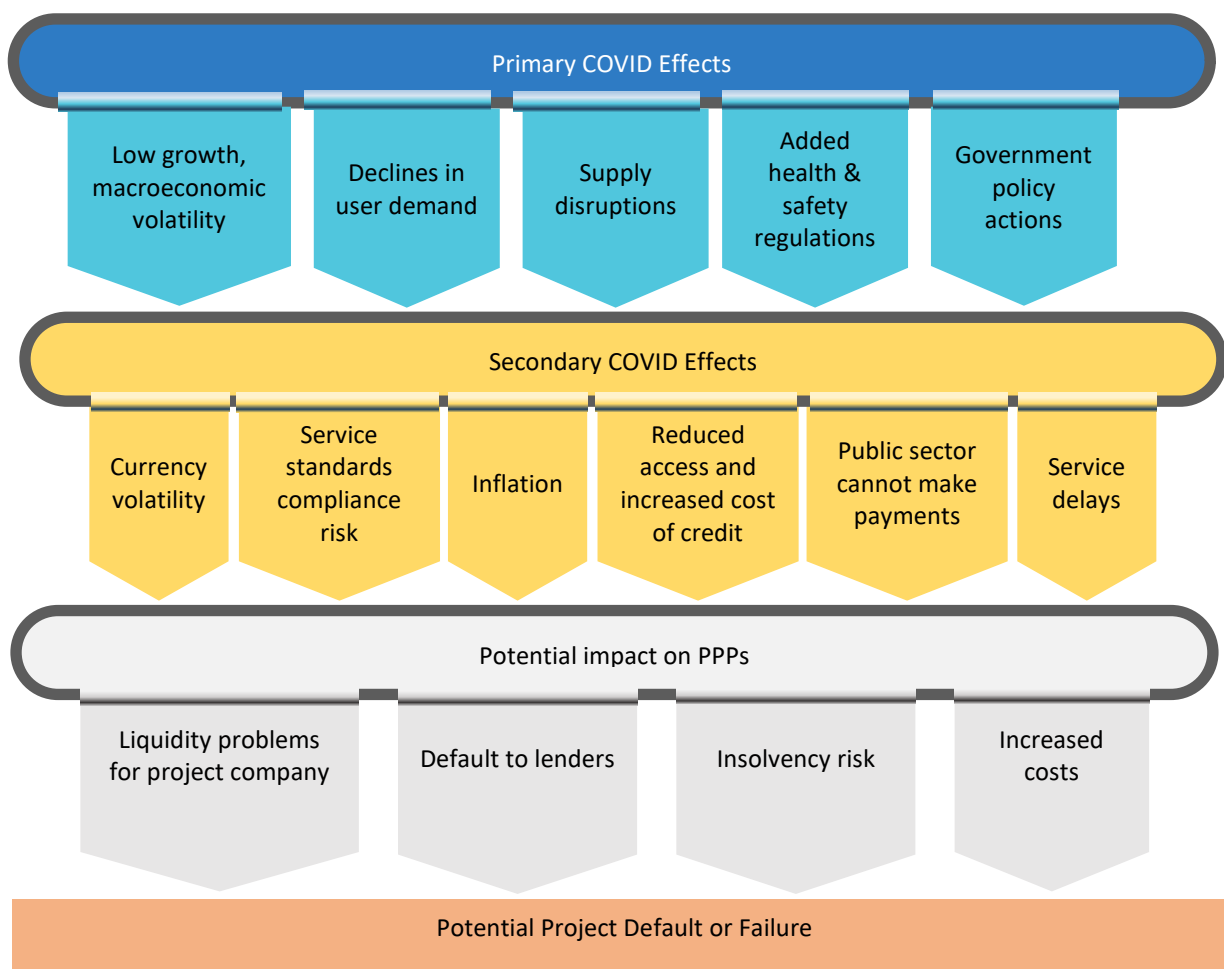
While, thus far, the problem is one of drops in free cash and near-term liquidity, the long-term outlook for these assets could be placed in doubt under prolonged stress—threatening the Project Company's ability to service debt; provide services according to contractual expectations, with potential resulting hardships to consumers; as well as the viability of the project itself. *Figure 1* illustrates the multifaceted impact that COVID-19 and the resulting economic downturn can have on PPP projects.

¹ This note is informed by expert knowledge, international practice and early lessons from the support being provided by the Infrastructure Financing, PPPs & Guarantees (IPG) Global Practice, through PPIAF, to country clients who have sought assistance under a COVID-19 Rapid Response Facility.

² Other notes being developed alongside this one cover other issues linked to COVID-19 impacts on PPPs: PPPs under preparation, fiscal implications of COVID-19 to PPP programs, and developments in the infrastructure financial markets.

³ [PPI 2020 Half-Year Update](#).

Figure 1 Potential Channels of COVID-19 Impacts on PPPs in Operation

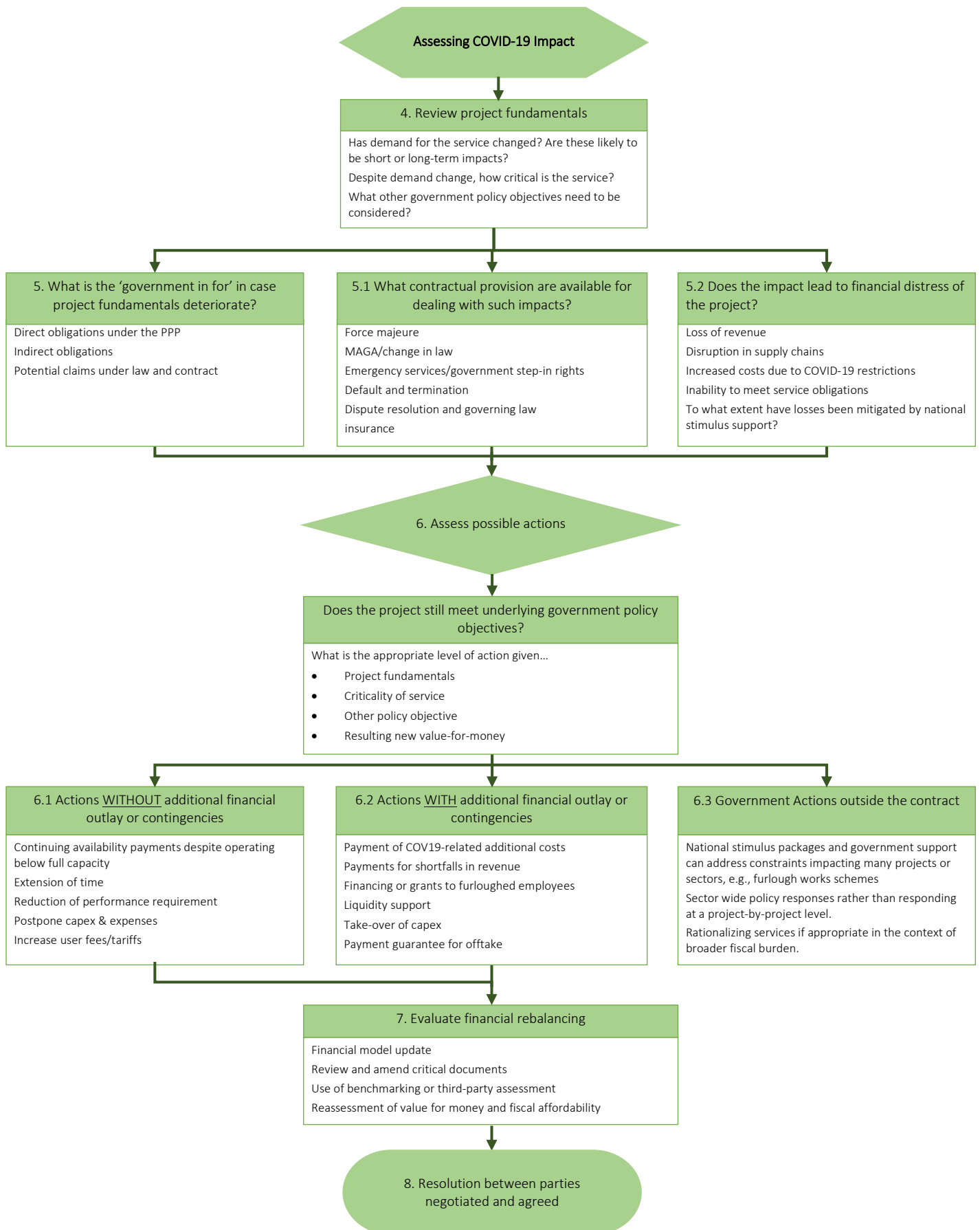


3. How Might COVID-19 Impact Operational PPP Contracts?

Early identification of stress points through the prompt examination of information, stress testing, and assessment of contract rights and obligations can help identify the appropriate level of action from governments.

Governments and authorities managing infrastructure PPPs should get ahead of anticipated developments through a rapid assessment of their PPP portfolios in order to identify risks, estimate the cost of such risks, and inform decisions on options and actions. The process diagram in Figure 2 sets out steps for assessing COVID-19 impacts on PPP projects that are under operation or construction. Sections four to eight will describe each of these steps in more detail.

Figure 2 Process for Assessing and Resolving COVID-19 Impacts on PPPs



4. Review Project Fundamentals and the Overall Context

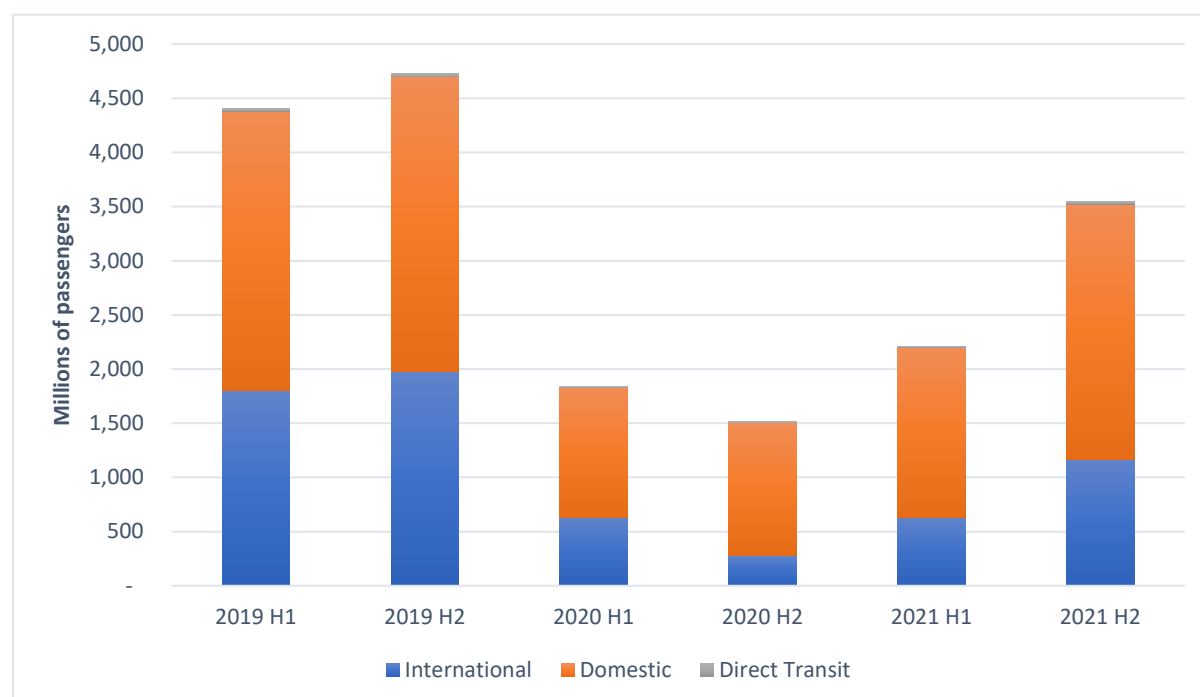
4.1 Changing demand in the face of the COVID-19 crisis

Rapid assessments of short- and long-term changes in demand are critical to informing what actions can be taken to ensure continuity of service under the contract.

The pandemic has drastically impacted demand for infrastructure services, shattering many assumptions that underpin PPP risk allocation and revenue generation. Many PPPs will be significantly affected by COVID-19 in the short-term, due to physical restrictions in movement and consumer confidence, and in the long term due to decreases in income (and therefore, demand for services), and changes in consumer behaviour.

Restrictions on movement enforced during the pandemic have resulted in drastic drops in demand, particularly in the transportation sector. Recommendations to avoid travel and airport closures led to a 61 percent drop in demand for global air traffic in 2020 and estimated industry losses of \$118 billion⁴. Urban transport has also been affected by lockdown orders with dramatic drops in ridership in 2020. The Airport Council International expects passenger volume to remain weak in the first half of 2021 but to pick up in the second half of the year as an increasing number of people get vaccinated and travel restrictions are gradually lifted. However, a full recovery to pre-COVID-19 levels is not expected in the medium term.

Figure 3: Air Traffic Forecasts⁵



Reduction in demand has also been observed in utility services, particularly in the commercial and industrial sectors. The International Energy Agency (IEA) estimates that COVID-19 reduced global electricity demand in 2020 by 2 percent but expects this to bounce back by 3 percent in 2021.⁶ A

⁴ International Air Transport Association (www.iata.org).

⁵ Airport Council International (December 2020).

⁶ [International Energy Agency, Electricity Market Report \(December 2020\)](#).

survey by the Global Water Leaders Group estimates that industrial water demand will fall by an average of 27 percent due to COVID-19⁷ but is expected to recover in 2021.

These short-term impacts are affecting revenues collected by operators and, as the scale of this reduction has been unprecedented, will affect the free cash flows of PPP Project Companies at least in the short term.

Demand scenarios should not only look at short-term impacts, say from travel restrictions, but also potential of income reduction on future demand for services.

The economic impacts of the pandemic are expected to be longer lasting, and the impact on demand and changes in consumer patterns post-COVID-19 are hard to predict. Despite unprecedented macroeconomic policy support, the global economy contracted in 2020 by -3.5 percent with a recovery expected in 2021.

Macroeconomic assumption can be used as a starting point for developing assumptions and stress-testing future scenarios for post-COVID-19 recovery, particularly for services that are, relatively, demand and income inelastic. Changes in GDP can serve as a proxy to estimate how much demand might fall or recover. Research into income elasticity of demand shows that basic services such as water and electricity as well as digital services are relatively inelastic, while land transport and air travel services are more income elastic (e.g., Box 1).

Box 1: Income Elasticity of Demand Versus Physical Constraints of Infrastructure Customers

A report by the National Infrastructure Commission of the UK in 2016 presents this information on income elasticity of demand for different infrastructure services under 'normal' circumstances:

Income elasticity of demand in the UK (National Infrastructure Commission, 2016)



From the above, every \$1 reduction in income could result in up to a \$2.40 drop in spending on air travel. Assuming income falls at the same rate as the projected GDP in the UK in 2020, i.e., 10.2 percent, then based on income change alone, air travel spending could drop by 24 percent—which is significant (even before factoring in the impact of COVID-19 restrictions on travel). However, compare this with the assessment of the International Air Transport Association (IATA) in March 2020 that COVID-19 will put half of passenger revenues at risk in 2020. In their reports, IATA also expects a lag of 2 years of air travel recovery compared to the rest of the economy, with domestic and short-haul travel recovering ahead of international travel.

The 'double whammy' effects are also mutually reinforcing. As per IATA estimates, passenger demand will drop by 47 percent in 2020, resulting in a cumulative revenue impact of \$ 4.5 billion and 548,300 job losses.⁸

4.2 Continuity of service and policy objectives

Assess other policy considerations such as the need to maintain basic services, support economic recovery, or preserve jobs. Typically, such policies not only affect PPP projects alone, but all projects/service providers in a sector. Coherence in the government approach and understanding how one set of actions affects another is critical in assessing government actions relating to the specific PPP.

⁷ Global Water Intelligence, May 2020.

⁸ <https://www.iata.org/en/pressroom/pr/2020-04-24-01/>.

Governments will have other policy objectives such as the alleviation of consumer hardship, continuation of basic services, preservation of jobs, or prevention of loss to specific types of government contractors that may drive the decision making process beyond purely the obligations under a PPP contract. For example, the accommodation given by the Singapore government for temporary relief to suppliers from performance obligations caused by COVID-19, encompassing construction and supply contracts, is given to enterprises at least 30 percent owned by citizens or permanent residents of the country and turnover of no more than 100 million Singapore dollars in the last financial year. See also the UK example in Box 2.

It is important that there is clarity on the scope of these ‘additional’ policy pursuits and how they relate to PPP contracts. Typically, these types of support will be time-bound and may include further qualifications on their applicability.

Box 2 Coherence Between Broader Policy Objectives Versus PPP Obligations

The UK has pre-emptively issued guidance for supplier relief, including for privately financed infrastructure (PFI) projects. The [Supplier Relief Guidance \(PPN 02/20\)](#) seeks to ensure business continuity and to protect supplier cash flows. Linked to this broader guidance, the Infrastructure Projects Authority of the UK issued guidance specifically covering PFI and Private Finance 2 (PF2) projects under the [Supporting Vital Services Provisions guidance](#). Like the overall supplier relief guidance, the PFI/PF2 guidance seeks to maintain delivery of services but recognizes that contractors may not be able to achieve full performance under the PFI contract. The PFI/PF2 guidance includes the following points:

- PFI parties should cooperate to ensure continued delivery of public services.
- COVID-19 should not be considered a *force majeure* event.
- PFI contractors should maintain up-to-date contingency plans to maintain services.
- Authorities use all options to maintain public services, including: continued payment (enabling payment to workforce and suppliers), revising contract requirements or standards (including scope changes), and moderating performance mechanism regimes where appropriate.
- Where an asset is temporarily closed (e.g., a school), it must be kept in a condition to be immediately brought back into use once the current emergency is over.

Importantly, the FAQs on the guidance also specifies that the support does not directly address issues of revenue protection and that its scope is intended only to relate to supplier relief/continuity. PFI providers will need to enter into discussions with the contracting authority and consider other support mechanisms available.

A government’s assessment of how demand might change for services delivered under PPPs, and therefore the potential additional support those projects might need from the government, must be weighed against how such projects support their overall policy objectives as the government—i.e., as custodians of the welfare of the state rather than only as parties to a contract. The Scottish Administration, for example, enjoined PPP contractors to consider themselves to be part of the public sector response to the emergency. See Box 3.

Box 3: Cooperation to Maintain Public Service

The **Scottish Futures Trust** issued a document titled [Guidance on Operational PPP Projects \(covering NPD Contracts, hub DBFM contracts, PPP and PFI contracts\) and COVID-19.](#)

The key principles are:

- PPP Contractors should consider themselves to be part of the public sector response to the current emergency.
- PPP Contractors should cooperate, including sharing resources where applicable, to ensure the continued delivery of public services (the COVID-19 emergency is not, and is not to be, regarded as an event of force majeure or an excusing cause).
- Contracting Authorities should work closely with PPP Contractors to use all available options to maintain public services during the emergency period. This will include maintaining unitary charge payments (enabling PPP Contractors to pay their workforce and suppliers), revising contract requirements and standards (including scope changes where necessary) and moderating payment and performance mechanism regimes where appropriate, all in a manner consistent with this guidance.
- PPP Contractors should ensure contingency plans are up to date and have been reviewed and discussed with Contracting Authorities to enable continuity of full services as far as possible to respond to the emergency and maintain vital public services, particularly across the National Health Service. The overriding requirement is to ensure facilities meet health and safety requirements, statutory requirements, and meet revised operational standards that will need to be agreed upon locally.
- All parties, including funders, must recognize that normal contractual processes may not be able to be followed in these circumstances.

During such times of financial hardship for citizens, supporting continuity of essential infrastructure services and protecting access to such services, especially by low-income households, needs to be considered when assessing the impact of government actions, be it through private or public means. Government decision is ultimately about evaluating a new value-for-money equilibrium.

For example, in Canada, how much support should be provided would be based upon a neutral assessment of a fair return on equity going forward, while in Chile, this determination is left to technical and arbitration panels. The UK PFI guidance asks public authorities to openly and pragmatically ensure that contracts are still relevant and deliver value for money over the medium- to long-term and in cases where they are not, termination is mentioned as a possibility (Box 2).⁹

Some governments, such as Portugal, have sought to limit government exposure during the pandemic (Box 4). However, it is important to note that these policy choices will not only impact projects currently in operation, but will also affect pricing, and potentially the confidence, of sponsors and investors in future projects.

On the other hand, where the government has determined that accepting the practical reality and considering its policy objectives, negotiating a solution with private partners would make more sense, a clear signal of cooperation can have a positive impact and can broaden options for more solutions.

⁹ [https://www.gov.uk/government/publications/supporting-vital-service-provision-in-pfip2-contracts-during-the-COVID-19-emergency.](https://www.gov.uk/government/publications/supporting-vital-service-provision-in-pfip2-contracts-during-the-COVID-19-emergency)

Box 4: Limiting Government Exposure

In Portugal, Decree-Law no. 19-A/2020 of April 30, 2020, established an exceptional and temporary regime for the restoration of financial balance in long-term contracts affected by the occurrence of the COVID-19 pandemic.

This law reduced the government's liability to financial rebalancing. Under Article 3, contractual clauses and provisions provide for the right to restore financial balance or for compensation due to a reduction of utilization levels in any long-term contract entered with the Portuguese state or other public entity, including public-private partnership contracts were suspended from April 3, 2020, until May 3, 2020.

Without prejudice to the above, in contracts that expressly provide for the contractor's or private partner's right to be compensated due to a reduction of levels of use or in which the occurrence of a pandemic constitutes a basis of a claim to restore the financial balance of the contract, such compensation or restoration of financial balance shall only be carried out through the extension of the deadline to meet contractual obligations or the term of the contract, without giving rise, regardless of legal provision or contractual stipulation, to price revision or the assumption, by the contracting authority or the public partner, of an obligation to provide for any compensation to its counterparty.

In PPP contracts in the roads sector, the obligations of concessionaires or sub-concessionaires under their contracts were temporarily reduced or suspended, in accordance with terms that were determined and specified by the government. Such terms will take into account (i) updated traffic levels in a manner that is consistent with actual and (ii) minimum service levels to ensure road safety.

If the remuneration of the concessionaire under such contract derives from payments from the grantor, the grantor was to unilaterally determine the reduction of the payments due in proportion to the reduction or suspension of the concessionaire's obligations.

All legal acts of the Portuguese state, or of any other public entity, issued within the exercise of powers provided for by public health and civil protection legislation or within the context of the state of emergency aimed at preventing and fighting the COVID-19 pandemic are deemed as force majeure and no compensation is due in respect of the damages or loss caused by such acts.

5. What Is the 'Government in for' in Case the Project Fundamentals Deteriorate?

Having reviewed the potential impact of COVID-19 on the underlying sector fundamentals, the next step is to review the impact of deterioration of these underlying conditions on the PPP contract itself and estimate what claims might be legitimately raised against the government according to the contract. This estimation is with respect to both financial, in terms of direct and indirect obligations, and legal under the governing law or the contract.

The commercial effects of COVID-19 and related events on a specific PPP contract are determined by the risk allocation underpinning the contract, the language of the PPP contract, related project and financing documents, and their governing law.

It is important to remember that government obligations under PPPs are most likely to be first triggered by commercial commitments and risks that the public sector directly undertakes. Some of the most common commercial commitments undertaken directly by the government that are likely to be affected by COVID-19 include:

- Supply of inputs – for example, the supply of input fuel (e.g., coal or gas) in an energy distribution or generation project
- Revenue guarantees – for example, traffic guarantee payments by governments for drops in toll road usage below a threshold
- Viability gap funding commitments for operating shortfalls
- Liquidated damages and other penalties or payments related, for example, to non-performance by the government, such as those related to consents and approvals

It is important to quickly assess ‘what the government is in for’ in case of delays in operations or inputs, or in case the project fundamentals deteriorate. This ‘baselining’ primarily requires an estimation of the magnitude (or a range) affected by such obligations.

A second order of commitments can arise from indirect commercial obligations such as:

- Payment guarantees of public sector off-takers
- Loan guarantees if made by the government on behalf of the Project Company

Such indirect liabilities present a more serious challenge. They signal that an initial set of ‘fail safes’ have been breached – i.e., the entity whose direct obligation it is, has defaulted and is likely to be in breach of contract. Governments will want to get ahead of such eventuality. In assessing what the government might be ‘in for’ and in deciding ‘an appropriate level of action,’ understanding how much time there might be before the primary obligor defaults, is of the essence.

5.1 *What contractual provisions are available for dealing with such impacts?*¹⁰

In considering their initial position, governments need to establish what legal mechanisms under the contract could be applied to the COVID-19 pandemic.

In considering their initial position, governments need to review their rights and obligations under the PPP contracts and what mechanisms might apply to COVID-19. Contracts will typically include provisions on when, how and for what reasons contract modifications can be made and the process to be followed. Contracts will also provide for the process of resolving disputes. It should be noted that many countries have not resorted to evoking contractual dispute mechanisms during the pandemic, rather seeking to find a mutually agreed approach to maintaining services.

The legal drafting of the contract itself, governing law, other regulations, precedence, and practice will inform this assessment. Generally, the response to COVID-19 is dependent on whether the country is governed by common law or civil law systems. However, many countries also do not fall clearly within these legal traditions, and parties will be guided by their respective legal frameworks, including potentially related provisions within public procurement laws, and the PPP contract.

Common law jurisdictions: Because these jurisdictions do not rely upon a civil or commercial code, the response to COVID-19 has mostly been case-by-case, relying upon the existing contractual provisions, such as force majeure, Relief Events, Compensation Events, or Change in Law. Each provision usually leads to a different remedy that may or may not be advantageous to the Project Company, so there have been disputes even when the existence of such a supervening event is accepted by the government. In many cases, there is no direct remedy for the impact of COVID-19 and parties have therefore relied on temporary practical relief or variations to the contract (such as relaxations to contractual standards, performance measures, and penalties).

¹⁰ This Note focuses on the specific aspects of the PPP contract rather than the broader legal framework that is covered in the [Practice Note on Legal Frameworks post COVID-19](#).

Civil law jurisdictions: In these countries, PPPs fall within the definition of administrative law contracts and are not usually considered commercial contracts. They are therefore subject to a different legal code and body of laws and regulations in addition to, or rather than, the civil code or commercial code. The public/administrative law regimes in many purely civil law jurisdictions include a concept of rebalancing a contract in cases where circumstances have changed to the point that the “initial economic arrangement” is no longer in place. In these circumstances, the recalibration of a contract is permitted upon the application of the affected party, which can be both the public or private party depending on the risk matrix and the allocation of risks thereof. Also, the concept of force majeure is generally better developed in civil law countries and applicable to contracts impacted by COVID-19. In addition, PPPs have been subject to similar case-by-case issues as in common law jurisdictions.

In general, five key provisions and their applicability will need to be examined:

- For services disruption, delays in supply chain or construction due to COVID-19 that temporarily affects either party’s ability to perform their obligations under the PPP Contract => **Performance Standards, Cure & Notice**
- For general service disruption, fall in demand, rising costs, liquidity issues, or delays in supply chain/construction due to COVID-19 that prevent either party’s ability to perform their obligations under the PPP Contract => [5.1.1 Force majeure](#)
- Where the government has taken, or is considering, action (such as social distancing policies), including passing new laws and regulations, which may adversely impact the project => [5.1.2 MAGA/Change in law](#)
- Where there is a need for increased capacity or there is an essential service which the Project Company can no longer provide => [5.1.3 Emergency clauses and government step-in rights](#)
- Where there is continuing disruption for an extended amount of time, insolvency of the Project Company or other forms of severe distress => [5.1.4 Default and termination](#)

Once the government is clear about which of these provisions are most likely to apply and what magnitudes of claims it potentially faces, governments will be able to determine the best strategy going forward.

[5.1.1 Force majeure](#)

Typical requirements for relief: i) when parties are prevented from fulfilling obligations under the contract; ii) due to the occurrence of an unforeseeable event specified in the force majeure (FM) clause that is beyond the control of the party claiming; iii) due to no fault or negligence of its own; and iv) claiming party has taken reasonable steps to prevent damage.

Important considerations: i) Is there a force majeure clause? ii) Does it include pandemics or similar? iii) Is there a catch-all? iv) What is the standard of relief? v) Might there be insurance proceeds for the same event? vi) Is the relief sought contemplated in the contract?

FM can be invoked where there has been an event or circumstance that: (a) is beyond the control of the contracting Parties; and (b) makes it impossible for one Party to fulfill all or a material part of its contractual obligations. At times the standard for relief is less than ‘impossibility,’ for example, contracts may use lesser standards, such as ‘adversely affecting’ or ‘preventing.’ Most FM clauses also require that the party invoking FM relief has done all it can to prevent or mitigate the impacts.

Usually, the FM clause will list out specific events that qualify, such as political events (war, strikes, protests) and natural disasters (floods, earthquakes, hurricanes, other “acts of God”). The FM clause may specifically mention plague, pandemics, or infectious diseases. If not, there is often a catch-all

definition (such as ‘any other unforeseen event that could not have been avoided’).

COVID-19 could create FM scenarios where the fallout from the pandemic makes it impossible for the government to fulfill its obligations, such as securing permits and licenses, acquiring land, supplying inputs, or making ongoing payments under the contract. It could also create FM scenarios on the part of the Project Company, where it cannot complete construction or operate the asset due to supply interruptions, loss of workforce, liquidity constraints, etc. Repercussions relating to COVID-19 could trigger other force majeure categories, such as strikes by workers where they do not feel safe, etc.

If FM is invoked, the contract may specify that the parties meet to draw up any mitigation measures and to negotiate any possible relief. The availability of insurance to cover the event and the duration of the FM event will affect what types and how much relief is available.

Note that either party may invoke FM and reliefs thereunder. Therefore, it is common that FM relief leads to each party bearing their own costs and risks, unless otherwise specified in the contract, law or regulations.

The most basic relief is an excuse from performance on the part of the party invoking FM, so that non-performance would not result in the usual consequences such as liquidated damages, breach of contract, or default. If the Project Company is invoking FM, relief may or may not also include compensation in terms of ongoing payments, extension of contract, a reduction in the performance requirements, or increase in tariff (corresponding to costs related to FM), depending on the circumstances and the risk allocation in the contract. Usually, the affected party will need to demonstrate ongoing mitigation efforts to qualify for any relief. As a contractual provision (rather than relief provided under statutory or common law), FM clauses can vary widely and the scope of events that qualify as FM and the relief available to a party impacted thereby will depend upon the specific language used in a contract. This must therefore be carefully assessed on a case-by-case basis, as can be seen from Box 5, and different governments have taken very different positions on whether COVID-19 constitutes a FM event.

Box 5 COVID-19 as Force Majeure

Brazil: On April 15, 2020, the Office of the General Counsel within the Ministry of Infrastructure in Brazil recognized COVID-19 as a “force majeure” event in order to allow claims related to the rebalancing of federal Concession Contracts (APP) in the transport infrastructure sector, like railways, highways, and airports (sectors that fall within the jurisdiction of the Ministry of Infrastructure). Force majeure in concession agreements in Brazil is considered to be an “extraordinary economic event” (or an “extraordinary risk”) not usually covered by the contract, which triggers the right to “re-establish the relationship that the parties initially agreed upon.”

In Brazil, the applicable legislation acknowledges force majeure as an event that usually falls within the government’s responsibility, unless otherwise stipulated in the contracts. Under the rebalance procedure, the Project Company may get relief via (i) increase of tariffs; (ii) extension of time of the concession contract; (iii) reduction of obligations/investments; (iv) reduction of variable fees to be paid during the concession agreement to the public party; or (v) another solution agreed upon by the parties.

Even with the recognition that COVID-19 is considered as a “force majeure”, it should not be interpreted as a carte blanche to the parties. To the contrary, the parties will still have to demonstrate that the emergency caused by COVID-19 altered the financial equation established when the contract was awarded. Also, there are public contracts in Brazil that establish that a force majeure event only falls within the government’s risk if it not insurable in the Brazilian market for a reasonable price. In that case, private parties must also show that there was no readily available insurance for a pandemic under a reasonable price.

However, it is noteworthy that discussions are ongoing within Federal Regulatory Agencies in Brazil to rebalance concession agreements considering the COVID-19 pandemic. As an example, very recently the Electric Energy National Agency started a public hearing to discuss the procedures to rebalance contracts within the electric energy sector.

India: The concept of force majeure is governed by the Section 32 of the Indian Contract Act.

On February 19, 2020, the Ministry of Finance (MoF) issued its first Office Memorandum (OM) acknowledging that the COVID-19 pandemic could be considered a natural force majeure if it affects the obligations of the contracting party.

On April 27, 2020, the Ministry of New and Renewable Energy asked for the coronavirus restrictions to be considered as an FM event, which will allow developers a suitable time frame to complete pending projects, on account of disrupted supply chains.

Subsequently, on May 13, 2020, MoF issued the second OM, which mentioned PPPs. It allowed parties to contracts to invoke a FM clause for all construction/works contracts, goods and services contracts, and PPP contracts with the government agencies if the non-performance is attributable to a lockdown situation or restrictions imposed under any Act or executive order of the government on account of the global COVID-19 pandemic. Upon their expiry, obligations of parties would resume.

Where an FM clause is invoked, the date for completion of contractual obligations that had to be fulfilled on or after February 20, 2020, shall be extended for three to six months without imposition of any cost or penalty on the contractor/concessionaire. It was emphasized that invocation of the FM clause would not absolve all non-performance of a party to the contract, but only in respect of non-performance attributable to a lockdown situation or restrictions imposed by any act or executive order of the government on account of COVID-19. All contractual obligations would accordingly revive on completion of the FM period.

On July 25, 2020, a doubt has arisen as to whether the Central Public Sector Undertakings (CPSU or state-owned companies) are covered under the term 'government agencies' referred in the May 13th OM. In this regard, the MoF clarified that the OM is not only applicable to all Central Ministries/Departments, their attached and subordinate offices, and Autonomous Bodies covered by General Financial Rules, but also to CPSUS.

As of January 26, 2021, the OMs are still in force in India.

Morocco: In order to limit the impact of COVID-19 on the economic sector, the Moroccan government confirmed that the current state of the health emergency must be considered as a force majeure event. It was consequently declared that companies with public contracts can request an additional period to perform these public contracts if they cannot meet their contractual deadlines because of the state of health emergency.

If FM is continuing for a specific amount of time, then either party may seek to terminate the contract => [5.1.4 Default and termination](#)

[5.1.2 Material adverse government action or change in law](#)

Typical requirements for relief: Party is prevented from fulfilling its obligations under the contract due to an act or omission of the government or a Change in Law that is considered 'material'.

Important considerations: i) Is there a MAGA or Change in Law clause? (2) What are the relief remedies under the contract?

Material Adverse Government Action (MAGA) and Change in Law clauses are designed to provide relief to the Project Company where the government has taken an action or changed a law that has a material adverse effect on the Project Company, such as its financial standing, through no fault of the Project Company.

There are many variations of these clauses: contracts may only have one of these clauses, whereas others may have both, and the definition of one may include another (e.g., adverse Change in Law is often captured under MAGA clauses), still other contracts may not have any defined terms but a simple statement that the government acts or omissions that negatively affect the Project Company must be compensated. Other contracts may refer to MAGA as political FM, but in a separate category to natural FM. Regardless of the definition, such events are distinct from FM in that they are considered within the government's control and therefore the onus is usually on the government to "make whole" the Project Company if it suffers any damages.

When discussing whether an event is "material" the following generally needs to be considered:

- Is it a substantial change
- Is it a significant change
- And, is it for a significant period of time

Where the answers to all the above are "yes" – then the change may be considered material. The typical hurdle for most changes is the period of time. In respect of the current pandemic, changes in law have generally been on a temporary emergency basis (lockdown measures, lifting road tolls or suspending electricity tariffs) but how long this might last is unforeseeable. Therefore, there is an argument to be made that changes proposed may not be considered "material". Ultimately it will depend on the facts, unless a specific definition of material is provided, for example, reference to specific monetary value or impact.

In the COVID-19 situation, there may be scenarios where the government has considered taking measures that could trigger MAGA or adverse change in law. These could include the restrictions on movement, moratoriums on construction, foreign exchange controls, or even nationalization (direct or indirect). Because the government bears all risks under these clauses, they are usually carefully worded and negotiated, thus it will be important to review the wording itself and applicable laws to know whether and how it may apply. At present it may be too early in the pandemic to take a clear view on the extent to which materiality and impact can be defined.

Remedies may include relief from performance (including payment of delay liquidated damages where there may be delays), extension of time, and compensation for costs incurred as a result of the MAGA. However, where the government feels forced to take action due to COVID-19, which is not in its control, it is not clear whether this clause can be invoked instead of FM—though, it is possible the Project Company will try, given that the remedies are usually better than under FM.

The extent of whether a government action qualifies as MAGA will depend on how the terms are defined under the contract, as well as the reasonableness of the actions and the outcomes of negotiations. MAGA clauses are more common in less developed markets where there is less track record for administering PPP contracts well. While project sponsors are expected to take commercial risks, drawing a line can be difficult, hence the specific and narrow drafting of such clauses is advised, for example, using a defined list of covered events, not only to avoid disputes in their interpretation, but also to limit the extent of liability of the government under such clauses. Guidance on how MAGA is defined can vary even within a single country (Box 6).

Box 6 MAGA in Emerging Markets – Not so Narrowly Drafted

The Institute of Government and Law Reform of the University of the Philippines Law Center's handbook recommends a definition with an exclusionary list:

MAGA is defined as:

“...; or

d. Change in Law, which is, in each case, has a direct and material adverse effect on the Private Proponent's obligations under this PPP contract including by rendering the performance of such obligations prohibitively expensive, illegal, void or unenforceable, to the extent not caused or contributed to by:

... ii. an action or inaction by a Philippine Government Authority as a result of a force majeure Event or on the grounds of national security or public safety, provided such action or inaction is not direct result of a Change in Law; or ...

Provided that no other relief is available to the Private Proponent under the PPP Contract.”

The above recommendation would have been ideal in the current situation where acts of the government in averting crisis would have been clearly excluded from MAGA and entirely consistent with the fundamental powers of governments to maintain the general welfare through the exercise of police powers.

However, unfortunately, MAGA in most PPP contracts is defined broadly. The Philippines Manual on National Government Agency PPPs (2014) defines MAGA to cover any national government action, including changes in law, that has material adverse effects “on any of the rights and privileges of, or on the enjoyment and/or exercise thereof by, the Project Proponent under this concession contract, or which has a material adverse effect on the construction schedule or the Project Proponent's ability to comply with its financial and/or other contractual obligations.” The manual goes further to say, “If MAGA occurs during the operation and maintenance period, the Project Proponent is entitled to compensation equal to the additional costs incurred and/or loss of revenue.”

A key concern becomes what is the extent of compensation that a government is obligated to make? In the absence of clear contractual clauses, the liability will be partly tempered by the principles of ‘economic and financial balance’ and ‘unjust enrichment’ in civil law jurisdictions, where courts can provide relief considering enrichment of one party to the detriment of the other. In common law jurisdictions, an absence of MAGA-related causes and reliefs is likely to result in the failure of the claim—common law providing primacy over the principle of right to contract.

5.1.3 Emergency clauses and government step-in rights

Important considerations: (1) Is there an emergency services clause in the contract that allows the government to ask for additional needed services? (2) Has there been an ‘emergency’—i.e., an event that causes death, injury, serious disruption of essential services, or to the lives of a number of people (3) requiring the mobilization of emergency services? (4) Does the contract provide for government step-in rights?

Some utility-type PPP contracts have an emergency services clause that may be triggered if additional services are needed in an emergency for additional payments. For example, management contracts and operations and maintenance contracts will typically require the operator to develop an Emergency Management Plan and will have provisions for the operator to take steps in an emergency that is subject to compensation at the cost of the government were such measures not contemplated in the ordinary course of operations and maintenance.

Alternatively, some PPP contracts provide for governments to “step-in” to the project and take control of the Project Company (usually in agreement with project lenders), for reasons of national security, health and safety, to discharge a statutory duty, or where the Project Company is not performing its obligations and the project is delivering an essential service. This should not be confused with lender’s step-in rights to cure a performance breach of the private partner.

Government step-in could take place under COVID-19, for example, if port or airport cargo services get interrupted (essential to keep food and other supply chains open), water supply or power plants are not operating (essential to provide water and electricity), or public transport operators cannot operate (essential workers still need to get to jobs). Hospitals under PPP contracts may also fall under this category, if there are any service interruptions for any reason.

Generally, the procedure and timeline for step-in, responsibility for costs and liabilities for both parties, and other rights will be set out in further detail in the contract. Whether there will be compensation for the Project Company usually depends on whether it is at fault. Some clauses are drafted such that the step-in rights are only triggered where the Project Company is not performing, in which case it will not get compensation. Others allow public policy reasons for step-in, in which case some form of compensation to the Project Company is usually offered. Either way, the government should only invoke step-in rights if it feels that it (or a third-party that it appoints) can do a better job than the Project Company. If the step-in right is ongoing, the Project Company may also invoke MAGA or FM clauses and the appropriate remedies under those, including potential termination.

5.1.4 *Default and termination*

Important Considerations: Has there been ongoing breach of contract, prolonged force majeure, insolvency, or other forms of extreme distress? What are the relevant default scenarios and their cure periods? What are the termination payments in the case of prolonged FM? Is Project Company default? Is the government default? Are there cross-default clauses with related contracts?

Particularly if the COVID-19 situation continues and assets become severely distressed, PPP Contracts may enter into default scenarios which, if not cured, may result in termination of contract. Default can be due to government fault (e.g., for non-payment) or Project Company fault (e.g., for non-performance, failure to deliver, etc.). Termination could also occur for prolonged force majeure (definitions vary, from approximately 6 months to 2 years).

Default events usually include a cure period for the defaulting party to remedy the situation (though, in some cases such as insolvency, such a cure period may not exist). Only after the cure period is over and the default is continuing, can the other party choose to begin termination proceedings.

In the event of termination, the government is usually required to compensate the Project Company in exchange for the asset. The compensation is usually based on a formula depending on fault:

- i) If the government is at fault, then compensation is usually all outstanding debt + costs + return on equity or some variation thereof
- ii) If the Project Company is at fault, then compensation is usually outstanding debt or market value
- iii) If force majeure, it may be somewhere in between

Termination compensation presents one of the largest fiscal costs of PPPs for a government. Usually, termination occurs only after a dispute settlement process, which presents even further costs to governments. Thus, it is usually in each party’s best interest to find a negotiated way out of a default.

5.2 Does the impact lead to financial distress of the project?

A fair assessment should be made of the financial losses incurred by the Project Company as a result of COVID-19. The financial equilibrium of the contract may need to be rebalanced if the government's policy decision is to maintain the service and the project.

COVID-19 can impact the financial position of a PPP Company for many different reasons outlined below.

5.2.1 Loss of revenue

With reduced economic activity due to the impacts of the pandemic, PPP projects (especially in the transportation sector) will experience considerable revenue generation challenges. Examples are the impacts to maritime ports (loss of shipping and service fees), airports (loss of gate fees, refuelling fees, airport commercial concessions), toll roads (no users due to city-wide quarantines), and hospitals (new patients with uncertainty of how they will pay their medical bills). Even PPPs that receive revenue through availability payments might suffer in the long term as governments face contracting economies that result in declining tax revenues and less budgetary resources to honour their payment commitments.

Both loss of revenue and potential difficulties of governments to fulfill their payment obligations will have an impact on a private partner's ability to meet scheduled debt repayments under financing arrangements with lenders. The market is alert to this issue, and it is expected that borrowers and lenders will work together to agree a sensible approach.

PPPs, as partnerships with government entities, are generally better protected from COVID-19 impacts than other private businesses. They are either government-funded projects or, if user-funded they usually benefit from tools that require governments to share or cover costs created by the crisis. For contracts where FM is not well addressed, governments may need to quickly announce the protection they will afford to PPP companies (Example Box 7). PPP projects with a heavy debt burden may need immediate support that involves public funds or government guarantees.

Box 7: Mitigating Loss in Revenue on 4G Toll Road Concessions in Colombia

As Colombia introduced a state of emergency twice in response to the pandemic, Colombian ministries and other official bodies issued a number of regulations addressing the consequences of the restriction measures in their remits. Decree No. 482 of March 26, 2020, suspended obligations for transport infrastructure contracts as well as suspended the collection of toll tariffs to vehicles.

Therefore, road PPP contracts saw a significant reduction in revenue as a result of the COVID-19 emergency measures. To address this issue, regulatory and contractual measures were taken. From a regulatory perspective, the Colombian government issued Decree No. 768 of May 30, 2020, which (i) reactivated the collection of toll tariffs as of May 31, 2020, and (ii) enables the parties of existing concession and PPP contracts to agree to term extensions that, added together, exceed the limits provided by current regulations. At the contractual level, the National Agency of Infrastructure (ANI), which awards and oversees all the transport infrastructure concession contracts, carried out negotiations starting in May 2020 with toll road concessionaires, in which the Colombian Infrastructure Business Association (CCI) and other government control entities also participated.

A final agreement between ANI and the concessionaires was reached on October 5, 2020, and concessionaires have the option to execute such document within the next 30 business days. Such agreement:

- Has the effect of a settlement agreement and aims to reduce future claims related to COVID-19.

- Recognizes that COVID-19 constitutes a Liability Excluding Event (Evento Eximente de Responsabilidad¹¹) as it is defined and regulated in the toll road concession agreements, since it is an unpredictable and uncontrollable situation for the parties.
- Enables the concessionaires to (i) apply for retribution or special compensation, (ii) have an additional 98 days for the completion of unfulfilled obligations between March 25 and June 30, 2020, and (iii) requests the ANI to bear the additional equipment, personnel, and administrative idle costs due to COVID-19 that the concessionaire incurred during the given period.
- Establishes that the concessionaires may not claim for costs related to existing biosecurity measures as of the execution date of such agreement.
- Provides that the payments of idle costs shall be made with available resources, surpluses, or remaining amounts within each PPP contract.
- Establishes a mechanism to recognize future similar Liability Excluding Events related to COVID-19.
- Even though it was mainly negotiated with concessionaires of the 4G toll road concessions, shall be also applicable to 1G and 3G concessions.

5.2.2 *Disruption in supply chains*

The effects of interrupted manufacturing capacity, and disruption of trading routes will be felt both upstream, in agriculture and the extractive industries, and downstream, in construction, wholesale, and retail commerce. For the construction industry, delays to materials and workforce shortages will require careful management of subcontractors and clients.

Infrastructure projects, particularly those procured using PPP models, may be impacted by closure or restrictions concerning the utilization of public infrastructure.

Projects in the development stage are facing the impacts of COVID-19 through contractors being affected by global restrictions on travel. There is also the potential for delays in construction due to affected global supply chains, ranging from extended customs clearance times to unavailability of parts or equipment due to shutdown of manufacturing facilities.

5.2.3 *Increased costs*

For delays or increased costs incurred prior to completion, it may be possible for the Project Company to agree to an extension to the commercial operations date and/or expiry date and tariff adjustment with the offtake. This may result in additional financing costs, which would necessitate further discussions with lenders and shareholders.

Box 8 Addressing Loss of Revenue due to COVID-19 – United Kingdom

In the United Kingdom and Ireland, COVID-19 impact on some road projects has been a lot less than feared, effectively a big reduction in April 2020, but with recovery since then, back up to 70–75 percent of old traffic levels soon after. The more robustly structured and well-reserved projects have stayed healthy, while anything more thinly capitalized has fared less well.

For volume-based projects, some Authorities have agreed to pay on an average of previous months, but unlike demand-based projects, these variable cost elements can (and likely will) be considered within a wider reconciliation to come, looking across the various profits/losses from this time. For example, some projects have looked at usage numbers from the previous three months or from the equivalent month last year and the Authority has paid on that basis rather than actuals.

¹¹ Similar to force majeure.

However, some other projects suffering financial losses have had unsuccessful discussions with Authority on issues and have had to rely on reserves.

5.2.4 *Inability to meet service obligations*

In order not to cause massive occurrence of contract breach of performance, contracting authorities may intend to introduce temporary measures to provide relief to Project Companies who are unable to fulfill their contractual obligations because of COVID-19. This should aim to provide temporary relief to Project Companies who may otherwise have to pay penalties for non-performance or for being unable to meet service obligations.

Where it is available, the nature of the relief will vary by contract, availability of insurance, and other project-specific factors. Under some contracts, the service provider will remain entitled to full payment or will not be liable for availability damages. Under others, service payments may be reduced, but not to the extent that certain unavoidable costs (such as debt service and fixed costs) would go unpaid.

6. Assessing Possible Action

Having reviewed the areas above, there is a range of possible actions that governments can take to address the effects of the pandemic on a PPP. Depending on the severity of impacts, the project may only need an adjustment in time and relief from penalties and obligations or may need more substantive financial support if it is judged to be effective and continues to represent value for money to do so.

The following is a list of possible actions/adjustments. Besides reviewing reliefs under contract and law, a government can invite the Project Company to propose actions that it would appraise for effectiveness and continuing value for money. Parties would go through a process similar to the one outlined in Section 7 to help with decision making and final agreements.

6.1 *Possible actions WITHOUT additional financial outlay or contingencies*

In the first instance, through constructive dialogue, the parties to the PPP contract can identify temporary measures that can be taken to maintain service provision throughout the pandemic that do not request additional cash outlays or new contingencies for the government. However, these actions may include costs to governments, but these are direct costs or liabilities expressly considered in the contract and therefore included in its fiscal management framework. These could include:

- Extension of time to meet deadlines and waiving penalties or extension of PPP contract term to achieve the expected net present value of project cashflow.
- For availability payment-based projects, as they are not dependent on operational capacity but on the availability of the assets, governments can reasonably continue to make unitary payments to the Project Company according to schedule despite an asset not operating to full capacity. Governments may be able to restructure the payments to manage current low demand and revenue inflows.
- Suspension or relaxation of performance standards to lower costs, avoid defaults and penalties.
- Postponement or reduction in capex requirements and reassessment of future capital investment assumptions and requirements due to slowed economic growth and/or reduction in demand.
- Agreements to suspend or postpone payments from the Project Company to the government such as the payment of concession fees or taxes.

- Allowing increase in user charges/tariffs—this will need to be supported under the regulatory framework and ensure protection of poor consumers.
- Implementation of contractual payment due to realization of contingent liabilities, such as minimum revenue guarantees triggered by drop in demand.
- Although most likely limited in application, compensation for lost revenues through business interruption insurance during periods when access to property is impeded by emergency/destruction or under civil authority coverage (due to restrictions imposed by the government) could be explored.

6.2 Possible actions WITH additional financial outlay or contingencies

In other cases, however, there will be a need for the government to step in and provide additional financial support or take on additional contingent liabilities to maintain a PPP project, if this is judged to represent value for the government and the most effective course of action to maintain services. Such as:

- Payments for specific costs such as the cost of COVID-19-related expenses to ensure health and safety of infrastructure service (e.g., sanitizing of train cars) or worker's safety.
- Payments to cover shortfalls in revenues for non-payment by low-income households or for moratoriums in tariffs imposed by the government.
- Financing or grants to support furloughed employees—while not a cash injection to the PPP, it could support smooth remobilization/recovery of activities.
- Short-term liquidity support/backstop to Project Company.
- Government takeover of essential capex investment requirements or providing grants for viability gap.
- Credit enhancements such as payment guarantee to backstop public off-takers in the event their financial position declines.

In considering their options, governments will need to review what the law and PPP contract provides for (See Section 5.1 above) and which actions or adjustments could affordably meet their objectives and provide effective relief to the private partner, with a view to maintaining value-for-money.

Governments should also consider whether such remedies are most effectively implemented as project-specific financial support, or by adopting broad fiscal expansion, i.e., increased government spending to mitigate the economic impacts of COVID across the national economy, which would address the financial shortfall in a particular project. This could be done via cash payments to citizens, tax cuts, funding furlough schemes, unemployment insurance supplements, etc.

The measures should be limited in time, but also in scope. Care should be taken to ensure that these measures are not solving problems unrelated to COVID-19, such as inefficiencies and poor financial decisions by the parties.

6.3 Government stimulus support

Many governments have implemented social safety net or stimulus programs to counter the negative impacts of COVID-19 restrictions on the population and business. Project Companies may benefit from such measures and therefore should be factored in when assessing the financial impact of COVID-19.

Governments may also choose to implement sector-wide responses to COVID-19 that benefit all service providers rather than negotiating on a project-by-project basis. If the fiscal space in the country becomes more constrained in the context of the global economic downturn, rationalizing services across a specific sector may need to be considered.

7. Evaluating Financial Rebalancing Options and Scenarios

In order to evaluate the different actions/scenarios, decision making needs to be supported with reliable information, a way to systematically evaluate the scenarios' impact to the various stakeholders, government objectives, and supported by a transparent and cooperative process. The following sections describe the scenario-building process through the financial model and translating this information into the fiscal review process of governments:

7.1 Financial rebalancing

To support the potential financial rebalancing of a PPP, the following information should be submitted by the Project Company to enable governments to properly assess the financial implications of COVID-19 on the project.

“Submission for Relief” that outlines the following:

Project Company's situation including an overview of:

- i) Key milestones and performance indicators
- ii) Description of operations and activities/projects/developments being implemented and planned for the next two years
- iii) Costs and revenues and current financial standing
- iv) Information on employees and customer status

Statement of impacts/challenges caused by COVID-19 and proposed relief, including:

- i) Description, measurement and magnitude of the COVID-19-related impacts the claimant is seeking to address
- ii) a range of possible recovery scenarios
- iii) Statement of proposed relief and alternatives considered and assessment of alternatives
- iv) Legal or contractual basis of the claim
- v) Description of method and assumptions to arrive at the proposed claim
- vi) Actions taken to mitigate the impacts
- vii) Costs incurred

Documents to support the above, including:

- i) Initial financial model that accompanied the PPP tender
- ii) Audited financial statements
- iii) Legal, progress, economic and financial reports to support the project
- iv) Relevant agreements and major contracts, including to major suppliers, insurers, lenders and guarantors
- v) Latest demand study or market forecast in case available

To pinpoint the impact of COVID on the financial situation of the Project Company the adjusted financial model should represent the economic-financial situation of the concession immediately prior to the date of declaration of any health emergency then assess the following scenarios:

Scenario 1 – Adjusted financial model (Without COVID-19): Build an economic and financial cash flow. Quarterly financial statements should be used to present flows from the start of the PPP to the date of the declaration of the health emergency. A projection should be presented under the

assumption of continuity of the existing conditions from that date until the end of the agreement (i.e., without the effects of COVID-19).

Scenario 2 – Adjusted financial model (With COVID-19): Based on the Scenario 1 financial model, Scenario 2 will model the COVID-19 effects and costs that have been agreed by the parties to be legitimate under the contract or law or have agreed under policy objective considerations. The projection will be developed to the end of the contract and must consider the expected recovery of the economy or sector based on the national recovery plan and best estimates, as agreed by the parties. A range of sub-scenarios could be modeled to illustrate the likely impact of the rate of recovery from the COVID-19 crisis.

Scenario 3 – Adjusted financial model (Compensation): Based on Scenario 2, the requested compensation will be presented. The necessary assistance/compensation could be aimed for an initial time-bound period, for example, for the next 24 months. Additionally, it will be necessary to present different compensation proposals to determine the appropriate approach, always maintaining the economic-financial balance between the parties.

Independent audit: The parties are advised to appoint an independent third party to audit and validate the information, assumptions, and results of the economic projections and financial models that result from the interaction described above.

7.2 *Reassessing fiscal implication of financial rebalancing*

The impact of the above scenarios and possible compensation will need to be reviewed from a fiscal affordability perspective, i.e., does the project still meet basic value-for-money criteria and are any new government financial commitments affordable.

Fiscal commitments and contingent liabilities from PPPs should be incorporated into the broader national public investment management systems to enable governments to:

- Assess the fiscal implications of a proposed PPP project
- Control aggregate exposure to PPPs
- Budget for fiscal commitments to PPPs
- Reflect fiscal commitments to PPPs in government accounts and reports

In cases where COVID-19 results in a change or increase in such liabilities, these should be reassessed within the context of the national fiscal management framework to ensure liabilities are affordable and properly accounted for.¹²

8. Reaching a Resolution

The wide range of aspects to be assessed, as outlined above, and the potential options for action will drive a government's decision making process. In many countries, governments (usually through the Ministry of Finance) have provided more general guidelines to contract granting authorities to have a uniform framework of handling actions related to PPPs. A government should also have regard to the legal and contractual framework on dispute settlement for these discussions as well as other relevant laws. Governments should ensure they have sufficient capacity, or engage advisers as necessary, to independently assess options and support negotiations with the private partners. While the option is always available to parties to come to a mutual agreement, or to provide relief that is outside of the contract, governments will want to make sure that the agreement follows the formalities required by law and contract in order to be binding and enforceable. Such agreements may also want to specify

¹² The WB is currently undertaking a review of the impact of COVID-19 on Fiscal Commitments and Contingent Liability management.

whether they jeopardize other reliefs or rights available to the parties.

In summary, the **principles** of such actions should be:

- Based on early identification of stress points through the prompt examination of information, stress testing, and assessment of contract rights and obligations to help identify the appropriate level of action from governments.
- To find an agreed-upon approach of maintaining services that is built on mutual trust and transparent rationale with a degree of pain/gain sharing between the parties.
- Proactive – rather than wait for the private partner to make a claim of FM and potentially end up in dispute, engage to determine the private partner's assessment of the risk of COVID-19 to the projects and its plans for addressing such risk. Note that private partners can take a number of actions on their own to keep costs down during times when revenues are low.
- To involve all relevant parties in the discussions. This includes the Project Company's authorized representatives, the government contracting authority, supervisory agent, Ministry of Finance, regulator, and PPP Unit. Project lenders may also need to be brought in, particularly where a government is guaranteeing the financing.
- Considered on a project-by-project basis whether to negotiate and implement a COVID-19 response plan for the project in which the government and Project Company agree to actions that each party should be taking now to address COVID-19, actions that each party will take in the future and the triggers for such actions.
- Consistent with government policies—such as maintenance of and access to services, job protection and economic stimulus—assessing how government actions impact the specific PPP project.
- Time-bound or temporary in nature, based only on COVID-19 impacts and not broader issues relating to the project.
- To not take unilateral action that may undermine the government's position in negotiating with PPP counterparties, or worse, place the government in breach of its obligations under those contracts.
- To ensure support, if necessary, is not a 'windfall' to private operators and to ensure the public does not perceive it as such, in order to avoid a backlash against PPPs.
- Benchmarked against similar projects and global experience.

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