



# COVID-19 AND PUBLIC-PRIVATE PARTNERSHIPS PRACTICE

Stocktake of government responses to the impact of COVID-19 on PPP projects

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COVID-19 has impacted infrastructure PPP projects around the globe in all sectors. There were disruptions not only to operational projects, but also to the planning, preparation, and procurement of PPPs. Projects were delayed, cancelled, and restructured. Changes to customer demand and attitudes are forcing a shift in infrastructure needs, making governments and investors revisit priorities and look more closely at issues of resilience, sustainability, and inclusion in PPPs.

Governments responded in different ways to the impact of COVID-19 on their infrastructure and PPP projects. This Practice Note presents a snapshot of how a wide range of countries initially responded to the COVID-19 crisis, whether through legislative or regulatory measures, sector-wide actions to maintain basic essential services, or through negotiating project-specific solutions. This note only covers the immediate impact of the pandemic from March 2020 to June 2021 and refers to the status of specific examples as of June 2021. The note only focuses on the government response to PPP projects or programs, rather than the broader government COVID-19 response.

This note complements two other World Bank Practice Notes that dealt with the effect of COVID-19 on PPPs: "[Assessing the Impact of COVID-19 on Operational PPP Portfolios](#)" and "Assessing the Impact of COVID-19 on PPP Pipelines and Projects in Preparation."

This note summarizes the results of a multi-jurisdictional survey carried out in 2021 by the World Bank's [Public-Private Infrastructure Advisory Facility \(PPIAF\)](#) to better understand actions taken by governments to address challenges to their PPP projects and programs. This work was undertaken as part of the World Bank's [COVID-19 PPP Rapid Response Umbrella Program](#), which mobilized resources to enable client countries to diagnose and propose solutions to mitigate the impact of COVID-19 on PPP projects. Respondents to the survey were PPP practitioners, both public and private, in the respective countries. The responses received from 43 countries were analyzed to identify common trends in respect to the impact of the COVID-19 pandemic on PPP projects, as well as the exceptions to those trends. In particular, this report takes a snapshot of the following:

- Impact of COVID-19 on operational PPP projects
- Impact of COVID-19 on the procurement of new PPP projects
- Implementation of laws, regulations, or administrative measures to mitigate the impact of COVID-19 on PPP projects

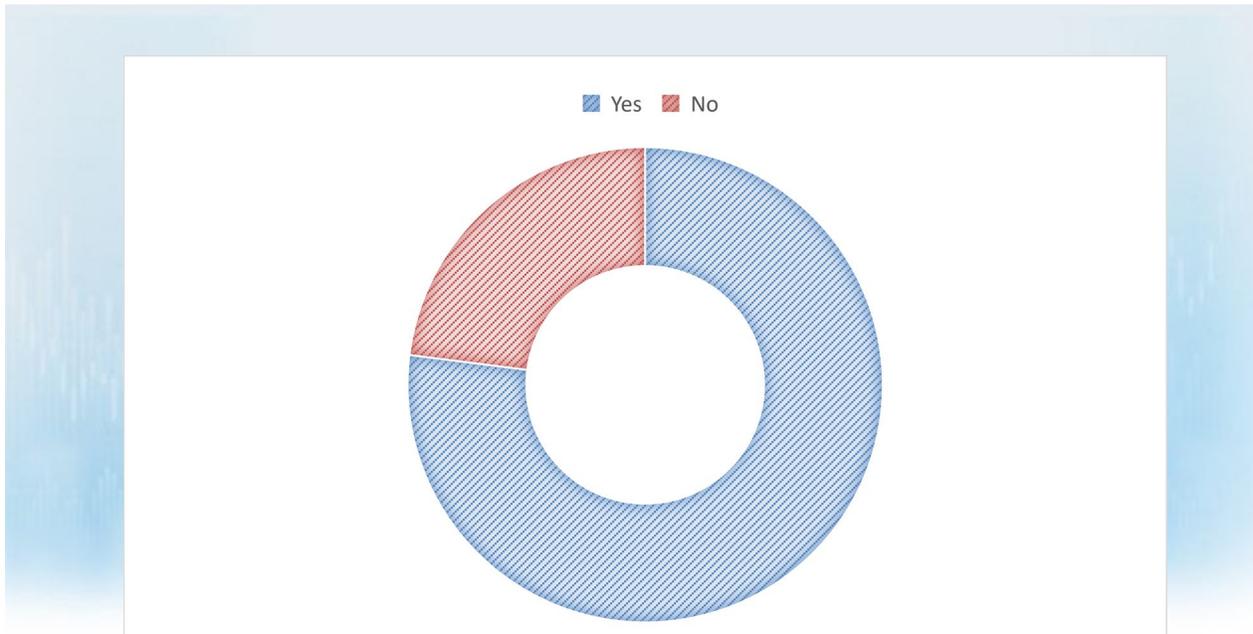
Details on specific country actions of the 43 countries surveyed and 10 detailed case studies can be found on [the interactive map](#). The country case studies include:



*This map is for illustrative purpose only. Names and boundaries do not imply official endorsement or acceptance by the World Bank or PPIAF.*

In nearly 80 percent of the countries surveyed, respondents confirmed that COVID-19 resulted in an adverse impact on operational PPP projects. Highways, other transportation, and demand risk PPP projects were particularly adversely affected. Among the most common difficulties faced by PPP projects in surveyed countries were (i) the availability of labor and materials for the concessionaire to fulfill its contractual obligation and (ii) a significant drop in revenues.

Notwithstanding the adverse impact of COVID-19 and legal restrictions to business activities enacted by national governments in different jurisdictions, in the countries surveyed no evidence was found of PPP projects being terminated due to the pandemic.



*Has COVID-19 had an impact on operational PPP Projects? (World Bank 2021)*

**Less project distress was seen than might be expected.** Given the extent and severity of the COVID-19 lockdowns and restrictions, it is notable that almost 20 percent of respondents reported no impact. Many countries reported claims and renegotiations from operational projects, but no outright terminations were identified. Some examples of project distress and actions that were taken on a project basis are outlined below.

In **Chile**, COVID-19 affected operational PPP projects due to the allocation of demand risk to concessionaires. This occurred especially to roads, highways, and airport projects, where the fees collected from end-users have reduced as a result of lower demand. Some disputes arose between concessionaires and the Ministry of Public Works, for example, the concessionaire of Nuevo Pudahuel airport terminal initiated a process against Chile before the International Centre for Settlement of Investment Disputes of the World Bank (“Ciadi” for its acronym in Spanish) due to the lack of agreement on the compensatory measures to be adopted to deal with the effects of the pandemic. Other disputes

were initiated with the concessionaires of El Tepual airport located in Puerto Montt and Carriel Sur airport in Concepción.

In **Italy**, the measures enacted to face the negative effects of COVID-19 and the provisions of the law governing force majeure or extraordinary events were pursued by a concessionaire *vis-a-vis* the relevant grantor in the context of the demand-based, light rail link PPP in northern Italy. In this project, the concessionaire formally commenced a rebalancing procedure pursuant to the concession agreement. The rebalancing procedure concluded after six months with an interim decision from the grantor, giving approval to a two-year extension of the concession. The decision followed a detailed analysis of the impact of the pandemic on the project conducted by consultants for both the concessionaire and grantor. The uniqueness of this project was that the operation phase commenced during the pandemic, hence the grantor claimed that it was unable to assess the actual impact of the pandemic given the lack of benchmarks for traffic revenues pre- and post-COVID. For this reason, the decision taken by the grantor is “interim” as the parties will need to reconvene over the following two years to assess whether the proposed extension is sufficient to restore the long-term financial and economic rebalancing of the concession or whether additional measures will need to be taken. The grantor excluded the possibility of providing a public grant to cover the extra costs, while the concessionaire excluded the possibility of increasing tariffs due to the sensitivity of demand to the level of the tariff as evidenced by comparing with, and the presence of, alternative means of transportation, including buses and taxis available on the same route.

The pandemic resulted in a relatively moderate impact on PPP projects in **Australia**. There were no insolvencies nor major disputes. Instead, the impact was largely operational as parties delivering PPP projects had to grapple with the challenges of continuing to deliver in the face of the pandemic. An example of this challenge is the NorthConnex Project where completion was delayed because technical experts who were required to certify completion were unable to travel to Australia.

While no terminations, insolvencies, or disputes were reported in **Kenya**, a number of operational projects were adversely affected as a result of COVID-19, particularly in the energy sector. The Kenya Power and Lighting Company PLC (**KPLC**) issued force majeure notices to various Independent Power Producers (**IPPs**) under their respective Power Purchase Agreements (**PPAs**) on the basis of reduced national demand for electricity. The IPPs sponsors pushed back citing that the risk of a decrease in the national demand for electricity is a risk that KPLC accepted under the PPAs. Eventually, KPLC opted to negotiate with the individual IPP projects on the way forward.

There were significant delays in payments by municipalities to private operators that managed waste collection services and urban transport in several cities in **Morocco**. The pandemic may have also adversely affected a desalination PPP in Morocco where the European sponsor filed for insolvency. This raised concerns from local Moroccan banks who are financing the project. Private operators involved in the distribution of water and electricity were instructed:

- Not to suspend, interrupt, or reduce their utility services in case of non-payment of bills by households
- To accept postponement of the payment of utility bills and facilities for paying the said bills
- To suspend the distribution of utility bills until the end of the state of health emergency

Not surprisingly, these measures caused significant financial difficulties to these private operators in Morocco.

The various degrees of lockdown imposed by the **South African government** since late March 2020 had varying effects on operational PPPs. COVID-19 generally caused lower revenues for operational PPPs in the transport sector due to restrictions on passenger and interprovincial travel. Indirect effects of the pandemic also negatively impacted revenue generation as a result of reduced traffic for toll roads due to work-from-home policies, for example. This resulted in:

- Possible increased contingent liabilities for the government resulting from guarantees or other financial support
- Where no such financial support was provided by the government, private parties looked to other mitigants, such as claims from insurers (to the extent these risks were insurable)

**In some countries with large PPP portfolios, governments took a sector-wide approach, such as in Colombia.** The government reached two framework agreements with road concessionaires and an agreement with airport concessionaires.

The framework agreements for road concessions, which amended the relevant concession agreements, established that the COVID-19 pandemic should be treated as a liability exonerating event for work plans, environmental management, public utility relocation, land acquisition, social management, equity contribution, subaccount funding, and for fulfillment of certain Key Performance Indicators (KPIs) and further established:

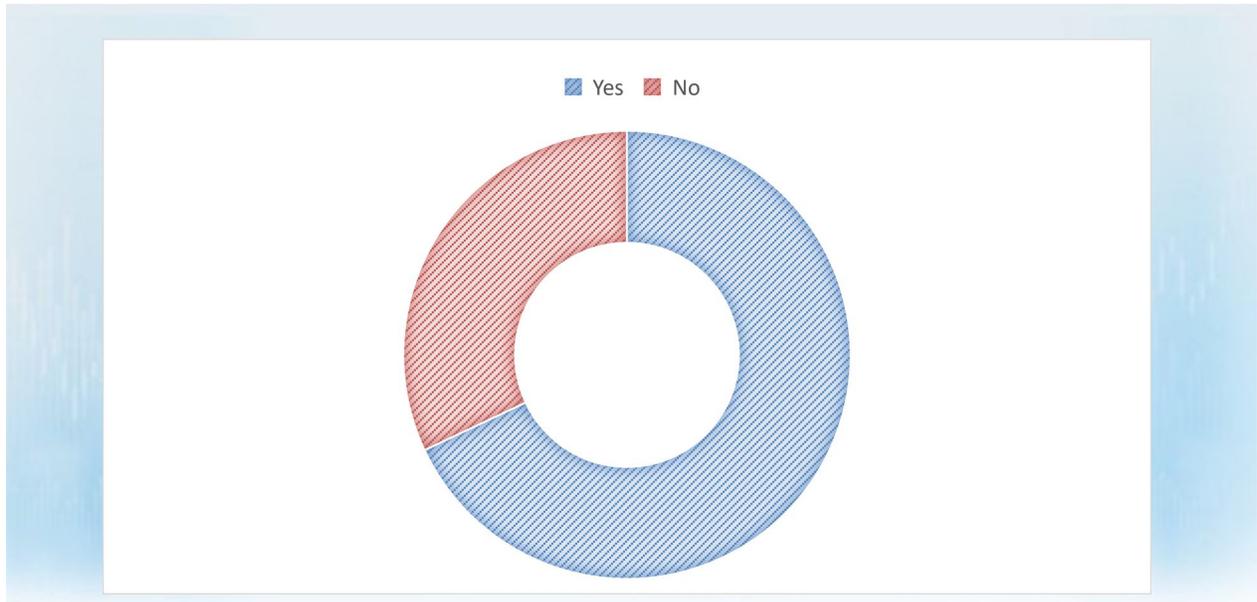
- i. An additional 98-day term for the execution of contractual activities
- ii. Compensation using funds from each concession trust that did not impact project revenues by using excess preestablished compensation mechanisms and funds that would contractually belong to the granting authority
- iii. Recognition of 'standing' costs, including rules such as the applicable time periods for compensation, the manner of demonstration of the occurrence of the standing costs, the manner of determination of the daily value to be compensated, and the payment source of the compensation
- iv. Rules to discuss any further issues that may arise due to COVID-19 in accordance with legal and contractual provisions
- v. Concessionaires agreed to bear biosecurity costs for both staff and users. It is understood that more than 21 concessionaires of toll road projects executed the amendment with the National Infrastructure Agency
- vi. Recognition by the parties of the affected project revenues due to the suspension of toll charges and lock-down measures
- vii. Compensation for all traffic revenues lost due to the enacted suspension, without recognition of interest

The agreement with airport concessionaires, which also comprised an amendment of the applicable agreements, established the following:

- i. Recognition from the parties that the pandemic measures that included closure of all Colombian airports to commercial traffic for the period between March 23, 2020, and September 1, 2020
- ii. No monetary compensation for the incurred damages
- iii. Concessionaires agreed to bear biosecurity costs for both staff and users
- iv. For fixed-term agreements, the established compensation mode was an extension of the agreement term to cover lost revenues during the suspension period. For expected income contracts, an adjustment to the fixed- and non-fixed income thresholds as well as an extension of the contractual term were agreed
- v. The parties agreed that the agreement would be subject to the terms of each of the individual financing documents of each project
- vi. The parties recognize the transactional effects of the agreement, meaning that no further recognition for COVID-19-related losses related to the period between March 23, 2020, and September 1, 2020, shall be applicable

## The Impact of COVID-19 on the Procurement of New PPP Projects

Procurement processes for new PPP projects experienced delays in different jurisdictions, and in some jurisdictions, specific suspension measures in respect of tenders were enacted, but many have since been restarted. In just under 70 percent of the countries surveyed, respondents confirmed that the COVID-19 pandemic had had an adverse impact on the procurement of new PPP projects.



*Has COVID-19 had an impact on the procurement of new PPP projects? (World Bank 2021)*

**Many countries reported initial delays in the procurement of new PPP projects.** In **Spain**, Additional Provision 3 of Royal Decree 463/2020 declared the suspension of all administrative proceedings initiated by public sector entities as of March 13, 2020, including, as a general rule, public procurement proceedings.

The government of **Albania** suspended or postponed the deadline for a number of previously announced tenders. An example was the tender for the PPP for the construction of a new airport in Vlora, which was relaunched and completed in the first months of 2021.

The COVID-19 pandemic caused delays in **Poland** to select private partners, particularly in the competitive dialogue phase, for example, in Tarnow Hubs for Innovative Specializations—a project that involves the construction and technical maintenance of a public building and IT infrastructure.

The COVID-19 pandemic affected the PPP project pipeline in **Australia** in the following ways:

- Projects that were in the process of being procured or delivered were delayed due to the impact of lockdown on project teams

- Procuring authorities revisited their procurement pipelines with a view to prioritizing projects that were seen to deliver the most stimulating impact to the economy post-COVID

At the outbreak of the pandemic in March 2020, approximately 1,824 PPP projects were in different stages of implementation in **India**. Of these, approximately 57 percent were in the transportation sector, which bore the worst impact of the pandemic. New projects, which were proposed to be awarded by government agencies were put on hold during lockdown restrictions and due to lack of interest by bidders in India at the time.

There are examples of project procurements proceeding during the pandemic, and many countries are looking to their PPP programs as part of a post-COVID-19 recovery. In the United Kingdom, the pandemic did not completely halt procurement of new PPP projects, although there was a marked decline in the number of new PPP projects coming to market in the United Kingdom. An example of a PPP project that closed during the pandemic was the £1.14 billion project to design, build, finance, and operate Sections 5 (Dowlais to A470) and 6 (A470 to Hirwuan) of the A465 road in South Wales (A465 Project). The project represents the first privately financed PPP project of this scale to be completed in the United Kingdom since the outbreak of COVID-19.

In response to the then-emerging issues, the UK government relied on its ability under the "extreme urgency" provisions of Regulation 32 of the Public Contracts Regulations 2015 ("PCR") to award contracts by a negotiated procedure without prior publication. However, the longer the COVID-19 pandemic persisted, the less tenable the argument that the situation is extremely urgent and unforeseeable and more typical procurement methods need to be followed.

In **Colombia**, the project pipeline suffered delays mainly because the government issued Decree 491 of 2020, which suspended administrative actions for several weeks and public authorities had to reevaluate their budgets, which delayed approval proceedings. Although delayed by the pandemic, Colombia launched the first procurement process for its fifth-generation (5G) concession program, which will include at least 12 road, airport, rail, and waterway projects in its first round. The government is also structuring a considerable number of social infrastructure and water and sanitation PPP projects at different levels of government, including the National Infrastructure Agency (with strategic waterway projects in the Magdalena River and the *Dique* canal, which are part of the 5G concessions program) and other regional government bodies at the local level (such as the development of several municipal water treatment plants being developed by local authorities with the support of the National Planning Department).

On a local level, the mayor's office of [Bogotá approved District Accord 780](#), a plan containing several measures aimed at the economic reactivation of the city, on November 6, 2020. The plan includes extra indebtedness quota, which will allow the city to develop several infrastructure projects currently in the pipeline.

The government of **Kenya** fast-tracked approvals of various PPP projects in a bid to increase private investment as part of its wider strategy of jump starting an economy that has been hard hit by the COVID-19 pandemic. As part of the recovery effort, the government of Kenya has accelerated the JKIA—Westlands Expressway project that is being undertaken as a PPP under a build-operate-transfer model and began construction in mid-2021. This development is intended to attract foreign investors to Kenya as well as boost the tourism sector, which has been devastated by the effects of the pandemic.

The **Kenya** Public-Private Partnerships Bill, 2021 ("Bill") was published in late 2021. While under development before the pandemic, the government passed the Bill in recognition of the role that PPPs could play in the post-COVID-19 economic recovery process and the need to reduce reliance on

government borrowing. The Bill was introduced with the aim of creating a more streamlined PPP procurement process and addressing various shortcomings of the Public-Private Partnerships Act, 2013 thus strengthening the PPP framework in Kenya and making such investments more attractive to investors.

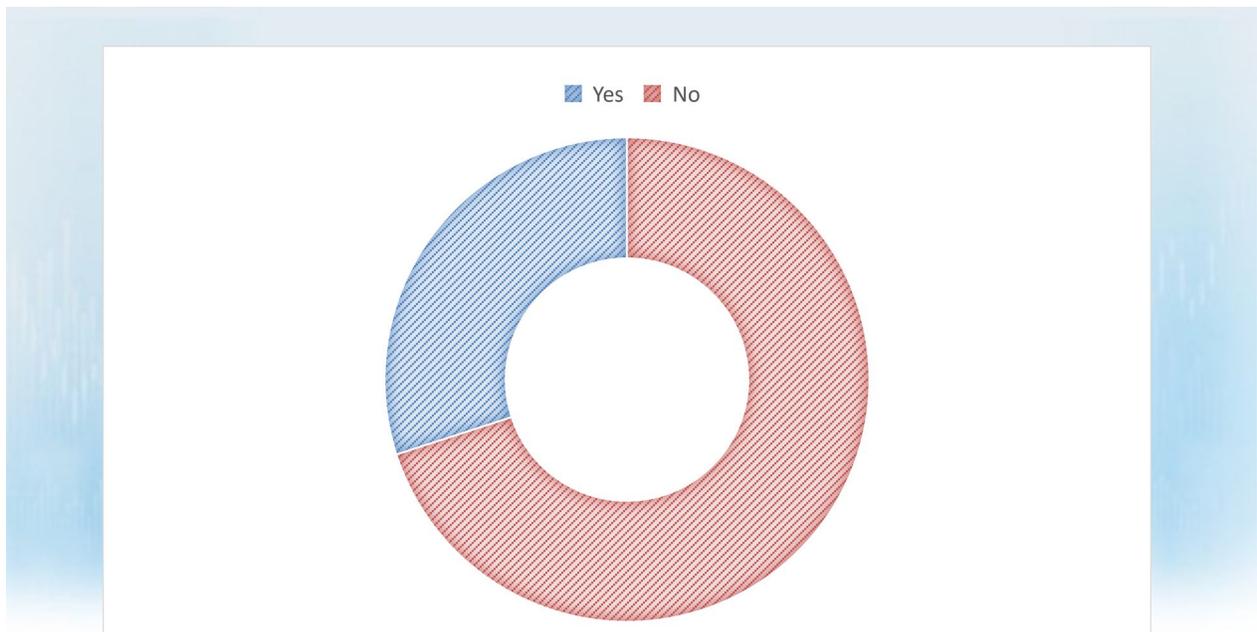
The COVID-19 pandemic pushed the **Moroccan** government to adopt numerous decrees with the aim of limiting public expenses. The procurement of new projects by public entities was significantly impacted. However, the pandemic caused the government to develop new PPP projects, especially in the healthcare, urban transport, and port sectors. These new projects will only be launched once the government has visibility regarding the status of the COVID-19 pandemic on a global basis.

**There were a few jurisdictions that reported not suffering any major adverse impacts on their PPP programs due to COVID-19.** In **Austria**, during 2020, new PPP projects were adopted or continued, for example, the refinancing of the KHR SZO Radiation Oncology PPP in Vienna by KfW IPEX with about €80 million of debt. In **Thailand**, COVID-19 appears not to have affected the procurement of new PPP projects. The Thai government approved the revised PPP plan for 2020–2027 to support 77 new PPP projects with a total value of around 1 trillion Thai bhat, including new 20 high-priority PPP projects with an approximate value of 503 billion Thai bhat.

**Some PPP projects were procured to help fight the COVID-19 pandemic.** One of the most notable was the establishment of the country's first infectious disease center, the 100-bed **Ghana** Infectious Disease Centre (GIDC) at the Ga East Hospital (a government health facility). The center aims to improve the medical diagnostic and research capacity of Ghana regarding infectious diseases. The project was facilitated and funded by the Ghana COVID-19 Private Sector Fund, a private-sector led fund that was established following a call by the government at the start of the pandemic to all citizens to help with solutions and interventions. The construction of the facility was completed in collaboration with the Ghana Armed Forces.

## The Implementation of Laws, Regulations, or Administrative Measures to Mitigate the Impact of COVID-19 on PPP Projects

The majority of countries surveyed (70 percent), reported that no specific legislative or administrative measures were enacted to mitigate the impact of COVID-19 on PPP projects suggesting that the majority of governments chose to address issues at a project level. In many countries, PPP projects benefited from general support measures to mitigate the effects of COVID-19 on PPP projects. Some examples of legislative measures are outlined below. These were mainly seen in countries with large PPP programs and more advanced markets.



*Have any law, regulations or administrative measures been enacted to mitigate the impact of COVID-19 on PPP project? (World Bank 2021)*

In **Brazil**, the government published laws and regulations to allow for the early extension of terms for concession agreements and extending deadlines for compliance with contractual and regulatory obligations (Resolution No. 5900/2020 of the National Land Transportation Agency), as well as revised public procurement proceedings to select new concessionaires. In addition, public authorities took many administrative measures to mitigate the effect of the pandemic, such as carrying out administrative proceedings to assess the economic and financial rebalancing of contracts and issuing legal opinions on the matter.

**China** enacted various regulations/administrative measures at a national or provincial level to mitigate the effect of COVID-19 on PPP projects. These included the publication of policies on financial discount, government fee reduction, and tax deferral to support industries affected by the pandemic to return to work and production. The relevant Chinese laws, regulations, and administrative measures generally do not provide detailed rules on the mitigation of the effect of COVID-19 on PPP projects. Given the "benefit-and risk-sharing" mechanism of PPP projects, in practice, government bodies and concessionaires agreed on revised financial terms of the concession agreement, prolonged cooperation period, additional government subsidy, etc., to mitigate the impact on PPP projects.

The government in **Colombia**, mainly through the Ministry of Transport, the National Planning Department, the National Roadway Institute, and the National Infrastructure Agency, issued a number of administrative measures regarding the infrastructure sector. For example:

- Decree 492 of 2020 implemented by the Ministry of Finance established measures to strengthen the National Contingency Fund, which is sometimes used to cover compensations for risks allocated to the government under PPP contracts, especially under the fourth-generation (4G) and 5G concessions program.
- Decree 575 of 2020 implemented by the Ministry of Transportation established a series of relief measures for the infrastructure sector, mainly financial relief measures for mass transportation systems and air transport operators.

The government in **India** took various measures to mitigate the adverse impacts of the pandemic. The Ministry of Finance declared the pandemic as a non-political force majeure event and extended timelines for completion of contractual obligations. Subsequently, sector ministries<sup>1</sup> such as the Ministry of Power, Ministry of Ports, Shipping and Waterways, Ministry of Railways, Ministry of Road Transport and Highways, and the Central Public Works Department issued orders that introduced measures to ensure continuation of services and completion of projects, for example extension of completion dates, flexibility on penalties, and deferral of payments.

The 'Aatmanirbhar Bharat Abhiyaan' announced by the Prime Minister in May 2020 as a special comprehensive economic package of 20 trillion Indian rupees, equivalent to 10 percent of India's GDP, included reference to developing world-class infrastructure facilities using PPPs. To boost PPP projects in the infrastructure sector, the package committed to enhancing its viability gap funding ("VGF") by up to 30 percent of the total project cost.

**In Nigeria**, no specific law or regulation was enacted for the purpose of cushioning the effect of COVID-19 on PPP projects. However, in the oil and gas sector, a regulator, the Department of Petroleum Resources<sup>2</sup> issued a Circular<sup>3</sup> declaring the COVID-19 pandemic a "force majeure" to ensure the safety and welfare of all personnel and to contain the spread of COVID-19. The declaration of "force majeure" may be relevant in the application for granting extensions of licenses for the affected project companies.

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<sup>1</sup> See Case Study for References.

<sup>2</sup> The Petroleum Industry Act 2021 ("PIA"), which was signed into law on August 16, 2021, replaced the DPR with the Nigerian Upstream Petroleum Regulatory Commission ("NUPRC") and the Nigerian Midstream and Downstream Petroleum Regulatory Authority ("NMDPRA").

<sup>3</sup> [Industry Circular March 30, 2020](#)

The government in the **United Kingdom** (both central and devolved) responded to the adverse effects of COVID-19 on the performance of commercial contracts for the supply of works and services to public bodies (including under PPP contracts) by preparing and issuing a number of procurement policy notes ("PPNs") and guidance documents directed to public sector bodies to encourage consistent best practice and provide guidance with an emphasis on ensuring business and service continuity and avoiding wholesale termination of contracts. They issued policy and guidance notes in addition to the introduction of a package of financial support schemes for businesses to help with the preservation of cashflow—this financial support is not specific to PPP projects—information on it can be found in the House of Commons Library briefing paper titled [Coronavirus: Support for businesses](#)<sup>4</sup>.

For example, the Cabinet Office of the UK government published its PPN02/20 – [Supplier relief due to COVID-19](#)<sup>5</sup> setting out proposed relief measures with the aim of ensuring that suppliers under contracts (including under PPP arrangements) with public sector bodies ('contracting authorities') will be in a position to resume normal contract delivery and fulfill their contractual obligations once the adverse effects of COVID-19 upon suppliers come to an end.

PPN 02/20 states that contracting authorities should (amongst other things):

Inform suppliers who they believe are at risk of performance failure (due to the impact of COVID-19) that they will continue to be paid as normal, even if service delivery is disrupted or temporarily suspended.

Put in place the most appropriate payment measures to support supplier cash flow.

If appropriate, provide relief against suppliers' current contractual terms (for example, relief on KPIs and service credits) so as to maintain business and service continuity (rather than accept claims for other forms of contractual relief, such as force majeure)—each claim for relief is to be considered on a case-by-case basis according to the: (i) nature of services supplied; (ii) challenges being faced; (iii) contract terms; and (iv) statutory constraints.

Ensure invoices submitted by suppliers are paid immediately on receipt (with any reconciliation to follow later) in order to maintain cash flow in the supply chain and protect jobs.

PPN 02/20 also provides that payments under 'output-based' contracts involving payment by results (as is most likely the case for most, if not all, PPP contracts) should be on the basis of previous invoices (e.g., the average monthly payment over the previous three invoices). This is to be adjusted to ensure that any profit element is not payable on any undelivered aspects/services, but any adjustments should not delay payments being made.

It is noted in PPN 02/20 that suppliers should, to qualify for these measures, agree to act on an 'open-book basis' and make cost data available to the contracting authority during the period covered by the PPN and that they should continue to pay employees and 'flow down' funding to their subcontractors. Contracting authorities should be maximizing any commercial flexibilities within contracts, particularly 'excusing cause' and other relief provisions, and any changes to the contract should be recorded (e.g., in a contract variation/change note) and make clear that: (i) changes only relate to a COVID-19 situation; (ii) there is an option to review/time limit on the changes; and (iii) it is the authority's option when things should return to normal.

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<sup>4</sup> [Coronavirus: Support for businesses](#)

<sup>5</sup> [Suppliers relief](#)

This analysis, based on the first 18 months of the pandemic, demonstrates that COVID-19 had systemic impact on PPPs, particularly in the transport sector, it caused delays in project procurements, and promoted governments to revise the priorities and focus on their pipeline development. However, it did not lead to widespread cancelation of projects, and the majority of countries resorted to resolving the impacts of the pandemic on a project basis or at a sector level. This suggests that PPP contracts are sufficiently robust and flexible to enable the parties to resolve issues resulting from shocks from the pandemic. The more sophisticated PPP markets also resorted to legislative or administrative measures to provide transparency and ensure a level playing field in the treatment of projects across the sector or country.

There are early signs of market recovery with pipeline and project development activities restarting and governments seeing PPP and private investment in infrastructure as part of their recovery from the pandemic. Details on specific country actions and detailed case studies on 11 of the countries surveyed can be found on [the interactive map](#).

## Annex case studies

These case studies reflect on the impact of the COVID-19 pandemic on PPP projects and privately financed infrastructure projects in Brazil, Chile, Colombia, India, Italy, Kenya, Morocco, Nigeria, South Africa, and the United Kingdom. They examine only the effect on investment in PPPs in 2020 and early 2021 plus early government initiatives to stimulate recovery through infrastructure investment and are not an exhaustive review of the countries' PPP programs.

# Brazil case study



## *Operational PPP Projects*

The Brazilian legal framework defines three types of concessions in Brazil allowing the private partner (“concessionaire”) to render public services: (i) common concession, comprising contracts in which the revenues of the concessionaire are mainly generated by tariffs paid by the end-users; (ii) administrative concession, in which the public partner is the end-user and pays the concessionaire for the works, goods or services and (iii) sponsored concession, in which the concessionaire is remunerated both by tariffs of the end-users and by a payment from the public partner. The administrative and sponsored concessions described in (ii) and (iii) are referred to by the Brazilian legal framework as “public-private partnerships” or PPPs. As the PPP definition is stricter in Brazil, for the purposes of this report, measures and precedents for common concessions have also been mentioned.

The COVID-19 pandemic has had an adverse impact on PPP contracts at all jurisdiction levels in Brazil (federal, states, and municipalities), mainly to the contractual risks matrix, which divides responsibilities and risks between the private and public sectors.

In many infrastructure sectors with lockdown measures, such as transportation, user demand for services has decreased, thus reducing the concessionaires’ revenues. The passenger air transportation sector was one of the most negatively affected.

As a result, requests for economic and financial rebalancing have been made, which are based on the Constitution of the Federative Republic of Brazil and several regulations. On the other hand, some specific sectors, such as the health industry, have been benefiting from the effects of increased demand, especially PPPs for hospital management.

With respect to insolvency and contract termination proceedings, some concessionaires (mostly those holding common concessions) had been facing financial problems even before the pandemic, and the decrease in demand caused by the pandemic has contributed to worsening the situation.

## *PPP Project Pipeline*

According to public information, 93 infrastructure PPPs and concessions tenders in all government spheres (federal, states, and municipalities) were canceled in 2020. This means that the number of cancellations rose by 52 percent compared to 2019, when 61 cancellations were registered. Another 270 tenders were postponed or suspended in 2020, representing an increase of 23 percent compared to 2019 (219 postponements or suspensions). The pace of project launches also worsened. In 2020, an average of 44 new projects were launched per month, while in 2019 this number was 54.

## *Laws, Regulations, and Administrative Measures*

The government has published laws and regulations to allow for the early extension of the term of concession agreements and extending deadlines for compliance with contractual and regulatory obligations for railway and road transportation (Resolution No. 5900/2020 of the National Land Transportation Agency (ANTT)), as well as revised public procurement proceedings to select new concessionaires.

In late 2021, ANTT published Resolution No. 5,954/2021, establishing a methodology to calculate the financial and economic impacts of COVID-19 on-road concession contracts. The methodology consists of simulating an economy without the impacts of COVID-19 and comparing it to the real effects of the pandemic (a counterfactual analysis).

In addition, public authorities took many administrative measures to mitigate the effect of the pandemic, such as carrying out administrative proceedings to assess the economic and financial rebalancing of contracts and issuing legal opinions on the matter.

The Ministry of Infrastructure, through the Attorney General's Office, issued legal opinion No. 261/2020 recognizing the COVID-19 pandemic as an extraordinary, unforeseeable case or “force majeure event” that may justify the review of the economic and financial provisions in common concession and PPP contracts, but the final decision to apply force majeure relief must be taken according to a case-by-case analysis. This is because, although most of the PPP contracts assign the risk of force majeure events to the government, some contracts may assign such risks to concessionaires, whenever, for example, insurance is available in the market to cover such risks.

In the airport sector, the Civil Aviation National Agency (ANAC) approved extraordinary revisions for the common concession contracts with respect to four federal airports (Guarulhos, Salvador, Confins, and Brasilia, respectively located in the States of São Paulo, Bahia, Minas Gerais, and in the Federal District). From the private sector perspective, the Brazilian Roads Concessionaire Association (ABCR) has been studying the impacts of the pandemic and discussing a calculation methodology with concessionaires. In the water and sewage sector, the Inter-American Development Bank published a request for tenders to select a consultant to study methodologies for economic and financial rebalancing of water and sewage services in the pandemic context, together with the National Water Agency (ANA).

There have also been some court decisions recognizing the effects of the pandemic in the economic and financial equation of concession contracts, such as the concession for public bus transportation in the Municipality of Araruama, State of Rio de Janeiro.

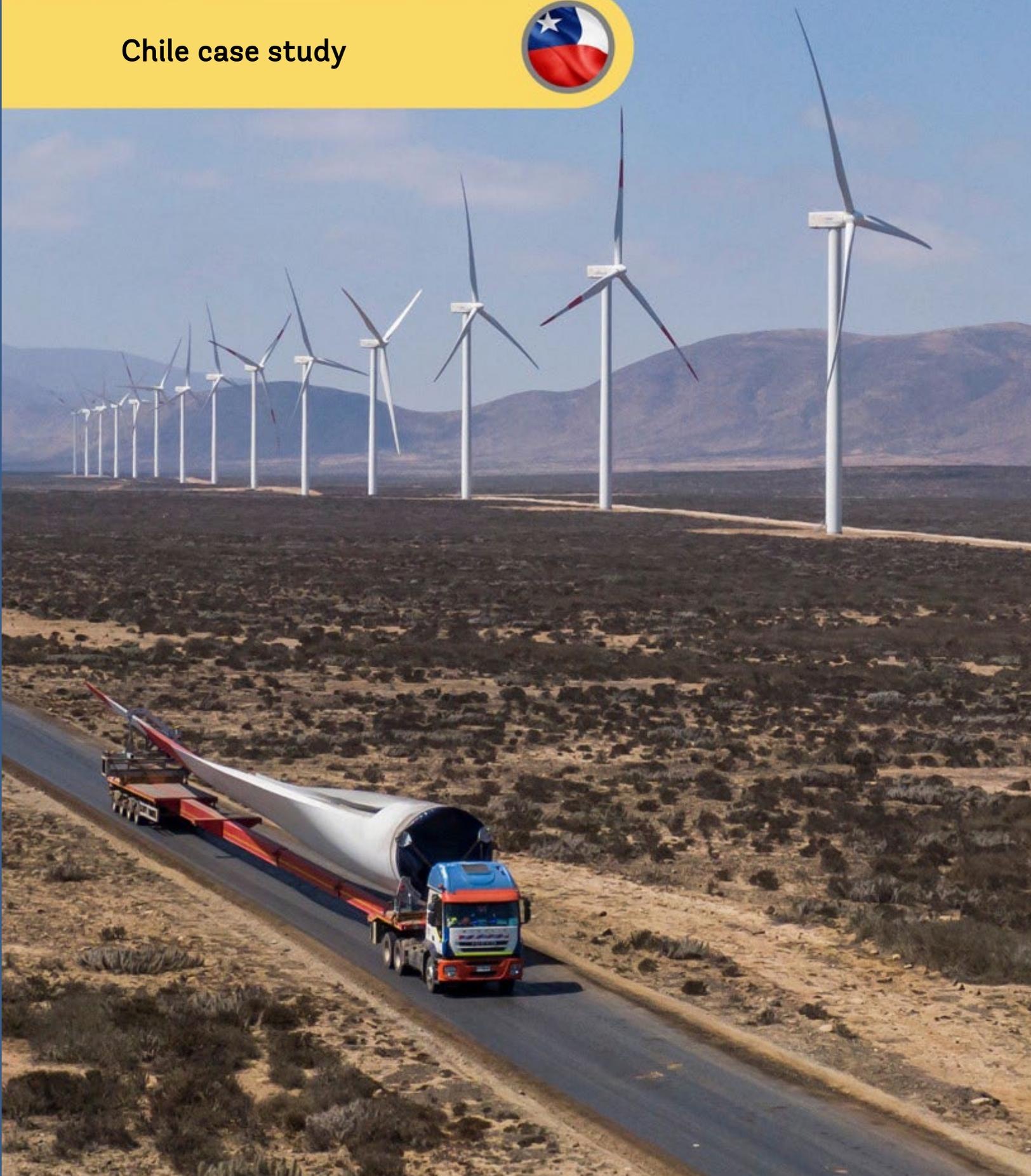
### *Banks and Grantors*

Banks stepped forward to assist the concessionaires and grantors in facing the economic impacts of the pandemic. For example, the Brazilian Development Bank (**BNDES**), a public bank that is the main financing agent for infrastructure development in Brazil, took several measures, such as (i) providing financial aid to concessionaires in the electricity sector to avoid significant readjustments in the electricity tariffs for final consumers; (ii) suspending temporarily the concessionaires’ obligation to make loan repayments in some specific sectors (e.g., public road and rail transportation) a type of transaction known in the market as “standstill” and (iii) suspending temporarily public clients’ obligation to pay debts related to financing taken by the states, the federal district, and the municipalities. The Inter-American Development Bank has also published guidelines for risk identification and decision making in PPP projects in the context of the pandemic.

### *Insurance*

It is understood that insurance companies in the market are not planning to offer insurance coverage for pandemic risks in PPPs and common concession agreements/projects, based on our experience and our contacts’ information.

## Chile case study



### *Operational PPP Projects*

In Chile, COVID-19 has affected operational PPP projects due to the allocation of demand risk to concessionaires. This has occurred in particular with respect to airports, roads, and highways where the fees collected from end users have reduced as a result of lower demand. Also, some disputes arose between concessionaires and the Ministry of Public Works. The concessionaire of the Nuevo Pudahuel airport terminal, part of the Santiago de Chile airport, initiated a negotiation process against Chile before Ciadi due to the lack of agreement on the measures to be adopted to deal with the effects of the pandemic. Other disputes were initiated with the concessionaires of El Tepual Airport located in Puerto Montt and Carriel Sur airport in Concepción.

### *PPP Project Pipeline*

The Ministry of Public Works announced over 150 public works projects to speed up the recovery of economy and employment. These projects will be conducted with support from a public investment plan of \$4.5 billion (described below). Notwithstanding this, there are some procurements that have been postponed, such as for casino permits and for the fast train project between the cities of Santiago and Valparaíso.

### *Laws, Regulations, and Administrative Measures*

Although it is not specifically aimed at PPPs, in the context of the COVID-19 pandemic, the Chilean government is implementing an “Economic Reactivation Plan,” which may have an impact in favor of PPPs. This plan contemplates, among other things:

### *Laws, Regulations, and Administrative Measures*

Although it is not specifically aimed at PPPs, in the context of the COVID-19 pandemic, the Chilean government is implementing an “Economic Reactivation Plan,” which may have an impact in favor of PPPs. This plan contemplates, among other things:

- Strengthening public investment, especially through the Ministries of Public Works and Housing and Urban Development. For example, through the public policy "Step by Step: Chile recovery," a public investment plan of \$4.5 billion will apply in addition to the regular budget of the ministries and will be available over 2021-2022 to boost economic activity. This includes a portfolio of projects for the construction of highways and bridges, road improvement, mobility and integration of cities, and water matters, amongst others that may eventually be developed through PPPs.
- Support to solvent strategic companies: The specific form of financial support will be adopted on a case-by-case basis and may consider a combination of the following alternatives:
  - A government guarantee to encourage third-party financing
  - Direct debt with an option to convert into shares
  - Equity participation for a pre-established period. The government will obtain a remuneration consistent with the financial risks incurred

- Encouragement of private investment through the establishment of tax measures, such as:
  - An instantaneous depreciation scheme to 100 percent up to December 31, 2022
  - By the end of 2021, release of the 1 percent of regional contribution for investment projects
  - Streamlining regulations and deadlines for investment projects. The objective is to reduce permit procurement times for the beginning of investment and to reduce the time periods for the environmental evaluation of large projects

The measures described above contribute to mitigating the economic effects of the pandemic on PPP projects in three aspects:

- Generation of investment opportunities in matters that can typically be carried out through PPPs
- Strengthening of financing measures, in the terms previously indicated
- Acceleration of regulatory procedures. This can be seen, for example:
  - In the streamlining of regulatory procedures to unblock projects that were delayed by environmental evaluation requirements, especially during the first half of 2020
  - In October 2020, a transitory article was introduced to the Regulations for Public Works Contracts (Supreme Decree 75/2004), which allows simplifying some matters related to bidding and contracting during 2020, 2021, and 2022

These measures, and the disruption of COVID-19, have impacted concessions in the country to varying degrees:

- Concessions under a flexible scheme, with fixed profit to the concessionaire and variable-length contracts to manage demand risk, have not been affected by the pandemic or received public support as the drop in short-term demand can be compensated for with an increase in length of the contract as provisioned in the contract. The large majority of the concession contracts are under this type of contract.
- For concessions that operate under an income distribution scheme between the state and the concessionaire, such as Santiago airport, the majority of revenue is allocated to the state; therefore, this mechanism already allows for risk distribution.
- There are a smaller number of fixed-term concessions (i.e., Movistar Arena) that experienced a large drop in revenues during COVID-19. These concessionaires have submitted to the usual dispute resolution mechanisms regulated in the contracts and expect to obtain revenues through such instances. The government's order has been to accelerate the processing of such procedures and to pay the concessionaires whatever is decided—in an expeditious manner.

The government's/procuring authorities' strategy has been to review PPP projects on a case-by-case basis, since each operate with different financial structures. Finally, the direct assistance that the

concessionaires have received from the state has been the same as that offered to all other companies (i.e., use of unemployment insurance for workers who are laid off).

### *Banks and Grantors*

In some PPP projects, for example, in the case of the Nuevo Pudahuel airport, the banks that financed this project (BCI, BICE, Santander Chile, Itaú, as well as the insurance company Penta Vida and Vida Security, among others) agreed to postpone the loan payments.

### *Insurance*

It is understood that insurance companies are not currently considering to insure pandemic risk in the future in Chile.

# Colombia case study



## Operational PPP Projects

During the first months of lockdown, work plans were impacted due to the government's order to stop any construction in Colombia; this caused stand-by costs in some projects. When the government reopened the construction and infrastructure sector, concessionaires mobilized to reactivate works. This caused additional costs and impacts on construction schedules, which were further impacted by biosecurity measures.

In regards to tolls, the government ordered that tolls for all road PPP projects should not be collected for a period of almost three months (March 13–June 1, 2020); a measure that had an adverse impact on the financial model of such projects. To mitigate this impact, the government agreed to a framework agreement with road concessionaires through which the government established several mitigation measures, as explained below.

Additionally, the government ordered the closure of airports to commercial traffic for a period of almost nine months (March 13–September 1, 2020), during which time airport concessionaires did not receive passenger revenues or infrastructure usage fees from airlines. This also had a major effect on their revenues, which resulted in the framework agreement for the compensation of revenue losses that was agreed on February 15, 2021.

These suspensions and closure measures had a negative impact on project revenues, and this was compensated through the agreements reached between the National Infrastructure Agency and road and airport concessionaire described below.

## PPP Project Pipeline

The project pipeline in Colombia suffered delays mainly because the government issued Decree 491 of 2020 that suspended all legal terms for administrative actions for several weeks and public authorities had to reevaluate their budgets, which delayed approval proceedings.

Nonetheless, Colombia identified infrastructure development as a key to reactivating the economy after the impact of COVID-19. For example, under Colombia's 5G program, the road project "*Accesos Cali-Palmira*" was awarded. RFPs have been published for other projects, including "*Troncal del Magdalena 2*" (road) and "*Canal del Dique*" and "*Río Magdalena*" (waterways/navigation).

During 2022, the government plans to launch other strategic PPPs, including the upgrade of Cartagena's current international airport; the construction of a new international airport for Cartagena; two projects that are strategic due to the positioning of the city, a major tourist destination; the upgrade of the *Buga-Buenaventura* road, which connects the major production centers with Colombia's main port in the Pacific; the *Troncal del Magdalena*, a strategic road project linking the center of the country with the Caribbean coast; as well as the southwest airports concession, which includes Cali's international airport, and the airports of Neiva and Buenaventura at a regional level. The government is also structuring a considerable number of social infrastructure and water and sanitation PPP projects.

In November 2021, the Ministry of Finance approved a \$20 trillion Colombian Peso (approximately \$5.5 billion) budget to support the financing of 5G road concessions.

On a municipal level, the mayor's office of Bogotá approved District Accord 780 on November 6, 2020, a plan containing several measures aimed at the economic reactivation of the city. The plan includes a \$11 trillion Colombian peso (approximately \$3 billion) extra indebtedness quota, which will allow the city to develop several infrastructure projects currently in the pipeline.

During 2020, "adverse" impacts such as cases of termination, insolvency, or major contractual disputes in PPP projects were not observed. However, certain road and airport concessionaires have not entered into the general compensation agreements with the National Infrastructure Agency so the outcome of these projects is unclear.

### *Laws, Regulations, and Administrative Measures*

The government, mainly through the Ministry of Transport, the National Planning Department, the National Roadway Institute, and the National Infrastructure Agency, issued administrative measures regarding the infrastructure sector during COVID-19. As alluded to previously in this case study, the following regulations affected the provision of mobility and transportation services, as they imposed mobility restrictions, biosecurity measures, suspension of user-fee collection, and, in general, measures that in some way affected the financial model of concessions due to reduced demand of the existing infrastructure:

- a) Decree 440 of 2020 implemented by the National Planning Department was issued on March 20, 2020, and established emergency measures in terms of public procurement, such as carrying out public hearings through online platforms and the use of electronic payment methods during the pandemic.
- b) Resolution 471 of 2020 implemented by the National Infrastructure Agency was issued on March 22, 2020, and suspended administrative and contractual acts of the National Infrastructure Agency between March 25 and April 12, 2020. It additionally ordered the suspension of certain obligations of concession agreements in the road, port, rail, and airport sectors.
- c) Decree 482 of 2020 implemented by the Ministry of Transport was issued on March 26, 2020, and established (i) a center of logistics and transportation to direct the provision of transportation services in Colombia; (ii) restrictions on transportation during the initial general lockdown period, which included severe restrictions on mobility between different areas of Colombia, limits on the operation of mass transportation to 50 percent and restricted taxi services; (iii) the suspension of all transit support services provided by public entities; (iv) the exemption in toll fees during the duration of the state of emergency; (v) complete suspension of domestic and international commercial flights and suspension of payments of airport fees to airlines and leasing of commercial spaces at airports; (vi) the continuity of construction works during lockdown and (vii) the possibility to extend the term of PPP contracts which saw their revenues diminished within the established legal limit of 20 percent.
- d) Memorandum No. 20204010101891 implemented by the National Transportation Agency, which was issued on March 27, 2020, provided traffic controls in concession roads and the continuity of essential works in concessions.
- e) Decree 569 of 2020 implemented by the Ministry of Transportation was issued on April 15, 2020, establishing measures regarding (i) certain easements in inter-municipal mobility; (ii) complete suspension of entry to Colombia by foreign nationals; (iii) the possibility to extend PPP contracts beyond the established legal limits for the duration of the pandemic.
- f) Resolution 498 of 2020 implemented by ANI was issued on April 13, 2020, and established transitory measures, including the obligation to all concessionaires to submit a works reactivation plan during the three following days as well as operations and maintenance (O&M) obligations measures.

- g) Decree 575 of 2020 implemented by the Ministry of Transportation was issued on April 15, 2020, and established a series of relief measures for the infrastructure sector, mainly financial relief measures for mass transportation systems and air transport operators.
- h) Decree 768 of 2020 implemented by the Ministry of Transportation was issued on May 30, 2020, and established certain measures for transport services, as well as the possibility to extend PPP contracts beyond the established legal limits.
- i) Resolution 618 of 2020 implemented by the National Infrastructure Agency was issued on May 31, 2020, and kept standing the suspension of terms for evaluating unsolicited PPPs until the end of the national emergency.

Resolution 222 of 2021 issued by the Ministry of Health and Social Protection on February 25, 2021, extended the state of emergency due to the pandemic until May 31, 2021, and implemented restrictions on mass attendance events and recommended self-isolation on citizens.

After May 31, 2021, no new measures have been issued regarding the transportation sector and the pandemic.

The government reached a framework agreement with road concessionaires in October 2020 and with airport concessionaires in February 2021. More than 21 concessionaires of toll road projects executed the amendment with the National Infrastructure Agency. Of airport concessionaires, all but one entered into the applicable agreement.

The framework agreements for road concessions, which comprise an amendment of the relevant concession agreements, established that the COVID-19 pandemic should be treated as a liability exoneration event for the work plans, environmental management, public utility relocation, land acquisition, social management, equity contribution, subaccount funding, and O&M indicator fulfillment obligations; and further established:

- a) An additional 98-day term for the execution of contractual activities
- b) Compensation using funds from each concession trust that did not impact project revenues by using excess preestablished compensation mechanisms and funds that would contractually belong to the granting authority
- c) Recognition of 'standing' costs, including rules such as the applicable time periods for compensation, the manner of demonstration of the occurrence of the standing costs, the manner of determination of the daily value to be compensated and the payment source of the compensation
- d) Rules to discuss any further issues that may arise due to COVID-19 in accordance with legal and contractual provisions
- e) Concessionaires agreed to bear biosecurity costs for both staff and users. It is understood that more than 21 concessionaires of toll road projects executed the amendment with the National Infrastructure Agency

- f) Recognition by the parties of the affected project revenues due to the suspension of toll charges and lockdown measures that were enacted between March and July 2020
- g) Compensation for all traffic revenues lost due to the enacted suspension, without recognition of interest

The agreement with airport concessionaires, which also comprises an amendment of the applicable concession agreements, establishes the following:

- a) Recognition from the parties that the pandemic measures included closure of all Colombian airports to commercial traffic for the period between March 23, 2020, and September 1, 2020
- b) No monetary compensation for the incurred damages
- c) Concessionaires agreed to bear biosecurity costs for both staff and users
- d) For fixed-term agreements, the established compensation mode was an extension of the agreement term to cover lost revenues during the suspension period. For expected income contracts, an adjustment to the fixed and non-fixed income thresholds as well as an extension of the contractual term were agreed
- e) The parties agreed that the agreement would be subject to the terms of each of the individual financing documents of each project
- f) The parties recognize the transactional effects of the agreement, meaning that no further recognition for COVID-19-related losses related to the period between March 23, 2020, and September 1, 2020, shall be applicable

An important point to be noted is that the government has also allowed the extension of the terms of all PPP agreements that were in implementation phase and were affected by the pandemic for as long as it takes to cover lost project revenues, even if it means going over the legal 30-year limit and for longer than the equivalent of the duration of the pandemic.

Additionally, the National Public Policy Council (CONPES) issued the following public policy frameworks to mitigate risks in the infrastructure sector, and with the objective of having more environmentally, socially, and financially sustainable projects:

- a) CONPES 4000 of 2020: Unifies risk allocation guidelines for airport PPP projects with a view to establishing more resilient airport projects
- b) CONPES 4028 of 2021: Establishes risk allocation guidelines for waterway PPP projects
- c) CONPES 4060 of 2021: Establishes a new risk allocation policy guideline for transportation PPPs that looks to establish more resilient and more sustainable (ecologically and financially) projects

There are no specific laws, regulations, or administrative measures to mitigate demand risks allocated to concessionaires. However, contractual provisions have been included in PPP contracts in the following manner:

- a) Fourth-generation concession projects include “DRs” that are toll revenue difference payments, in which the government covers the difference between projected tolls and actual tolls on the years 8, 13, 18, and 29 of the projects.
- b) Fifth-generation projects include “toll risk,” which are payments designed to cover the differences between projected and actual tolls, reducing the liquidity risk posed by “DRs” as they are programmed on a yearly basis in opposition to DRs, which only occur on years 8, 13, 18, and 29 of the project.
- c) Additionally, as stated above, in the framework agreement reached by the National Infrastructure Agency and the concessionaires, the COVID-19 pandemic has been treated as a liability exclusion event under which no party is considered liable, and thus suspends the performance of all affected COVID-19 obligations by both parties under all the applicable concession agreements. This measure has been the major relief provided to concessionaires.

### *Banks and Grantors*

As a consequence of the impacts of the pandemic on the development of PPP projects, banks and grantors have been analyzing with concessionaires the necessity to amend applicable financing documents, waive the satisfaction of covenants (mostly financial and performance covenants) thereunder, or grant grace periods for the payment of the amounts loaned to the project or for the fulfillment of other contractual terms. Any amendments, waivers and/or extensions have been analyzed on a case-by-case basis among the relevant parties to determine whether such amendments, waivers, and/or extensions are required for a project. As a consequence of the COVID-19 pandemic, financial institutions and borrowers have used the opportunity to refinance several project financings.

### *Insurance*

This is a subject still under discussion in the insurance industry. So far, insurance companies have not yet considered the pandemic risk coverage as a rule, nor have they considered it for future projects. Nevertheless, there is no reason why an insurance company in Colombia could not decide to cover this complex risk for a considerable premium.

Colombia has suffered from repeated lockdown orders issued by the government, which means that in many cases the greatest impact derived from the pandemic is the outcome of the effects and delays caused by such measures and not the pandemic itself. Hence, even though the pandemic risk is not insured for most cases, some insurance companies have included in their policies coverage for physical damage to assets caused by orders of competent authorities that force business interruptions and loss of profits, which could cover the consequences of the pandemic. To the extent of our knowledge, some claims have been put forward; nonetheless, they have not been successful yet.

# India case study



## Operational PPP Projects

The COVID-19 pandemic has had an adverse impact on operational PPP projects in India, and this adverse impact can be briefly classified into the following categories:

- a) **Disruption in day-to-day operations and management (O&M) of the projects:** This includes non-availability of spare parts (due to import restrictions) and key personnel, etc. Further, due to lockdown restrictions in India, scheduled maintenance of projects was delayed due to non-availability of labor and, in certain cases, the operating cost for the projects increased due to new regulatory requirements and higher costs required to meet safety standards.
- b) **Reduction/loss in collection of user fees due to the pandemic:** PPP projects, where revenue of private sector participant/concessionaire is proportionate to the numbers of users and collection of user fees (particularly in the transport sectors such as highways, airports, metro railways, and railway stations), witnessed a steep decline in collection of revenue due to the pandemic. This is attributable to the direction to close all commercial and private establishments by the Ministry of Home Affairs pursuant to its order dated March 24, 2020, to contain the spread of the pandemic.

However, it is understood that none of the operational PPP projects were terminated by government agencies, nor any disputes between the concessionaire and government agencies can be solely attributed to the pandemic, exception being where a change in law claim by any concessionaire, if any, was rejected by a government agency resulting in a dispute.

The government of India introduced the following measures to mitigate such consequences:

- a) **The pandemic was recognised as a ‘non-political force majeure event’:** The model concession agreements (MCA) approved by the government, which form the basis for most PPP projects in India, recognize the pandemic as a ‘non-political force majeure event.’ Consequently, the COVID-19 pandemic was treated as a force majeure event for such PPP projects that were implemented on the basis of the MCA. The MCA provides a mechanism for a force majeure event that is unforeseen and beyond the reasonable control of the parties. The MCA *inter-alia* provides that as a relief for occurrence of a force majeure event, the concession period should be extended for a period equivalent to the subsistence of such force majeure event.

In addition, the government, through the Procurement Policy Division within the Ministry of Finance’s (MOF) Department of Expenditure, issued an office memorandum dated February 19, 2020, (“February Memorandum”), which stated that supply chain disruptions due to the pandemic would be covered under the force majeure clause specified under the Manual for Procurement of Goods, 2017; Manual for Procurement of Works, 2019; and the Manual for Procurement of Consultancy and other services, 2017—collectively known as the “Procurement Manuals”.

Subsequently, the Ministry of Finance issued another office memorandum dated May 13, 2020, pertaining to force majeure (“May Memorandum”). In relation to PPP projects, the May Memorandum clarified that parties may invoke the force majeure clause (after fulfilling the due procedure as stipulated in the concession agreements) for all construction/works contracts and goods and services with government agencies, and in such event, the date for completion of contractual obligations (where required to be completed on or prior to February 20, 2020) would be extended for a period not less than three months and not more than six months without imposing any cost on the concessionaire. The May Memorandum also stipulated that a party would be entitled to claim relief for force majeure if it is not in default as of

February 19, 2020. Lastly, as per the May Memorandum, force majeure could only be invoked by the concessionaire, if non-performance of the obligations could be attributable to the pandemic.

- b) ***Regulatory package by the Reserve Bank of India***<sup>6</sup>: Pursuant to its circular dated March 17, 2020, the Reserve Bank permitted all commercial banks, co-operative banks, and regulated non-banking financial corporations to grant a three-month moratorium on payment of all installments falling due between March 1, 2020, to May 31, 2020. In respect of working capital facilities, lending institutions were permitted to defer recovery of interest applied in respect of such facilities between March 1, 2020, to May 31, 2020. Further, the Reserve Bank instructed lending institutions that non-payment of the interest or principal component would not be considered as a default, and the borrowers would not be subject to any rating downgrade or any other penal actions. Subsequently, pursuant to its circular dated May 23, 2020, the Reserve Bank permitted the extension of the moratorium by an additional three months i.e., from June 1, 2020, to August 31, 2020, on payment of all instalments in respect of term loans and recovery of interest applied to working capital facilities. Accordingly, repayment schedules and residual tenor were shifted for term loans.
  
- c) ***Ordinance suspending the operative provisions of the Insolvency and Bankruptcy Code, 2016***: Pursuant to its ordinance dated June 5, 2020, the government suspended the operative provisions of the code for a period of six months. The ordinance introduced a new section to the code, which provided that no application for initiation of corporate insolvency resolution process of a corporate debtor could be filled for any default arising on or after March 25, 2020, for a period of six months or for such additional period (not exceeding one year) from such date notified by the government.

### ***PPP Project Pipeline***

The finance minister, in the annual fiscal budget for 2019–20, announced an outlay for a national infrastructure pipeline as an initiative to provide world class infrastructure across India. To draw up the pipeline, a high-level task force was constituted under the chairmanship of the Secretary of the Department of Economic Affairs and the Ministry of Finance. Per the pipeline, investment of over 111 trillion Indian rupees was contemplated for the period 2020–25.

At the outbreak of the pandemic in March 2020, approximately 1,824 PPP projects were in different stages of implementation in India. Out of these, approximately 57 percent of the projects were in the transportation sector, which bore the worst impact of the pandemic. New projects proposed to be awarded by government agencies were put on hold during lockdown and due to lack of interest by bidders in India at that time.

### ***Laws, Regulations, and Administrative Measures***

It is relevant to note that India does not have comprehensive central legislation for implementation, development, and operation of PPP projects. Public procurement in India, including PPP projects awarded by government agencies, is broadly governed by: (a) the Constitution of India; (b) legislations such as the Contract Act, 1872; Sale of Goods Act, 1930; Prevention of Corruption Act, 1988; etc.; (c) administrative guidelines such as provisions of general financial rules, procurement manuals, Delegation of Financial

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<sup>6</sup> [R27 March 2020, Reserve Bank of India Covid regulatory package.](#)

Powers Rules, 1978, and the guidelines issued by the Central Vigilance Commission etc.; (d) legislation of relevant government authorities to enter into PPP contracts. In addition, as discussed above, for certain sectors such as national highways, metro railways, etc., the contractual framework stipulated under the MCA is strictly complied by government agencies awarding such projects. Currently, any deviation from executed concession agreements is not permitted within the PPP regime in India. Therefore, while the measures described below do provide some impetus to PPP projects in India, a renegotiation of concessions will not be possible.

The government took various measures to mitigate the adverse impacts of the pandemic. Some of the key measures were:

- a) **Office Memorandum issued by the Ministry of Finance**<sup>7</sup>: As discussed above, the Ministry of Finance issued an office memorandum declaring the pandemic as a non-political force majeure event and extended timelines for completion of contractual obligations by up to six months.
- b) **Direction by the Ministry of Power to the Central Electricity Regulatory Commission (CERC)**<sup>8</sup>: The Ministry of Power issued a direction to CERC to provide a three-month moratorium to distribution companies on payments to generating and transmission companies and to specify reduced rates of late payment surcharges. The Ministry further requested state governments to issue similar directions to state electricity regulatory commissions. In addition, the Ministry granted permission of movement for materials required for running the power-generating companies and O&M of the inter-state network for electricity transmission during the pandemic.
- c) **Guidelines by the Ministry of Ports, Shipping and Waterways**<sup>9</sup>: Pursuant to order PD-14300/4/2020-PD VII, dated March 31, 2020, to the major ports, *inter-alia*, provided that: (i) the period for completion of any PPP project should be extended; and (ii) the major ports could permit waivers of all penal consequences on a case-by-case basis and performance obligations would be deferred as per the concession agreement for existing and operational PPP projects.
- d) **'Aatmanirbhar Bharat Abhiyaan'**: On May 12, 2020, Prime Minister of India Narendra Modi announced a special economic comprehensive package of 20 trillion Indian rupees, equivalent to 10 percent of India's GDP for the 'Aatmanirbhar Bharat Abhiyaan.' One of the key aspects of the package was to develop world-class infrastructure facilities using a PPP. To boost PPP projects in the infrastructure sector, under the 'Aatmanirbhar Bharat Abhiyaan' the government introduced several measures:
  - i. Encouraging private sector investment in social infrastructure projects: The government committed to enhancing the quantum of viability gap funding (VGF) up to 30 percent of the total project cost for each proposed project that is considered unattractive for complete private investment, with a package of 81 billion Indian rupees for developing social infrastructure.
  - ii. All central agencies such as the Ministry of Railways, the Ministry of Road Transport and Highways (MORTH), and the Central Public Works Department would be required to give an

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<sup>7</sup> [May 13, 2020, Ministry of Finance Office Memorandum.](#)

<sup>8</sup> [March 28, 2020, Press Information Bureau Notice.](#)

<sup>9</sup> [April 7, 2020, Press Information Bureau Notice.](#)

extension of up to six months without costs to contractors/concessionaires. Further, in order to ease the cash flow issue, government agencies would be required to partially release bank guarantees to the extent contracts are partially completed.

Subsequently, in Aatmanirbhar Bharat 3.0, the Union Minister for Finance and Corporate Affairs inter-alia announced that to support infrastructure development, (a) performance securities for government contracts that required payment by concessionaires/contractors would be reduced from 5–10 percent to 3 percent of the project cost; and (b) the government will make a 60 billion Indian rupees equity investment in the debt platform of the National Investment and Infrastructure Fund that will help the fund provide debt financing for infrastructure projects.

- e) **Notification by MoRTH (MoRTH Circular) to provide relief to the concessionaires and contractors in the road sector**<sup>10</sup>: As part of 'Aatmanirbhar Bharat Abhiyaan', MoRTH pursuant to the MoRTH Circular implemented the following measures in relation to PPP projects:
- i. Retention money would be released in proportion to the work already executed by the contractor. For Build-Operate-Transfer (BOT)/ Hybrid Annuity Model (HAM) concessions, performance guarantees would be released on a pro-rata basis, if a concessionaire is not in breach of the concession agreement
  - ii. Extension of time to concessionaires for a period of three to six months
  - iii. Direct payment to approved subcontractors through escrow accounts
  - iv. Waiver of penalty for delay in submission of bank guarantee/performance security for new contracts entered into during March 2020 to September 2020

For BOT/Toll-Operate-Transfer (TOT) concessions, the concession period would be extended for a period between three to six months if a project had not achieved commercial operation. Further, for loss of collection of user fees, the concession period would be extended by a period in accordance with contractual provisions for the period that the daily collection is below 90 percent of average daily fee.

- f) **Relief to the concessionaires and contractors in the road sector in view of the second wave of COVID-19 pandemic**<sup>11</sup>: MoRTH granted further relief measures in 2021:
- i. All tenders/contracts issued or concluded till December 31, 2021, would be required to include provision for reduced performance security (from 5–10 percent to 3 percent of the project cost)
  - ii. Extension of time to concessionaires, to be considered on a case-to-case basis

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<sup>10</sup> [June 3, 2020, MoRTH Circular.](#)

<sup>11</sup> [August 26, 2021, MoRTH Circular;](#) [October 8, 2021, MoRTH Circular.](#)

- iii. Direct payment to approved subcontractors through escrow accounts would continue until December 31, 2021
- iv. Grant of waiver of penalty for delay in submission of performance security in relation to the new projects entered into during April to June 2021
- v. For BOT/TOT concessions, in case of reduction of collection of user fees, the concession period would be extended in accordance with the contractual provisions
- vi. Extension of relaxation of project completion schedule (Schedule H/G of MCA) until December 31, 2021

In respect of demand risk, broadly, PPP projects in India are developed on the following models:

- a) **BOT (Toll):** The concessionaire is required to design, build, finance, operate, and maintain the project for the concession period. Based on the viability of the project, viability gap funding of up to 40 percent of the project cost is paid by the government agency. The source of revenue is in the form of toll revenue and the demand risk is borne by the concessionaire.
- b) **BOT (Annuity):** The concessionaire is required to design, build, finance, operate, and maintain the project for the concession period. However, the demand risk lies with government agency and the concessionaire earns revenue primarily in the form of pre-determined annuity payments that are made by government agency to the concessionaire.
- c) **HAM (Hybrid Annuity Model):** The concessionaire is required to design, build, finance, operate, and maintain the project for the concession period. The demand risk lies with the government agency. The concession period is a project-specific construction period and a fixed operation period of 15 years. Inflation-adjusted construction support of 40 percent of the bid project cost is provided by the government agency to the concessionaire during the construction period and only 60 percent of the bid project cost is to be arranged by the concessionaire during the construction period. This is paid to the concessionaire by the government agency in the form of semi-annual payments. Interest on reducing the balance and operations and maintenance cost is also paid semi-annually by the government agency to the concessionaire.
- d) **Toll Operate Transfer (TOT):** It is a new model introduced by MoRTH and the National Highways Authority of India to monetize the already existing national highways, where the concessionaire pays the upfront payment in exchange for the right to toll, operate, and maintain the operational public-funded highway projects. The concessionaire is required to undertake long-term O&M responsibilities, and tolling rights are assigned to developers/investors after completion of construction.

Administrative measures implemented in India in relation to the pandemic ensured that (i) the concession period in respect of BOT (Toll) projects is extended for the period of six months; (ii) the concessionaire is relieved from its contractual obligations, which were adversely affected by the pandemic; and (iii) a

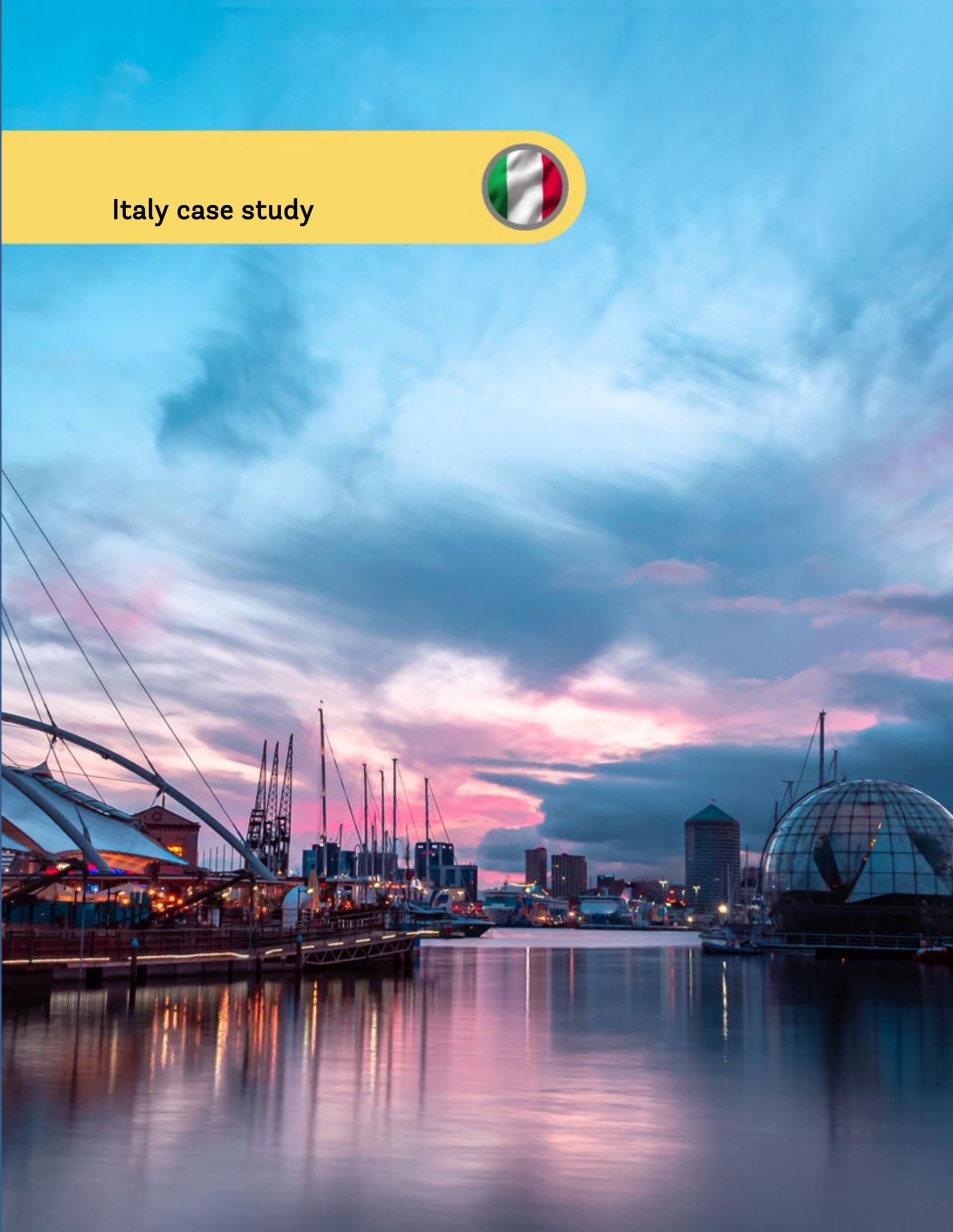
moratorium was provided to concessionaires in relation to their debt repayment obligations. However, demand risks in relation to BOT (Toll) would continue to subsist with the concessionaire.

With respect to PPP projects implemented on BOT (Annuity) and HAM models, no administrative measures were required in relation to demand risk, given that demand risk vests with the respective government agency implementing the project.

### *Insurance*

As described above, the model concession agreements (MCA) approved by the government, which forms the basis for most PPP projects in India, recognizes pandemic as a 'non-political force majeure event'. Therefore, for projects implemented under the MCA, it is not envisaged that insurance companies would consider insuring pandemic risks. However, in respect of project contracts which do not consider pandemic as a force majeure event, it will be relevant to examine the insurance policies to evaluate if certain losses could be mitigated through insurance. At present, it is unclear if the insurance companies are considering pandemic risk for future projects.

# Italy case study



### *Operational PPP Projects*

In Italy, the COVID-19 pandemic has had adverse impacts on PPP projects due to restrictions imposed by the government in the context of lockdowns and a decrease in commuting as a consequence. In particular, COVID-19 affected projects with demand risk such as highways, underground and light rail connections between cities and their airports. For example, a PPP light rail connection service between the Pisa Centrale train station and the Pisa International Airport was suspended during the first wave of the pandemic.

Conversely, hospitals managed under PPP schemes funded by availability payments were not affected as grantors did not suspend or delay payments.

The measures enacted to face the negative effects of COVID-19 and the provisions of the law governing force majeure or extraordinary events were pursued by a concessionaire *vis-a-vis* the relevant grantor in the context of a demand-based PPP light rail link project in Northern Italy. In this PPP project, the concessionaire formally commenced a rebalancing procedure by submitting a request pursuant to the relevant terms and conditions provided in the concession agreement. The rebalancing procedure concluded after six months with an interim decision from the grantor, approving a 2-year extension of the duration of the concession agreement.

The decision followed a comprehensive analysis of the impact of the pandemic on the PPP project where both concessionaire and grantor hired consultants to carry out the assessments. Since PPP project entered the operation phase during the pandemic, the grantor claimed the actual impact of the pandemic on the project could not be properly assessed given that it was not possible to benchmark the traffic revenues pre- and post-COVID-19.

This is why the decision taken by the grantor is “interim”, as the parties will need to reconvene within the next two years to assess whether the proposed extension is sufficient to restore the long-term financial and economic rebalancing of the concession or whether additional measures will need to be taken. The grantor excluded the possibility of providing a public grant to cover the extra costs, while the concessionaire excluded the possibility of increasing tariffs due to the sensitivity of the demand curve to the level of the tariff (the tariff was compared to alternative means of transportation, including buses and taxis available on the same route).

### *PPP Project Pipeline*

Given the essential nature of infrastructure, the COVID-19 pandemic did not completely halt the procurement of new PPP projects, although there was a marked decline in the number of new PPP projects coming to market in Italy. Some PPP procurement processes have also been slightly delayed and/or alternate activities have been utilized (e.g., in some cases, meetings between tenderers and bidders have been held by means of conference calls).

No law/regulation was enacted to suspend the public procurement processes. Neither was the award of a hospital PPP in the city of Turin disrupted during the severe lockdown first implemented in early 2020.

### *Laws, Regulations, and Administrative Measures*

The Italian Parliament enacted law n. 120/2020 on September 11, 2020, regarding inter alia public works, supplies, and services, including concession agreements. This law provides that if (a) a company is required to comply with social distancing regulation and other anti-COVID regulations and (b) such regulations prevent such company from regularly executing works or services, such event qualifies as a force majeure

event. The law stresses the importance of sustaining investments in infrastructure assets in the face of the impact COVID-19 has on such investments.

In addition to this law, the Italian Supreme Court noted in an official opinion that as a general principle of good faith under Italian law, should the COVID-19 situation affect the fundamental economic assumptions of a contract, both parties of the contract are legally required to negotiate in good faith a rebalancing of the contractual conditions.

The above measures are applicable to publicly procured projects as well as PPPs.

Some PPP projects took advantage of the above-mentioned measures and the relevant concessionaires started the procedure for the rebalancing of the financial and economic equilibrium of the concession.

The new law entered into force following the COVID-19 pandemic entitles concessionaires to:

- Be exempted from contractual penalties or compensation for damages for non-performance or improper performance (on a case-by-case basis)
- Be exempted from any event of default deriving from or in connection with the pandemic hence no termination for breach of the concessionaire can be claimed by the grantors
- Obtain the rebalance of the financial and economic equilibrium of the concession: the rebalancing typically involves one or more of the following measures (a) increase of tariffs or increase of indexation; (b) extension of the operation phase of the concession; (c) public grant to cover extra costs

Given the various sectors where PPPs are used in Italy (hospitals, light rail, metro, motorways, energy efficiency, public buildings, etc.), there is no measure, regulation, or law that applies to all PPPs. Even within sectors, the relevant authorities or ministries have not enacted specific sector regulations, so the majority of PPP projects that have been through a rebalancing process have done so on a project-by-project basis.

In relation to measures that mitigate the demand risk allocated on the concessionaire, Legislative Decree n. 50/2016, regarding public procurement and public contracts, including concessions, sets out a general principle that:

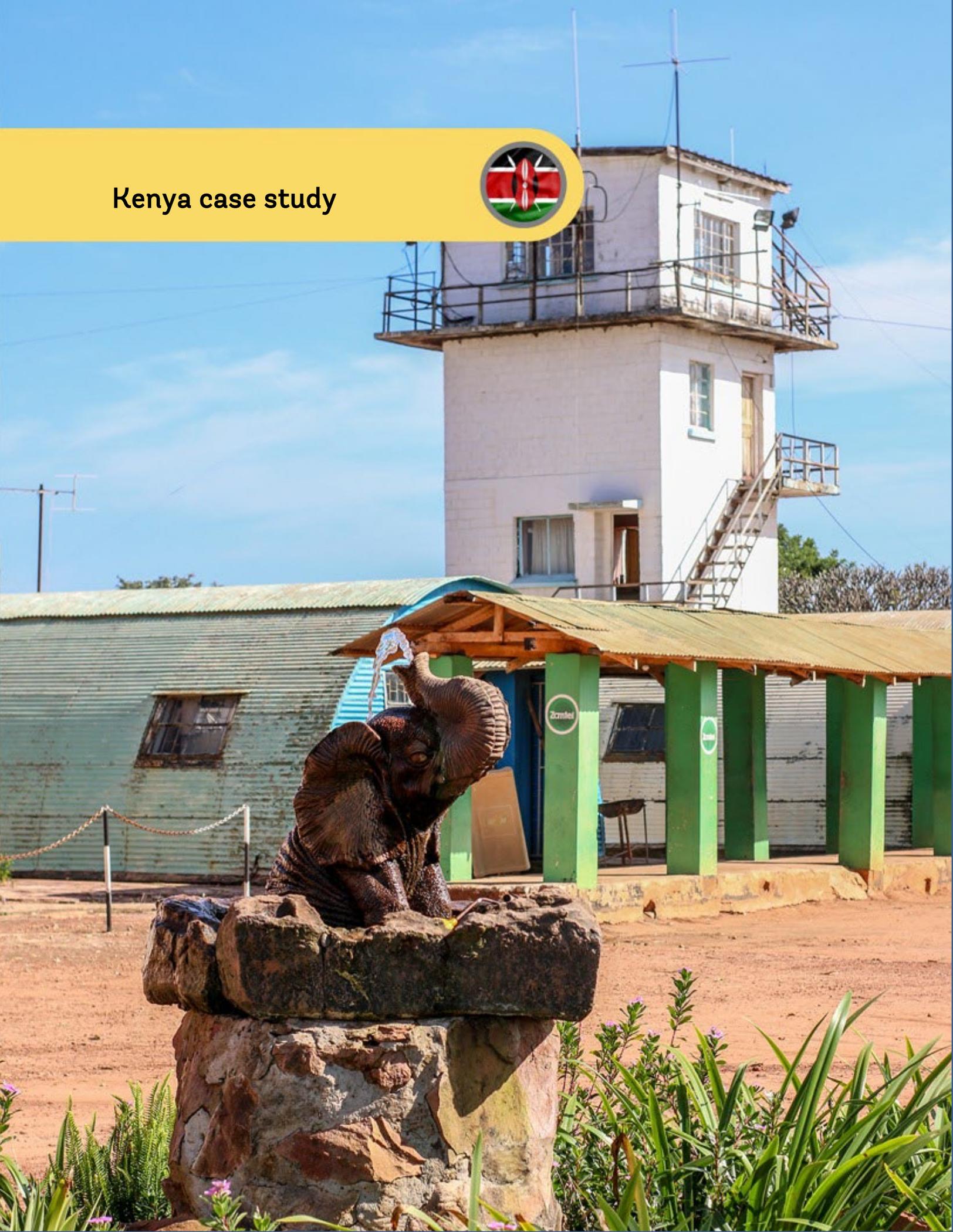
- ‘any event beyond the reasonable control of the concessionaire that affects the economic balance shall result in the obligation of the parties to renegotiate the contractual arrangement to restore the original financial and economic balance while keeping the risk allocation on the concessionaire in order to ensure the concession agreement complies with the EUROSTAT and off-balance treatment principles’.

Additionally, and in support of this principle, the Italian public procurement supervisory authority issued a note clarifying the pandemic is an event beyond the reasonable control of the contractor/concessionaire.

Based on this legal framework, a decrease in demand due to the pandemic can be considered grounds to request a rebalancing regardless of a specific reference to such grounds in the concession agreement. The concessionaire must prove that the COVID-19 situation has caused reduced demand and such drop affected the financial balance of the project as provided in the relevant concession agreement.

Italian law does not provide any preclusions to one or more means to achieve the rebalancing and therefore any typical rebalancing measure is available as mentioned above (e.g., extension of the term of the concession, public contribution, or increases of availability payments, tariffs, or indexation).

# Kenya case study



## *Operational PPP Projects*

While no terminations, insolvencies, or disputes were reported during the initial stages of the pandemic, a number of operational projects in the energy sector were adversely affected as a result of the COVID-19 pandemic, particularly in the energy sector. For example, the Kenya Power and Lighting Company PLC (KPLC) issued force majeure notices to various Independent Power Producers (IPPs) under their respective Power Purchase Agreements (PPAs) and their operational projects on the basis of reduced national demand for electricity. The IPPs pushed back on the basis that the risk of a decrease in the national demand for electricity is a risk that KPLC had accepted under the PPAs. Eventually, KPLC opted to negotiate with the individual IPPs on the way forward.

In a bid to combat the adverse effects of COVID-19, the government proffered a stimulus package that included concessionary tax rates to safeguard businesses against the resulting economic fallout. Unfortunately, the Tax Laws Amendment Act, 2020 also included a number of amendments that clawed back on some benefits previously enjoyed by energy projects, including:

- Deletion of the tax exemption on compensating tax accruing to a power producer under a PPA. The exemption had enabled investors in the power sector to extract profits without incurring a penalizing tax, which effectively claws back the tax savings generated from the other incentives granted.
- Introduction of the application of VAT for taxable supplies imported or purchased locally for direct and exclusive use in the construction of a power generating plant. Previously such supplies were VAT-exempt.

As a result of the tax law changes, a number of IPPs were entitled to claim relief under the ‘change in tax’ provisions that are present in most PPAs. Depending on the party granting the relief, the compensation could be provided in the form of a one-off payment or an adjustment to the tariff in the agreement.

## *PPP Project Pipeline*

The government of Kenya has fast-tracked the approval of various PPP projects in a bid to increase private investment as part of its wider strategy to jump-start an economy that has been hit hard by the COVID-19 pandemic.

As part of the recovery effort, the government fast-tracked approvals of the JKIA—Westlands Expressway project, which is being undertaken as a PPP under a build-operate-transfer model and began construction in mid-2021. This development is intended to attract foreign investors to Kenya as well as boost the tourism sector, which has been hard hit by the effects of the pandemic.

The Public-Private Partnerships Bill, 2021 was published in late 2021. While under development before the pandemic, the government passed the bill in recognition of the role that PPPs could play in the post-COVID-19 economic recovery process and the need to reduce reliance on government borrowing. The bill was introduced with the aim of creating a more streamlined PPP procurement process and addressing various shortcomings of the Public-Private Partnerships Act, 2013 thus strengthening the PPP framework in Kenya and making such investments more attractive to investors. The bill seeks to improve the PPP process in various ways including creating a clear process to evaluate Privately Initiated Investment Proposals, clarifying local content requirements, providing for direct procurement of PPP projects, streamlining the composition of the PPP Committee, and expanding the disclosure requirements.

In addition, the PPP unit has been elevated to a full Directorate within the National Treasury and a seasoned Director-General appointed as its head. Initially, the PPP program was run by a unit under the Directorate of Portfolio Management.

### *Laws, Regulations, and Administrative Measures*

At an administrative level, various measures have been adopted in a bid to mitigate the effects of COVID-19 on PPP projects, particularly in the energy sector. In a bid to address the consequences of imbalance in the demand and supply of power in Kenya that has been worsened by the pandemic, KPLC sought to renegotiate the terms of PPAs with various IPPs (including those with projects that are operational, close to commissioning, and where construction is yet to commence). In addition, KPLC may seek to negotiate the 'target' commissioning dates and the applicable tariffs. The renegotiations are ongoing at time of writing; thus, the extent of their effectiveness remains to be seen, and it is unclear if any legal or regulatory action will be taken (on the public or private side) in response to KPLC's negotiation attempts.

With regard to the renegotiation of PPAs, the process is still ongoing. On March 29, 2021, President Uhuru Kenyatta, appointed a 15-member taskforce mandated to review PPAs. It was tasked, among other things, with:

- a) Undertaking a comprehensive review and analysis of the terms of all PPAs entered into by KPLC
- b) Probing the compliance of the PPAs and all associated agreements with government policies, legislation, regulations, and identifying what appropriate actions should be taken, including the termination or renegotiation of the PPAs
- c) Reviewing the sustainability and viability of all independent power generation projects that have been proposed, are under implementation, or in operation, and making appropriate recommendations
- d) Reviewing the allocation of risk between IPPs and KPLC under the PPAs, and making appropriate recommendations
- e) Reviewing the take-or-pay approach applied under the PPA structure and recommending a viable pay-when-taken (merchant plant) approach, or any other viable payment structure, for use in independent power generation projects
- f) Reviewing the current methods for sourcing IPPs and recommending appropriate alternative sourcing frameworks, including energy auctions

The taskforce served for a period of six months starting March 29, 2021. During the tenure of the taskforce:

- a) A moratorium was placed on all PPAs not concluded as at the date of the notice, including any related letters of support and legal opinions pending issuance by the Attorney General.
- b) A moratorium was placed on the renewal of any PPA whose renewal would occur during the pendency of the taskforce, with the exception of those that would receive approval by the Board

of Directors of KPLC for the purposes of renegotiation but, at all times, subject to ratification by the Cabinet Subcommittee on KPLC.

This meant that any ongoing negotiations between IPPs and KPLC for PPAs that had not been concluded as of the date of the Gazette Notice were suspended for a period of six months.

The taskforce completed the review exercise in September 2021 and made a raft of recommendations that may, if implemented, impact the energy sector and trigger changes in terms of PPAs going forward. Some of the key recommendations include:

- a) Establishment of a committee to implement the recommendations of the taskforce
- b) Renegotiation of PPA tariffs within the existing contractual arrangements, to reflect price changes
- c) Exploration of denomination of future PPAs in local currency to manage fluctuations and volatility in customer bills that result from forex adjustments
- d) That the take-or-pay approach applied under the PPA structure be maintained, although where practical, existing PPAs should be renegotiated to “pay-when-taken” terms. It recommended, in particular, that the pay-when-taken approach be adopted in the case of expired thermal PPAs (where required)
- e) Adoption of standard PPAs and a standard government letter of support by KPLC
- f) Capping of the amounts payable by the government in the event of a change in law or change in tax that affects the financial position of the seller
- g) Issuance of government support measures only in exceptional circumstances and for strategic projects of national interest
- h) Adoption of Nairobi as the seat of arbitration in PPAs so as to reduce the costs of arbitration
- i) KPLC to take the lead role in formulation of the Least Cost Power Development Plan (**LCPDP**) and procurement of PPAs
- j) Harmonization of the force majeure clause across all PPAs and related project agreements
- k) Addition of “*pandemics, outbreaks of infectious disease or any other public health crisis necessitating quarantine or other employee restrictions*” as events or circumstances giving rise to force majeure, in light of the COVID-19 pandemic and the associated difficulties
- l) Introduction of a new clause on termination by either party for convenience
- m) Harmonization of conditions precedents clauses in PPAs

- n) Disclosure of the names and beneficial ownerships of IPPs that have contractual arrangements with KPLC, in KPLC's annual reports

On October 8, 2021, President Kenyatta appointed a steering committee to implement the recommendations of the taskforce.

Upon the release of the taskforce recommendations report, President Kenyatta directed the Cabinet Secretary of Energy to secure the immediate implementation of some of the taskforce's recommendations, including reducing the cost of electricity by over 33 percent by December 25, 2021. Several IPPs have since been invited to the renegotiation table to facilitate this cost reduction process. The outcome of these efforts remains to be seen.

As part of national government undertakings for post-COVID-19 development support programs, the government has issued the **LCPDP 2021–30**. The LCPDP is tailored to address specific challenges the sector is facing on account of the COVID-19 pandemic.

The guiding principles of the 2021–30 LCPDP include:

Enhancement of renewable energy technology integration in line with a global decrease in costs and ensuring that variable renewable energy resources in the country are optimally utilized for power generation

Encouragement of private sector participation in power generation through the FiT, energy auctions, and the PPP frameworks

Encouragement of distributed energy resources and captive power generation in line with section 167 of the Energy Act, 2019 by bringing this segment of developers into the regulated framework

Improvements in and greater deployment of information and communications technology in the energy sector, including digitalization such as Big Data, Internet of Things, and smart metering, which will lead to significant changes in the number of service providers netted into the system and will subsequently expand energy customer choices and control

Focus on load growth through aggressive connections and application of specialized programs

Integration of environmental concerns such as the nationally agreed targets to reduce greenhouse gas emissions that require the sector to conserve the environment and limit such emissions

Focus on emerging technologies and investment in primary data such as wind and solar insolation mapping necessary for attracting quality developers

The Ministry of Energy has also published the Renewable Energy Auction Policy and the Feed-in-Tariffs Policy on Renewable Energy Resource Generated Electricity (Small-Hydro, Biomass and Biogas), January 2021. This is proof the government is ready to encourage investments in the energy sector.

In order to reposition the economy onto a steady and sustainable growth trajectory as part of Kenya's post-COVID-19 economic recovery strategy and in a bid to enhance participation of the private sector in national development, the Public-Private Partnerships Bill, 2021 (discussed above) was, at the time of concluding this case study, awaiting Presidential Assent.

The government, in its post-COVID-19 Economic Recovery Strategy, intends to mobilize approximately 200 billion Kenyan shillings (\$ 1.85 billion) in the 2020–21 fiscal year by concluding the financing of several projects that are currently at an advanced stage of negotiations, including the Nairobi-Nakuru-Mau Summit highway PPP project.

### *Banks and Grantors*

As part of the emergency measures taken by the Kenyan government to mitigate the adverse impact of the pandemic on loans, the Central Bank of Kenya in a circular dated March 18, 2020, directed that

corporate borrowers be allowed to request banks operating under the laws of Kenya for loan reliefs to make an assessment and subsequently restructure the loan. These measures only applied to loans that were performing as of March 2, 2020, and would last only for a one-year period.

Borrowers, including those in the energy sector, were subsequently provided with various restructuring options, including extension of repayment period, moratorium on principal, or interest and waivers on interest or fees. Cumulatively, since March 2020, loans amounting to 1.7 trillion Kenyan shillings were restructured by the end of February 2021, accounting for 57 percent of the banking sector's gross loans.

### *Insurance*

There is no clear indication from the insurance sector of an intention to insure pandemic risk with regard to future projects in Kenya. It is anticipated that stakeholders in the sector will be engaging and lobbying insurance companies to provide pandemic risk insurance in Kenya.

# Morocco case study



### *Operational PPP Projects*

The COVID-19 pandemic has had an adverse impact on operational PPP projects, especially in the urban transport, water and electricity supply, and waste collection services. The challenges faced by private operators in these sectors relate, in particular, to delay in payments by the municipalities. For example, there have been significant delays in payments by the municipalities to the private operators in the context of the delegated management of waste collection services and urban transport in several cities in Morocco.

Private operators distributing water and electricity were also instructed:

- Not to suspend, interrupt or reduce their utility services in case of non-payment of bills by households
- To accept postponement of the payment of utility bills and facilities for paying the said bills
- Suspend the distribution of utility bills until the end of the state of health emergency

Not surprisingly, these measures have caused significant financial difficulties to these private operators. However, no PPP projects were terminated because of the COVID-19 pandemic.

### *PPP Project Pipeline*

The COVID-19 pandemic pushed the Moroccan government to adopt numerous decrees with the aim of limiting public expenses. In this regard, the procurement of new projects by public entities was significantly impacted. However, the pandemic did prompt the government to develop new PPP projects, especially in the healthcare, urban transport, and port sectors. These new projects will only be launched once the government has visibility regarding the global status of the COVID-19 pandemic.

In January 2021, the Mohammed VI Investment Fund was created with the aim of supporting major investment projects and to contribute to the capitalization of small- and medium-sized enterprises (SMEs).

### *Laws, Regulations, and Administrative Measures*

No specific laws or regulations were enacted by the Moroccan government to mitigate the impact of COVID-19 on PPP projects. However, it is worth noting that several regulations and administrative measures were enacted with regard to public procurement and payments to private companies<sup>12</sup>. In Morocco, the COVID-19 pandemic and the state of health emergency were on the whole considered as force majeure or unforeseen events, leading to a renegotiation of the contracts between the municipalities or the relevant public operator and the affected private operator. These renegotiations aimed, in principle, at reviewing the payment terms and mitigating the delay in payment by the municipalities especially in the waste collection services and urban transport sectors.

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<sup>12</sup> [http://lof.finances.gov.ma/sites/default/files/circulaire\\_26032020.pdf](http://lof.finances.gov.ma/sites/default/files/circulaire_26032020.pdf)

<https://www.finances.gov.ma/Publication/cabinet/2020/Circ%20Simpl%20Covid.pdf>

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# Nigeria case study



## *Operational PPP Projects*

The outbreak of the COVID-19 pandemic posed new challenges and had adverse impacts on several operational PPP projects in Nigeria, specifically those in Lagos, Abuja, and Ogun State. Some of the challenges included workforce shortages and significant losses of revenue for operational PPP projects.

This is likely due to the COVID-19 Regulations 2020 (COVID-19 Regulations) introduced by Nigerian President Muhammadu Buhari, which prescribed the restriction of movements and travel of persons and the closure of businesses for a certain period of time in the above-mentioned states. Certain commercial sectors were excluded in the regulations. However, the regulations caused PPP project companies in the oil and gas, aviation, and infrastructure sectors to suspend operations.

For example, the Concessionaire of the Muritala Muhammed Airport Ikeja–Lagos Domestic Terminal (Lagos) suspended operations due to the COVID-19 pandemic and was only able to re-open operations of the terminal after about three months.

## *PPP Project Pipeline*

Aside from the lockdown period with restricted movements, an analysis of procurement stage status report as of February 28, 2021, listed on [the Infrastructure Concession Regulatory Commission's \(ICRC\) website](#) reveal that the COVID-19 pandemic does not appear to have affected the procurement of new PPP projects in Nigeria.

## *Laws, Regulations, and Administrative Measures*

There is no specific law or regulation that has been enacted for the purpose of cushioning the effect of COVID-19 on PPP projects in Nigeria. However, in the oil and gas sector, a regulator, the Department of Petroleum Resources<sup>13</sup>, issued an Industry Circular<sup>14</sup> declaring the COVID-19 pandemic a “force majeure” to ensure the safety and welfare of all personnel and to contain the spread of COVID-19. The declaration of “force majeure” may be relevant in the application for grant of extensions of licenses for the affected project companies in the oil and gas sector. The legal effectiveness of this circular in respect of third-party contracts and the ability to seek relief in its respect is still in question.

Also, by virtue of the COVID-19 Regulations, Nigeria’s development financial institutions were required by the Central Bank of Nigeria to engage international and multilateral development partners to negotiate concessions to “ease the pain” of borrowers (where applicable) under on-lending facilities using capital provided by the development partners. In addition, the Central Bank introduced, via its circulars to all banks and financial institutions, the following incentives:

- Provision of 100 billion Nigerian naira credit support (includes concessional interest rates at 5 percent per year for a maximum of 2 billion Nigerian naira per obligor up to February 28, 2022)<sup>15</sup> for the healthcare industry, particularly pharmaceutical companies, hospitals, and health practitioners that want to start new or expand existing drug manufacturing or healthcare facilities
- Granting of leave to deposit money banks to consider temporary and time-bound restructuring of the tenor and loan terms for businesses and adversely impacted.

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<sup>13</sup> The Petroleum Industry Act, which was signed into law on August 16, 2021, replaced the Department of Petroleum Resources with the Nigerian Upstream Petroleum Regulatory Commission and the Nigerian Midstream and Downstream Petroleum Regulatory Authority. The agencies introduced by the Act are responsible for the technical and commercial regulation of the upstream and midstream and downstream operations in the petroleum industry.

<sup>14</sup> [Industry Circular March 30, 2020](#)

<sup>15</sup> This was extended from 28 February 2021 to 28 February 2021 by virtue of the CBN circular to all banks and other financial institutions dated 3 March 2021.

# South Africa case study



## *Operational PPP Projects*

The various levels and degrees of lockdown imposed by the South African government since late March 2020 to date have had varying effects on operational PPPs.<sup>16</sup>

Most impacts were seen in terms of revenue generation, particularly in the transport sector (i.e., due to restrictions imposed on passenger travel (rail projects) and interprovincial travel (road concessions) as well as reduced traffic volumes for toll roads due to working from home policies, for example). This has resulted in the following:

- Potential of increased contingent liabilities for the government resulting out of guarantees or other financial government support; and
- In cases where no such financial support is provided by the government, private parties looking to other mitigants, such as claims from insurers (to the extent respective risks were insurable)

In April 2020, the National Treasury (supported by the World Bank) engaged with key stakeholders to assess potential risks and contingent liabilities in the PPP market arising out of the restrictions imposed by the government since the onset of the pandemic. The stakeholders engaged included the Gautrain Management Agency, the Western Cape Department of Transport and Public Works, the Independent Power Producers (IPP) Office, the South African National Roads Agency Limited (SANRAL), and the PPP Unit in the government Technical Advisory Centre. Potential contingent liabilities of the government (by way of guarantees and other support instruments) were evaluated as part of the study, and these were found to be manageable.

In respect of mitigating demand risk associated with COVID-19, some private parties relied on government support instruments already in place to mitigate this risk, including (for example):

- Patronage guarantees given for revenues under the Gautrain Rapid Link project that cover losses below a set revenue amount
- Debt guarantees given in relation to debt payments to the concessionaires' lenders under the Chapman's Peak Toll Road project

## *PPP Project Pipeline*

While not necessarily directly attributable to the COVID-19 pandemic, the South African government has renewed its focus on infrastructure development and, during 2020, there seems to have been a policy shift and renewed emphasis on infrastructure development, evidenced by the public announcement of a number of Strategic Integrated Projects (SIPs) on July 24, 2020, (made up of 50 infrastructure projects and 12 special projects in the water, energy, transport, residential, and digital sectors).

Not unexpectedly, certain projects (particularly PPPs in the planning stage) were delayed as a result of the pandemic. New projects to market were understandably sparse in 2020, barring the issue of tender documents for a handful of projects, including (i) a serviced government accommodation PPP project in Bisho, Eastern Cape, and (ii) the Kopanong Precinct PPP project in Johannesburg, Gauteng. However, some projects continued to reach financial close unabated, including:

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<sup>16</sup> Any projects procured under the Renewable Energy Independent Power Producer Programme have not been treated as PPP projects for the purpose of this report, as these projects were not technically procured as PPP projects.

- The Beitbridge Border Post Improvement project (bordering Zimbabwe and South Africa)
- The Department of Agriculture, Rural Development and Land Reform serviced accommodation project

### *Laws, Regulations, and Administrative Measures*

No new laws or regulations have been enacted or implemented to specifically mitigate the effects of COVID-19 on PPP projects. Rather, legislative and regulatory developments proposed, published, or enacted since the onset of the pandemic have been implemented to address more general issues related to PPP projects (e.g., to address legacy issues around the procurement and implementation of PPP projects).

Prior to the onset of the pandemic, the National Treasury, with support through the World Bank, had (in September 2019) launched a review of the PPP regulatory framework to address commonly perceived challenges in the PPP market and further encourage private sector participation. This was, at least in part, prompted by a notable drop in implemented PPP projects (and dwindling private sector participation) since 2010. As part of this process, various recommendations were made by the public and private sector and alongside further recommendations reflected in a report delivered to the National Treasury at the end of May 2021 and subsequently endorsed by the latter.

Notably, and in response to private sector feedback in recent years, a draft Public Procurement Bill was published for comment in February 2020<sup>17</sup>. The purpose of this bill was to simplify and consolidate all relevant procurement requirements into one statute (to address procurement requirements being contained in several pieces of legislation, as is currently the case).

### *Banks and Grantors*

It goes without saying that the COVID-19 pandemic has had, and is having, a significant impact on financial markets, global economic activity, and particularly, the South African economy. South African banks have been attuned to the fact that this will invariably also impact the ability of borrowers to meet their contractual obligations. As such, the impacts of the pandemic have precipitated a wide array of requests from borrowers for waivers, amendments, and variations to their contractual arrangements to deal with, or mitigate, the contractual effects of the pandemic.

Certain relief measures have been provided by the South African Reserve Bank for retail and corporate loans to provide suitable temporary relief on the minimum capital requirements for banks relating to credit risk. This allows them to continue to extend credit to the real economy during this period of financial stress without the need for inappropriate higher capital requirements (the intention is to assist banks to continue to serve their borrowers under difficult circumstances, thereby reducing the impact of the pandemic on the local economy). However, it is understood that these relief measures have not been available, or have not been applied, in relation to project-financed debt—and lenders have had to consider requests in the absence of this relief.

In light of that, banks and grantors have generally been understanding and receptive towards reasonable and evidence-based requests from borrowers for variations and amendments arising out of the COVID-19 pandemic. By and large, in response, they have attempted to balance and mitigate their risks as a result of the granting of waivers or amendments by imposing contractual mitigants (where applicable) and, in

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<sup>17</sup> At time of publication the bill had not been passed.

certain circumstances, increasing monitoring and reporting obligations to deal with the cause of the request.

### *Insurance*

There has been a fairly significant amount of litigation in South Africa involving claims under insurance for losses suffered as a result of the COVID-19 pandemic. A high-profile judgment handed down by the Supreme Court of Appeal in December 2020 found in favor of the insured and obliged the insurer to compensate the insured for losses suffered as a result of the pandemic. In response, it is understood that a number of insurers in South Africa were reviewing their policy wording relating to coverage for pandemic-related losses as well as, more fundamentally, their positions as to whether pandemic-related risk is, in fact, insurable. At least two major South African insurance companies have publicly indicated they may no longer be able to provide contingent business interruption insurance for pandemic-related losses, given that they are unlikely to view a pandemic as an insurable risk going forward.

# United Kingdom case study



## *Operational PPP Projects*

The UK government (and devolved administrations) recognized the importance of preserving their supply chains quickly once the nature and extent of the pandemic became known, which included operational PPP projects. Generally, operational PPP projects continued in a collaborative manner with very limited events of termination, insolvency, or disputes.

For those operational projects affected by the pandemic, the UK government provided guidance around offering general relief from performance standards to preserve the existing economic terms/balance of PPP contracts rather than offer blanket compensation. PPN 02/20 (as noted below) made clear that government customers had the ability to make project-specific amendments to contractual performance metrics rather than wholesale renegotiations to the financial terms of the relevant agreement. This is consistent with the basic concept of English contract law, which does not protect the parties from striking a bad bargain and a supplier cannot default because a contract has become more expensive to perform. Instead, the focus was on preserving cash flow throughout the supply chain and varying the scope of agreements to fit the new requirements—e.g., deschooling schools projects where the children were not required to attend in-person lessons or increasing the scope of hospital projects to include more intensive cleaning services. The restrictions on social contact and requirements to self-isolate/quarantine have impacted contractors' abilities to staff projects, however, it is understood that this has not generally had a significant negative impact on service provision.

In response to a number of queries and speculation surrounding the standard definition of "force majeure event" in the UK government's PF2 contracts and PPP contracts more widely, the IPA Guidance (referred to below) explicitly confirmed that the COVID-19 emergency is not, and is not to be regarded as, an event of force majeure, a view that was widely supported by the legal community.

While PPP contracts recognize the concept of "Compensation Events," as with force majeure events, it is unlikely that COVID-19 itself, and many of the impacts of it, will fall within the formal definition, so the existing contractual regimes are unlikely to apply (in any event, there are often strict notification periods that may not have been complied with). Where legislation has been enacted that amounts to a "Qualifying Change in Law" there have been a limited number of claims presented by the private sector for its additional costs, but wholesale claims were not made, most likely due to the ability of authorities to vary the terms of the contract through change protocols.

Where the private sector is not performing to the relevant contractual standard, the public sector is not offering compensation 'per se' (as PPN 02/20 makes clear that it should continue to pay based on historical performance standards), however, the project company is not permitted to profit on those parts of the contract it is not providing (and is required to make open-book accounting submissions to support this).

It is worth noting that early variations to the PPP contract in response to the pandemic (whether through the change protocol or otherwise) to increase the scope of the services provided would likely have included an element of risk pricing to ensure the private sector is adequately compensated for different eventualities.

Where contracts were being negotiated during the pandemic, it is possible that the private sector would seek to include a specific "Compensation Event" addressing pandemics/epidemics, but this would ultimately be a policy decision for the relevant contracting authority to take. Where contracts were short-term and placed towards the beginning of the pandemic, such a request may have been accommodated in recognition of the urgent need and unprecedented nature of events. However, as the pandemic continued and the risks were becoming more known to all parties, contracting authorities were likely to resist giving open-ended protection and instead to ask the private sector to price for certain risks. Of course, unforeseen qualifying changes in law would still likely be a public sector risk.

In the context of rail franchising in the UK, the underlying risk profile of contracts was altered on a time-limited basis. Prior to COVID-19, it was broadly the case that private operators competitively tendered to operate rail franchises and would bear the cost and revenue risk on the operation of such franchises. In March 2020, with a collapse in passenger demand, the UK Department for Transport (DfT), the government body that tendered the rail franchises, announced emergency support arrangements for the train operating companies, which transferred all income and cost risks to the DfT in return for operators continuing to run passenger services (for which they were paid a management fee, with the opportunity to earn a performance fee). This was achieved by entering into time-limited variations that overlaid each applicable rail franchise agreement. The 'Emergency Measures Agreements' (EMAs) introduced in March 2020 were replaced by 'Emergency Recovery Measures Agreements' (ERMAs) in September 2020. Again, this was achieved by entering into short-term variations in respect of applicable franchise agreements—the terms of the ERMAs built upon the experience of previous months under the terms of the EMAs.

From April 2021, the DfT plans, as part of a rail reform program (the Williams Rail Review), which started before the COVID-19 pandemic, to transition rail operators to new interim arrangements (called National Rail Contracts (NRCs)). This replaced the existing franchising system under which rail passenger services were provided under franchise agreements between train operating companies and the DfT. The terms of the NRCs, with regard to cost and revenue risk, are a further evolution of the experience under the EMAs and ERMAs, in that such risks will continue to primarily be retained by the DfT, but with further emphasis on cost control by the operator. In the longer term, once the impact of COVID-19 has stabilized, a new contractual model for the provision of rail passenger services will be used.

In addition, light rail operators (including PPP operators) who would ordinarily have borne revenue risk were also provided with support in light of the COVID-19 pandemic. This was to ensure that there was no unfair treatment across transport operators (as compared to rail franchisees and bus operators).

For projects in the construction phase, during the initial UK lockdown that began on March 23, 2020, (which was legally formalized for England by the Health Protection, Coronavirus, Restrictions, England Regulations 2020<sup>18</sup>), it was unclear whether construction works could continue, so a number of construction projects (some of them PPPs or variations to PPPs) encountered delays and disruption. However, this position has been clarified in subsequent lockdowns, with the UK government explicitly stating that, provided it is COVID-19 secure, construction and other outdoor work can take place. This has allowed much of the construction industry to continue.

### *PPP Project Pipeline*

Given the essential nature of infrastructure, the COVID-19 pandemic did not completely halt procurement of new PPP projects, although there has been a marked decline in the number of new PPP projects coming to market in the UK. An example of a PPP project that reached financial close during the pandemic was the £1.14 billion project to design, build, finance and operate Sections 5 (Dowlais to A470) and 6 (A470 to Hirwuan) of the A465 road in South Wales (A465 project). The A465 project:

Was the first privately financed PPP project of this scale to be completed in the UK since the outbreak of COVID-19

Was the first UK privately financed PPP project of this scale to be financially closed 'virtually'

Was the first UK PPP project in procurement to address the impact of COVID-19 and future epidemics/pandemics

In response to the emergent issues, the UK government sought to rely on its ability under the "extreme urgency" provisions of Regulation 32 of the Public Contracts Regulations 2015 (PCR) to award contracts

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<sup>18</sup> There were similar regulations for the devolved administrations.

by a negotiated procedure without prior publication. Of course, the longer the COVID-19 pandemic persists, the less tenable the argument that the situation is extremely urgent and unforeseeable becomes, and more typical procurement assumptions will need to be followed.

## *Laws, Regulations, and Administrative Measures*

### **Introduction**

The UK government, both central and subnational<sup>19</sup>, has responded to the adverse effects of COVID-19 on the performance of commercial contracts for the supply of works and services to public bodies, including under PPP contracts, by preparing and issuing a number of procurement policy notes (PPNs, as directed to public sector bodies) and guidance documents with the intent that these various publications should encourage consistent best practice by, and provide guidance to, the parties to whom they are directed. The emphasis is on ensuring business and service continuity and avoiding wholesale termination of contracts. The principal policy and guidance documents issued to date that have potential relevance to mitigating the effects of COVID-19 on PPP projects have been detailed below with links.

The policy and guidance notes referred to above were issued in addition to the introduction by the UK government of a package of financial support schemes for businesses to help with the preservation of cashflow—this financial support is not specific to PPP projects—information on it can be found in the House of Commons Library briefing paper titled ‘Coronavirus: Support for businesses’<sup>20</sup> (this paper is periodically updated).

In relation to statutory measures, while there have been no enactments in the UK designed specifically to mitigate the effect of COVID-19 on PPP projects generally (i.e., on PPPs as a procurement model), please note that the Corporate Insolvency and Governance Act 2020 (CIGA) enacted on June 25, 2020, provided for some temporary measures in response to COVID-19, such as a suspension of liability for wrongful trading (although ‘public-private partnership project companies’ were excluded from this suspension) and restrictions on presenting winding-up petitions and on the making of winding-up orders.

### **Procurement policy notes and guidance**

#### *England*

On **March 20, 2020**, the Cabinet Office of the UK government published its ‘Procurement Policy Note (PPN) 02/20 – Supplier relief due to COVID-19’<sup>21</sup> setting out proposed **relief measures** with the aim of ensuring that suppliers under contracts with public sector bodies (‘contracting authorities’) would be in a position to resume normal contract delivery and fulfil their contractual obligations once the adverse effects of COVID-19 upon suppliers come to an end.

PPN 02/20 states that contracting authorities should (amongst other things):

Inform suppliers who they believe are at risk of performance failure (due to the impact of COVID-19) that they will continue to be paid as normal, even if service delivery is disrupted or temporarily suspended

Put in place the most appropriate payment measures to support supplier cash flow

If appropriate, provide relief against suppliers’ current contractual terms (for example, relief on KPIs and service credits) so as to maintain business and service continuity (rather than accept claims for other forms of contractual relief, such as force majeure)—each claim for relief is to be considered on a case-by-case

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<sup>19</sup> PPP policy is a devolved matter in the United Kingdom.

<sup>20</sup> [Coronavirus: Support for businesses, UK House of Commons Library](#)

<sup>21</sup> [PPN 02/20: supplier relief due to coronavirus \(COVID-19\)](#)

basis according to the: (i) nature of services supplied; (ii) challenges being faced; (iii) contract terms; and (iv) statutory constraints

Ensure invoices submitted by suppliers are paid immediately on receipt (with any reconciliation to follow later) in order to maintain cash flow in the supply chain and protect jobs

PPN 02/20 also provides that payments under 'output-based' contracts involving payment by results (as is most likely the case for most, if not all, PPP contracts) should be on the basis of previous invoices (e.g., the average monthly payment over the previous three invoices)—this is to be adjusted to ensure that any profit element is not payable on any undelivered aspects/services, but any adjustments should not delay payments being made.

It is noted in PPN 02/20 that to qualify for these measures, suppliers should, agree to act on an 'open-book basis' and make cost data available to the contracting authority during the period covered by the PPN; and that they should continue to pay employees and 'flow down' funding to their subcontractors. Contracting authorities should be maximizing any commercial flexibilities within contracts, particularly 'excusing cause' and other relief provisions; and any changes to the contract should be recorded (e.g., in a contract variation/change note) and make clear that: (i) changes only relate to a COVID-19 situation; (ii) there is an option to review/time limit on the changes; and (iii) it is the authority's option when things should return to normal<sup>22</sup>.

On **March 24, 2020**, the Cabinet Office issued a related guidance document titled 'Procurement Policy Note 02/20: Guidance notes on model interim payment terms.'<sup>23</sup> This provides a set of terms that contracting authorities can use to implement PPN 02/20 (see above) in providing contractual relief to suppliers that have been affected by COVID-19.

On **March 27, 2020**, the Cabinet Office added a 'Frequently Asked Questions' document to its website in relation to PPN 02/20 (this FAQ document has since been updated – version 2 is dated **April 9, 2020**).<sup>24</sup>

On **April 2, 2020**, the Infrastructure and Projects Authority (IPA) (an agency of HM Treasury) and HM Treasury published a guidance note titled 'Supporting vital service provision in PFI/PF2 (and related) contracts during the COVID-19 emergency'.<sup>25</sup> This note states that it should be read alongside, and is consistent with, PPN 02/20 (see above). It was the first government guidance note to specifically address UK public-private partnership contracts in the context of COVID-19 and its consequences (NB. This note is referred to in footnotes 7, 9, and 17 of the World Bank's 'Practice Note on PPP Legal Frameworks Post-COVID-19'<sup>26</sup> (as released by the World Bank's Infrastructure Finance, PPPs & Guarantees Group)).

The 'background' section of the guidance note of April 2, 2020, reads as follows: "*PFI [(private finance initiative)] contracts deliver vital public services that must continue to be delivered during the current COVID-19 emergency. PFI contractors should now see themselves as part of the public sector response to COVID-19 and, as such, work cooperatively with their contracting authorities to ensure, as far as possible, vital services continue. Contracting authorities must reciprocate and ensure that where services or performance are **impacted due to COVID-19** despite the best efforts of the PFI contractors, there should be a temporary moratorium on related payment and performance mechanism deductions/points so that PFI contractors can continue to operate as far as possible and pay their workforce and suppliers". This guidance note is expressed to be in effect until June 30, 2020. It is discussed, along with PPN 02/20, in a DLA Piper update titled 'COVID-19 – UK government guidance on supplier reliefs for public sector suppliers*

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<sup>22</sup> PPN 02/20 expired on June 30, 2020

<sup>23</sup> [PPN 02/20: supplier relief due to coronavirus \(COVID-19\)](#)

<sup>24</sup> [PPN 02/20: supplier relief due to coronavirus \(COVID-19\)](#)

<sup>25</sup> [Supporting vital service provision in PFI/PF2 contracts during the COVID-19 emergency](#)

<sup>26</sup> [PPP Legal Frameworks Post-COVID-19 Practice Note, World Bank](#)

(including PFI/PF2 contracts)', April 10, 2020<sup>27</sup>. Subsequent FAQs for this document were issued on **May 28, 2020**, and updated in **June 2020**.<sup>28</sup>

On **April 6, 2020**, the Cabinet Office issued 'PPN 02/20: Additional guidance, FAQs and model terms for construction.' This document, 'Guidance Notes for Construction Contracts – Procurement Policy Note 02/20' (it was updated on May 19, 2020)<sup>29</sup> includes a template model deed of variation for an NEC3 Engineering and Construction Contract (April 2013 edition) and for a JCT Design and Build Contract (2016 edition).

On **May 7, 2020**, the Cabinet Office and IPA issued 'Guidance on responsible contractual behavior in the performance and enforcement of contracts impacted by the COVID-19 emergency' (an updated version of this guidance was issued on June 30, 2020—see below).<sup>30</sup> This strongly encourages all individuals, businesses (including funders), and public authorities to act responsibly and fairly in the national interest in performing and enforcing their contracts, to support the response to COVID-19, and to protect jobs and the economy. A DLA Piper client alert on this guidance was published on May 11, 2020.<sup>31</sup>

On **May 19, 2020**, the Cabinet Office issued an updated version of 'PPN 02/20: Additional guidance, FAQs and model terms for construction' (see above)—i.e., the document titled 'Guidance Notes for Construction Contracts – Procurement Policy Note 02/20'.

On **June 9, 2020**, the Cabinet Office published its Procurement Policy Note 04/20: Recovery and Transition from COVID-19<sup>32</sup> setting out information and guidance for public bodies on payment of their suppliers to ensure service continuity during the coronavirus outbreak. This PPN updates and builds on the provisions contained in PPN 02/20 (see above) and was valid from July 1, 2020, to October 31, 2020, (it is expressed to cover “*goods, services and works contracts being delivered in the UK (including PFI and PF2 contracts)*”).

On **June 25, 2020**, the Infrastructure and Projects Authority (IPA) issued an update on the 'Gov.UK' website in relation to its guidance note of April 2, 2020, titled 'Supporting vital service provision in PFI/PF2 (and related) contracts during the COVID-19 emergency' (see above). The website update reads: “*This guidance was reviewed on June 24, 2020. Guidance on the Recovery and Transition from COVID-19 has now been published by the Cabinet Office for all contracts, including PFI, in Procurement Policy Note 04/20. The guidance [(i.e., PPN 04/20 – see above)] is effective from July 1, 2020. No separate PFI guidance will be produced; authorities and contracts [sic] should refer to this general guidance*”.<sup>33</sup>

On **June 30, 2020** (posted on July 1, 2020), the Cabinet Office and IPA published the document 'Guidance on responsible contractual behavior in the performance and enforcement of contracts impacted by the COVID-19 emergency (published May 7, 2020): Update, June 30, 2020'.<sup>34</sup> As the name suggests, this document is an update on the document first issued on May 7, 2020 (see above) – the 'Gov.UK' website states that “*The original guidance of May 7 will continue to apply and should be read together with the update of June 30*”.

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<sup>27</sup> [COVID-19 – UK Government guidance on supplier reliefs for public sector suppliers \(including PFI/PF2 contracts\)](#), DLA Piper

<sup>28</sup> [Supporting vital service provision in PFI/PF2 contracts during the COVID-19 emergency](#)

<sup>29</sup> [PPN 02/20: supplier relief due to coronavirus \(COVID-19\)](#)

<sup>30</sup> [Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency](#)

<sup>31</sup> [New government guidance for England on responsible contractual behaviour in the performance and enforcement of contracts](#), DLA Piper

<sup>32</sup> [PPN 04/20: Recovery and Transition from COVID-19](#)

<sup>33</sup> [Supporting vital service provision in PFI/PF2 contracts during the COVID-19 emergency](#)

<sup>34</sup> [Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency](#)

On **February 4, 2021**, the Cabinet Office published Procurement Policy Note 01/21: Procurement in an Emergency<sup>35</sup>. This reminds contracting authorities of the options available to them when undertaking procurements in an emergency, including extremely urgent procurements required by the ongoing response to the COVID-19 pandemic—it builds on PPN 01/20 - Responding to COVID-19. All Cabinet Office PPNs can be accessed [here](#).

## Scotland

During 2020 the Scottish government and Scottish Futures Trust (SFT), established by the Scottish government, separately issued a number of documents comprising Scottish procurement policy notes (SPPNs)<sup>36</sup>, construction policy notes<sup>37</sup> and guidance documents<sup>38</sup>. Some key examples of relevance to COVID-19 and its impact on supply contracts (including PPPs) have been listed below (this is not an exhaustive list).

On **March 26, 2020**, the Scottish government published SPPN 05/2020 ‘Supplier relief due to COVID-19’.<sup>39</sup> This SPPN sets out guidance for public bodies on options for payment to their suppliers to ensure service continuity during the COVID-19 outbreak. It includes a template of model interim payment terms. This SPPN had an initial expiry date of June 30, 2020. See below regarding supplementary SPPN 8/2020, which came into effect on July 1, 2020.

(Please see the footnote for details of the first COVID-19-related SPPN issued by the Scottish government—this is referred to in SPPN 05/2020.)<sup>40</sup>

On **April 6, 2020**, the Scottish Futures Trust (SFT) issued a document titled ‘Guidance on Operational PPP Projects (covering NPD Contracts, hub DBFM contracts, PPP and PFI contracts) and COVID-19’.<sup>41</sup> This states that it should be read alongside, and is consistent with, SPPN 5/2020 (see above). Updated versions of the SFT’s guidance document were issued on **June 29, 2020**<sup>42</sup>, **September 30, 2020**<sup>43</sup>, and **September 30, 2021**<sup>44</sup>.

On **April 9, 2020**, the Scottish government issued a Construction Policy Note (CPN) 1/2020 titled ‘Coronavirus (COVID-19): impact on construction contracts: CPN 1/2020’<sup>45</sup> – this is intended to complement (amongst other things) SPPN 5/2020 (see above).

On **April 20, 2020**, the Scottish Futures Trust issued a paper titled ‘Addressing the Impact of COVID-19 on Existing hub Contracts’,<sup>46</sup> providing guidance for authorities on interpreting the provisions of the Scottish

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<sup>35</sup> [PPN 01/21: Procurement in an Emergency](#)

<sup>36</sup> [Scottish Procurement Policy Notes](#)

<sup>37</sup> [Construction Policy Notes](#)

<sup>38</sup> [SFT guidance documents](#)

<sup>39</sup> [Coronavirus \(COVID-19\): supplier relief SPPN 5/2020](#)

<sup>40</sup> The first Covid-19 related SPPN issued by the Scottish Government was on March 20, 2020 – this was ‘[SPPN 04/2020 – Coronavirus \(Covid-19\): procurement regulations for public bodies](#)’ (this provides information and guidance on public procurement regulations in the context of the Covid-19 pandemic).

<sup>41</sup> [Guidance on Operational PPP Projects \(covering NPD Contracts, hub DBFM contracts, PPP and PFI contracts\) and COVID-19 \(6 April 2020\)](#)

<sup>42</sup> [Guidance on Operational PPP Projects \(covering NPD Contracts, hub DBFM contracts, PPP and PFI contracts\) and COVID-19 \(29 June 2020\)](#)

<sup>43</sup> [Guidance on Operational PPP Projects \(covering NPD Contracts, hub DBFM contracts, PPP and PFI contracts\) and COVID-19 \(September 2020\)](#)

<sup>44</sup> [Guidance on Operational PPP Projects \(covering NPD Contracts, hub DBFM contracts, PPP and PFI contracts\) and COVID-19 \(30 September 2021\)](#)

<sup>45</sup> [Coronavirus \(COVID-19\): impact on construction contracts: CPN 1/2020](#)

<sup>46</sup> [Addressing the Impact of COVID-19 on Existing hub Contracts](#)

government's CPN 1/2020 (see above) for existing projects in the hub contracts program that are in construction.

The penultimate paragraph of the Scottish Futures Trust (SFT) paper of April 20, 2020 (see above) states that the "SFT will provide suggested drafting ... which can be tailored, as required, for project specifics". The SFT published its drafting around **May 15, 2020**, in the form of a variation agreement (with a preface) titled 'Standard Form Contract Amendment for COVID-19 Related Delay (hub D&B Projects), Version 1: 14 May 2020'<sup>47</sup>—this consists of a contract variation to the design and build development agreement. The standard form document is prefaced with a note that states (amongst other things) that it "*should be used in conjunction with the Guidance issued/adopted by the Scottish Government and/or SFT from time to time, in particular the Guidance issued by SFT in respect of COVID-19 related delays*" (i.e., the guidance paper of April 20, 2020).

On May 28, 2020, the Scottish government published 'CPN 4/2020 – Coronavirus (COVID-19): managing disputes and cashflow'<sup>48</sup>—this CPN explains how contracting authorities can manage disputes held-over from COVID-19 related site suspension and any issues arising from project restart. It also outlines steps contracting authorities should take to progress outstanding accounts and encourage the settling of disputes in order to reinforce main contractors' and supply chain cashflow.

On **June 12, 2020**, the Scottish government issued 'Coronavirus (COVID-19): recovery and transition from COVID-19: SPPN 8/2020'<sup>49</sup>—this SPPN is supplementary to 'SPPN 5/2020 – supplier relief' (see above), which sets out guidance for public bodies on options to ensure service continuity during the coronavirus (COVID-19) outbreak. SPPN 8/2020 came into effect on July 1, 2020.

On **July 1, 2020**, the Scottish government issued a set of updated frequently asked questions that relate to SPPN 5/2020 and SPPN 8/2020 (see above)—the document is titled 'Updated frequently asked questions (FAQs) – Scottish Procurement Policy Notes 5/2020 and 8/2020'.<sup>50</sup>

See above for the SFT's updated guidance (including the updates of **September 30, 2020**, and **September 30, 2021**).

## Wales

On **April 9, 2020**, the Welsh government confirmed that PPNs 01/20 and 02/20 as issued by the Cabinet Office (see above) apply to Welsh authorities and are being adopted by the Welsh government.

On **June 24, 2020**, the Welsh government issued a Welsh Procurement Policy Note (WPPN) / Procurement Advice Note (PAN) titled 'Recovery and Transition from COVID-19 Procurement Advice Note (PAN) for the Welsh Public Sector'.<sup>51</sup> This WPPN / PAN is based closely on the UK government's PPN 04/20 (see above) on payment of suppliers to ensure service continuity during and after the COVID-19 outbreak but has been tailored for Wales as appropriate.

## Northern Ireland

On **March 25, 2020**, a Northern Ireland Procurement Guidance Note (PGN) was published titled 'PGN 01/20 - Supplier Relief Due to COVID-19',<sup>52</sup> the summary of which states that "*The Executive [(i.e., the Northern Ireland Executive)] has agreed to implement measures to ensure that Departments pay their*

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<sup>47</sup> [Standard Form Contract Amendment for Covid-19 Related Delay \(hub D&B Projects\), Version 1: 14 May 2020](#)

<sup>48</sup> [Coronavirus \(COVID-19\): managing disputes and cashflow: CPN 4/2020](#)

<sup>49</sup> [Coronavirus \(COVID-19\): recovery and transition from COVID-19: SPPN 8/2020](#)

<sup>50</sup> [Updated frequently asked questions \(FAQs\) – Scottish Procurement Policy Notes 5/2020 and 8/2020](#)

<sup>51</sup> [Welsh Procurement Policy Note WPPN: Recovery and transition from COVID-19](#)

<sup>52</sup> This has been archived – see <https://www.finance-ni.gov.uk/articles/pgn-0120-supplier-relief-due-covid-19>.

*suppliers as quickly as possible to maintain cash flow and protect jobs. Further detail of the measures are outlined in the latest Procurement Guidance Note - PGN 01/20 Supplier Relief Due to COVID-19*. This PGN was revised on April 9, 2020—the relief provided under it expired on June 30, 2020.

On **June 22, 2020**, the Northern Ireland Executive published 'PGN 02/20 – Recovery and Transition from COVID-19'.<sup>53</sup> PGN 02/20 sets out information and guidance for public bodies on payment of their suppliers to ensure service continuity during the COVID-19 outbreak. It updates and builds on the provisions contained in PGN 01/20 (see above). The relief provided by PGN 02/20 expired on October 31, 2020.

## **Conclusion**

Adopting a unified or blanket approach to the basic principles of relief through the guidance described above has allowed the majority of contracting authorities to react quickly to preserve their supply chains, but the guidance retained sufficient flexibility to allow project-specific issues (such as KPIs and performance regimes) to be accounted for. This process has been assisted by the built-in change protocols and procedures that are already utilized effectively in operational projects, allowing minor variations and changes in scope to be dealt with 'on the ground' through a series of change notices, rather than requiring lengthy negotiations of wholesale variations.

## ***Banks and Grantors***

As noted above, the Cabinet Office and IPA guidance issued on May 7, 2020, strongly encourages all individuals, businesses (including funders), and public authorities to act responsibly and fairly in the national interest in performing and enforcing their contracts to support the response to COVID-19 and to protect jobs and the economy.

In relation to banks there was certainly a general appreciation of the need to be pragmatic and flexible, even with projects where the controls in the lending documents were particularly restrictive such that any "transaction, agreement or arrangement" of the special purpose vehicle (SPV) would require lender consent before the SPV was able to proceed, but there was still a concern as to debt repayment and cash flows (particularly for demand-based economic PPPs). At the onset of the pandemic in the UK, any pragmatism had to be balanced with the practical realities that many funders' back-office and administrative functions were either: (i) being transitioned to a work-from-home function; or (ii) based outside of the UK in countries that were suffering more pronounced effects from COVID-19 and/or did not have the ability to continue to operate in a remote working environment, both of which had an impact on the ability for decisions to be taken swiftly. Typically, UK SPVs would expect a formal credit committee approvals process to take 10 business days; this was extending to well beyond 20 business days at the start of the pandemic but has since returned to a more typical time period.

In relation to grantors/authorities, as mentioned above, PPN 02/20 made clear that contracting authorities should be maximizing any commercial flexibilities within contracts, particularly 'excusing cause' and other relief provisions; and any changes to the contract should be recorded (e.g., in a contract variation/change note). While there were a number of amendment requests coming from SPVs (to reflect the new working patterns), this was a reciprocal arrangement, and contracting authorities on many projects were required to request their own variations to respond to the pandemic, for example, to increase the scope/standard of cleaning on hospital, education, and other social infrastructure projects.

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<sup>53</sup> [PGN 02/20 – Recovery and Transition from COVID-19](#) – this has been archived.

## Insurance

Prior to COVID-19, pandemic insurance coverage was available in the marketplace. As is well known, take-up of the product was limited, due in part to a perception that it was expensive and the risk was low.

In the absence of specific pandemic risk coverage, policyholders have looked to core insurance coverage, such as property damage/business interruption, for indemnification of losses that have been incurred. Various test cases have taken place, or are taking place, in different jurisdictions, as insurers have resisted these attempts. In the UK, the Supreme Court judgment in the Financial Conduct Authority's (FCA) test case in January 2021 further increased the cost of insuring pandemic risk. It established that certain insurers are obliged, on the basis of their business interruption policy wordings, to indemnify policyholders for coronavirus-related business interruption losses. However, even with favorable court decisions, only a very small fraction of total pandemic business loss is insured.

Lloyd's CEO, John Neal, has urged insurers to insure pandemic risk. However, several insurers opposed this, arguing that insuring pandemic risk will increase the compliance costs and operating expenses of an already embattled industry. Pandemic risk is exceptionally hard to model and rate profitably, because a single pandemic can affect many businesses simultaneously across a very wide geographic area. Some insurance companies have retreated from pandemic risk altogether by imposing blanket infectious disease exclusions.

As a response to the global pandemic, the Lloyd's Market Association issued several communicable disease exclusions in March 2020, including the LMA5393 for use on property policies, issued on March 25, 2020, just two days after the UK is generally considered to have entered lockdown. The LMA5393, along with other subsequently issued clauses, excludes all communicable diseases and the threat or fear of communicable diseases. Many insurance markets are using the LMA clauses, although some are using their own clauses, many of which have broader exclusionary language.

The LMA5393 and similar exclusions are now widely in use in contract works and erection of all risks policy renewals or new project placements. This will likely be the standard position for the construction insurance market for the foreseeable future. Other changes in terms and conditions include increased premium rates and excesses. In addition, insurers may request increased information before they provide quotations for cover. As a result of these changes, the construction industry will likely see increases in premium rates for both single project placements and annual program insurances.

Proposals for insuring pandemic risk in the future include brokers and insurers cooperating and 'innovating around risk'. The Geneva Association proposes that insurers work with governments and public-private partnerships where the business interruption risk is so large insurers cannot insure it alone, in order to establish a mandatory insurance program against pandemic risk. At more local levels, innovative products may provide a solution.

There has been a market move towards the exclusion of COVID-19-related exposure on policy renewals and placement of new risks. This is unsurprising given the length of the pandemic. In the future, innovative solutions will be needed, perhaps ultimately underwritten by government authorities, to provide a workable solution. The widespread view appears to be that such risk is not effectively insurable in the private insurance marketplace alone.