

THE PUBLIC-PRIVATE
PARTNERSHIP
LAW REVIEW

SIXTH EDITION

Editors

André Luiz Freire, Thiago Luís Santos Sombra
and Raul Dias dos Santos Neto

THE LAWREVIEWS

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PREFACE

We are pleased to present the sixth edition of *The Public-Private Partnership Law Review*.

Public-private partnerships (PPPs) are increasingly becoming a solution to a gap in public investment that derives from natural budgetary constraints all over the world. Therefore, combining private and public efforts by means of a long-term contract becomes essential for tackling infrastructure matters that require massive investment for upgrading and expanding services' networks.

PPP contracts are a way of delegating the provision of public services and utilities to the private sector. Such practice induces effectiveness by bringing private sector solutions, technologies and investments, without excluding public sector oversight.

The formation of well-adjusted PPP contracts is no simple task, as they are marked by substantial complexity. In a single contract there are elements revolving around engineering, construction, financing, legal and regulatory aspects that must be addressed for the success of a given PPP.

A comparative study comprising practical aspects and different perspectives and viewpoints on PPP issues serves to spread knowledge of this contractual model around the world in the hope of consolidating a relevant benchmark worldwide. For instance, the United Kingdom is known as one of the pioneers regarding the use of PPPs and has structured projects ranging from telecom, power (electricity and gas), water and waste, and logistics (airports and railways). This experience, as well as the experience of other countries, certainly may serve as useful guidelines for the implementation of PPP projects

Therefore the purpose of this edition is to clarify and explain legal and other practical aspects involved in the formation of PPP contracts for disseminating best practices used by private professionals and governmental entities that rely on PPP projects for the provision of key infrastructure and public services and utilities. A comparative study is always useful for anyone who wants to know more about some phenomenon, and this edition will help those interested in PPPs.

The sixth edition brings chapters regarding PPP practices prepared by distinguished law firms from countries such as Argentina, Australia, Belgium, Brazil, China, France, Germany, Japan, Korea, Kuwait, Lebanon, Mexico, Nigeria, Portugal, Russia, Senegal, Serbia, Spain, Taiwan, Tanzania, Thailand, the United Kingdom, the United States and Vietnam.

We hope you enjoy this sixth edition and that it serves as a definitive and comprehensive guide for topics related to PPPs.

André Luiz Freire, Thiago Luís Santos Sombra and Raul Dias dos Santos Neto

Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

São Paulo

March 2020

PORTUGAL

Manuel Protásio and Catarina Coimbra¹

I OVERVIEW

The public-private partnership (PPP) model started to be widely used from the 1990s onwards, with the purpose of equipping the country with modern infrastructure and services. The sectors that attracted more private investment in PPP have been, mainly, the road infrastructure and health sectors, with the innovative feature of placing clinical National Health Service (NHS) hospitals under private management with an aggressive risk allocation to the private sector. Such PPP activity was boosted further after the international financial crisis of 2008, with the purpose of enhancing the Portuguese economy's poor performance.

As a consequence of the sovereign debt crisis experienced in Europe in 2011 and, more specifically, of the bailout advanced to Portugal by the European Union (EU) and the International Monetary Fund (IMF), public expenditure under PPP contracts was significantly reduced, which has led to the renegotiation of several PPP projects, in particular in the road sector.

Portuguese companies experienced difficult conditions, mainly owing to liquidity constraints and to the slowdown of the Portuguese PPP and construction markets in connection with the economic crisis, leading many of those companies to search for new opportunities in foreign markets, particularly in the Portuguese-speaking countries in Africa.

At the beginning of 2014, the Portuguese government approved the Strategic Plan for Transport and Infrastructure, which selects some infrastructure projects that may bring positive economic effects to Portugal between 2014 and 2020. The modernisation of the Portuguese rail freight sector, the development and increase in capacity of major Portuguese ports, a few projects in the road sector deemed essential to complete the road network, as well as the increase of cargo capacity at Lisbon Airport, are some of the priority projects. Owing to diverse aspects, such as the limitations of the new European funds framework, some of these future infrastructure projects may be launched and executed under a PPP model.

The existing PPPs have been subject to public disapproval, given the heavy burden that payments by the Portuguese state under those projects imposed on the national budget. However, the PPP model has not been completely abandoned and recently the Portuguese government launched the project of the Hospital Lisboa-Oriental Complex, probably the most important project launched under a PPP model in recent years. Moreover, the recent changes to the legal framework of PPP is a strong indicator of the Portuguese government's willingness to enhance the adoption of the PPP model.

¹ Manuel Protásio is a partner and Catarina Coimbra is an associate at Vieira de Almeida.

II THE YEAR IN REVIEW

Over the past few years the growth of the PPP business in Portugal has been slow, with few greenfield projects coming to the market.

In addition to the recurring renegotiations within the existing road PPP contracts, the international public tender for design, construction, financing, operation and maintenance of the Hospital Lisboa-Oriental Complex, having already been postponed twice, has seen proposals submitted on 31 January 2019; its current stage concerns the analysis and evaluation of those proposals to select a maximum of three bidders to move to the negotiation phase. This is the first time in Portugal that a PPP in the health sector has been launched solely for the construction, operation, maintenance and management of the hospital building, staying the responsibility of the management of the clinical services in the hands of the NHS and not in the hands of a private entity.

In 2018, the Portuguese government approved the extension of the PPP contract for the management of the clinical services of the Hospital of Cascais until 31 December 2021, by which time a new public tender will be launched. The same is not the case regarding the Hospital of Braga (which was, according to the Court of Auditors, one of the most efficient of the NHS, with less cost per patient than any other hospital), as the existing PPP contract expired on 31 August 2019. Accordingly, the Portuguese government announced the return of the Hospital to public management for up to a maximum period of five years as from the date of creation of the legal person in charge of the management of the Hospital, on 31 May 2019.

Further, the tender procedure concerning the extension of the Porto underground system, launched in 2017, is now reaching its final stage with the pre-qualification of the bidders, the beginning of the construction works being expected to start in 2020.

Nonetheless the award of these new PPP contracts, the renegotiation and restoring of the financial balance of the existing road PPP contracts (that covered the reduction of service requirements and availability payments and, in some road PPP contracts, the possible extension of the maximum duration of the concession contracts) is still the main subject matter and they still substantially contribute to the public expenditure. In this context, the costs arising from requests for the restoration of the financial balance of PPP contracts in the road sector have been particularly high in 2019.

Portugal is still one of the European countries with the highest costs assigned to PPP projects (mainly in the road sector), notwithstanding the slowdown in relation to new PPP-based projects over the past few years. In fact, according to the statistical information provided by the European Commission, Portugal recorded the highest ratio of PPP over total gross fixed capital formation between 2000 and 2014, which demonstrates the relative weight of PPP projects within the Portuguese economy.

Evidence of this is the choice of Portugal as the host country for the International Centre of Excellence on PPPs in water and sanitation, on May 2017, with the signing of a memorandum of understanding between the UNECE Executive Secretary and the Secretary of State for the Environment in Portugal. The Centre, affiliated to the UNECE International PPP Centre of Excellence in Geneva, will be hosted by the National Laboratory of Civil Engineering (LNEC) in Lisbon and was created with the aim of assisting low- and middle-income countries to utilise PPP-based projects for water supply and sanitation services.

In relation to the legal framework of PPPs, 2019 saw relevant changes in this area, with the enactment of Decree Law. 170/2019 of 4 December 2019, which has amended Decree

Law 111/2012 of 23 May 2012 (which establishes the main rules applicable to any PPP project) and the Public Contracts Code. While the amendments to the Public Contracts Code are minimal, Decree Law 111/112, of 23 May 2012 was significantly amended, aimed mainly at providing flexibility to the launching and awarding of PPP projects, the responsibility for preparing, contracting and awarding a PPP project being currently centralised in the Council of Ministers. Also, the new Decree Law excludes from the PPP legal regime any project that does not involve public payments to the private party.

The legislation regarding PPPs in the health sector was also subject to significant changes, with the enactment of Law 95/2019 of 4 September 2019, which approved a new Health Basic Law and revoked the original specific framework for PPPs in the health sector (as set out in Decree Law 185/2002 of 20 August 2002).

Regarding relevant events, in 2019, for the first time in Portugal, the creditors of the concessionaire of a road PPP project have enforced a step-in right upon the failure by the concessionaire to comply with its financial obligations. Following the enforcement of security interests and the take-over of the concession, the concessionaire and the creditors engaged in negotiations with the view to, inter alia, integrating the creditors as part of the management structure of the concessionaire.

III GENERAL FRAMEWORK

i Types of public-private partnership

Both institutional and contractual PPP structures are available in Portugal. However, institutional PPP structures are not commonly used. In fact, the majority of PPP projects closed to date in Portugal are based on project finance contractual structures and typically follow a build-operate-transfer or design-build-finance-operate model.

The underlying contractual framework of a PPP transaction in Portugal traditionally includes a concession contract giving the project company the right to carry out the project or the relevant activity, equity subscription and shareholders' agreements to regulate the relationship between the sponsors or project company's shareholders and the equity contributions to the project, a typical set of finance documents, as well as project implementation and sector-related commercial contracts. Among these, there is typically a construction contract and an operation and maintenance contract in infrastructure PPP projects. Supply agreements, sales agreements or both may also be entered into in connection with the project.

In the vast majority of the Portuguese PPP transactions closed to date, the concession-based construction contracts used do not follow any standard form, such as those issued by the International Federation of Consulting Engineers, the Joint Contracts Tribunal, or the Institution of Civil Engineers. Hence, the form of construction contract used in each case has varied depending on the sector of industry at stake or the sponsors involved.

In relation to the infrastructure projects closed in Portugal in the 1990s and early 2000s, it was generally accepted that, given the need to adapt the legal structure of the facility agreements to international syndication, the whole financing package other than the security documents had to be governed by English law, while the project documents, notably the concession contracts, were subject to Portuguese law. That ceased to be the case from the mid-2000s onwards, at which point the project financiers active in Portugal had become

sufficiently comfortable with the Portuguese law and, therefore, most finance documents executed thereafter are governed by Portuguese law, notwithstanding closely following the structure of a typical English law project finance documentation package.

PPP Projects are governed by Decree Law 111/2012 of 23 May 2012 (as amended by Decree Law 170/2019 of 4 December 2019) and by the Public Contracts Code (approved by Decree Law 18/2008 of 29 January 2018, as amended from time to time).

PPP major projects in the health sector, the second most relevant sector concerning PPP projects, also have some particularities in Portugal. Until recently, PPP projects in the health sector were governed by a specific legal framework, approved by Decree Law 185/2002 of 20 August 2002, which established rules regarding the development of PPPs for the construction, financing, operation and maintenance of healthcare units forming part of the NHS. An important feature of these PPPs is that they may envisage the private partner not only managing the hospital facilities but also providing clinical services as part of the NHS. When both managing facilities and clinical services provision are foreseen, two separate project companies must be incorporated. In such case, both project companies are bound to comply with their own obligations under a sole concession agreement, and one concessionaire is liable before the other provided that the non-compliance of its own obligations may give cause to the other concessionaire's infringement under the concession agreement. The health sector concession agreements set out different contractual periods for each concessionaire (10 years for the clinical services providers – which may be extended for additional 10-year periods up to a maximum of 30 years – and 30 years for the concessionaires responsible for the design, construction and operation of the hospital buildings). Law 95/2019 of 4 September 2019, which approved a new Health Basic Law, also established the revocation of Decree Law 185/2002 of 20 August 2002, subject to the approval, within a maximum period of 180 days up to 4 March 2020, of a legal framework establishing the terms for public management of the NHS facilities. If that legal framework is not approved within the referred deadline, the previous regime will remain in force.

Recent evaluations carried out by the Health Regulatory Authority (ERS) regarding PPP projects in the health sector show that the quality of clinic services provided by the private partner is similar to that of the services provided by the state-run public utilities while reducing the public expenditure. Notwithstanding that positive performance, the Portuguese government has set a target to reduce PPP projects in the health sector.

In the road sector, different solutions were put in place regarding the concessionaires' payment mechanism and risk matrices. Shadow toll systems were introduced in some road projects during the 1990s and onwards, but in all those projects such payment systems were replaced by road availability payments and real toll payment systems. An exception was made in Madeira and Azores, where the regional political authorities chose to maintain the shadow toll systems previously adopted in their respective road projects. More recently, real toll payment mechanisms were also substituted by road availability solutions under the recent renegotiation process on the PPP projects of the road sector. This renegotiation process also brought about specific solutions, including a set-off mechanism against toll revenues for the benefit of the concessionaires and an upside-sharing mechanism to encourage concessionaires to promote traffic in their concessions. At a municipal level, PPP activity took place through the launch of several projects for municipal water supply, wastewater treatment and waste management; Decree Law 90/2009 of 9 April 2009, and Decree Law 194/2009 of 20 August 2009, as amended, established the rules applicable to PPPs in the aforementioned sectors.

ii The authorities

Pursuant to the recently enacted Decree Law 170/2009 of 4 December 2019, the Council of Ministers (which is composed of all ministers of the Portuguese government) is the competent authority for the preparation, launching, awarding, execution and modification of PPP contracts.

Notwithstanding, responsibilities related to the preparation and execution of PPP contracts remains with the Technical Unit for Monitoring Projects, which was created by the Decree Law 111/2012, of 23 May 2012.

Other PPP projects at a municipal or regional level are prepared and executed by the respective public structures and such projects are not subject to the Technical Unit for Monitoring Projects' control.

Depending on the sector of industry in question, there are also some specific regulatory authorities, such as IP-Infraestruturas de Portugal, SA, a public company responsible for the management of the road and railway infrastructure; the Institute of Public, Real Estate and Construction Markets, (IMPIC, IP); the Electricity Services Regulatory Entity (ERSE); the National Directorate of Energy and Geology (DGEG); the Water and Waste Services Regulatory Entity (ERSAR) and the Health Regulatory Authority (ERS).

iii General requirements for PPP contracts

The legal framework applicable to the PPP projects expressly foresees the need to accommodate the type of expenditure within budgetary regulations and requires the preparation of economic and financial surveys to confirm the figures for the public sector comparator, as well as establishing general procedure rules applied to any type of PPP contracts.

Projects that require a global public cost above €10 million and an investment not higher than €25 million for the entire contractual period are not subject to the legal regime of Decree Law 111/2012 of 23 May 2012.

Since the previous PPP Decree Law, dated 2003 (Decree Law 86/2003 of 26 April 2003), procurement procedures may only be launched and awarded after approval of the relevant environmental impact declaration and once the relevant environmental and urban planning licences and permits have been obtained, to ensure an effective transfer of execution risks to the private partner.

The regime concerning environmental impact assessment for each project was approved by Decree Law 151-B/2013 of 31 October 2013, as amended, pursuant to which any application for an environmental approval must enclose a detailed environmental impact study, the procedure for granting the relevant environmental impact decision implying a coordinated effort between a different array of entities for better assessment of the environmental risks associated with each project.

Depending on the sector of industry in question, a project may also be subject to environmental licensing under the new integrated pollution prevention and control legal framework, approved by Decree Law 127/2013 of 30 August 2013. The environmental licence (which is required, in particular, for industrial projects) must be obtained before operation commences and must be successively renewed during the entire period of operation of the plant, although simplified licensing procedures may be in place in accordance with the scope of the activities carried out.

Furthermore, in the context of the EU emissions trading system, for projects in certain industrial sectors and meeting certain conditions or thresholds, the operators must hold a permit to emit greenhouse gases, and be the holder of emission allowances.

Other industrial and construction licences and permits may be required depending on the type and specific conditions of each project to be implemented.

Finally, compliance with all legal conditions and procedures is subject to validation by the Court of Auditors. After the execution of a PPP agreement by any public entity, the Court of Auditors will verify and confirm whether all legal requirements are fulfilled and payments under those contracts can only be made further to such validation.

IV BIDDING AND AWARD PROCEDURE

i Expressions of interest

Pursuant to the PPP legal framework established by Decree Law 111/2012 of 23 May 2012 (as amended by Decree Law 170/2019 of 4 December 2019), prior to launching the procurement process, the public sector can consult the private sector entities regarding their position towards the project under consideration, thus identifying the general market conditions and any private entity directly interested in the project. Also, during the preparation of the PPP it must be considered whether or not to gauge the private sector's positioning regarding the type of project with the purpose of identifying potential interested parties and the conditions offered by the market.

ii Requests for proposal and unsolicited proposals

The Portuguese Public Procurement Code (PCC) approved by Decree-Law 18/2008 of 29 January, which was amended by the Decree Law 170/2019 of 4 December, applies to every public tender procedure launched by a public authority. The Code sets out different procedures for the procurement process applicable to administrative contracts, including those to be entered into in connection with PPP projects: the direct agreement, the public tender, the limited tender by pre-qualification, the negotiation procedure and the competitive dialogue.

Unsolicited bid mechanisms are not foreseen in Portuguese law. Unlike the former legal framework for public procurement, the PCC does not automatically require a public tender for public works concessions or public services concessions, the awarding entity being entitled to choose between the launch of a public tender, limited tender by pre-qualification or a negotiated procedure, depending on the specific features of the project and the public expenditure involved.

iii Evaluation and grant

In each procedure allowed by the PCC, administrative principles of equal treatment, legality, transparency and competition are duly reflected in the respective regulation. Moreover, such principles are directly applicable to each procedure and may be invoked by any interested party. If an interested party considers that an act under the procurement procedure does not comply with applicable regulation and principles, it may claim directly to the awarding entity but also to a court. In such case, the interested party may ask the court to declare the suspension of all subsequent acts in the procurement procedure by means of a temporary injunction, to ensure that its rights are not irreversibly threatened.

Substantive provisions dealing with public works and the public services concessions are included in the PCC, some of which are mandatory in nature. These mandatory provisions refer to relevant features of a PPP, such as termination by the contracting authority, and sequestration or step in. Other substantive provisions of the PCC will only apply in the absence of express provision in the relevant contract.

The granting of the approval by the Court of Auditors is a condition for the contracting authority to make any payments under the contract; the contract may, however, enter into force prior to the validation and all rights and obligations contained therein may be performed, except for public payments.

In February 2014, the European Parliament and the Council adopted Directive 2014/25/EU (procurement in the water, energy, transport and postal services sectors), Directive 2014/24/EU (public works, supply and service contracts) and Directive 2014/23/EU (concession contracts). The new Public Procurement Directives were published in the Official Journal of the European Union on 28 March 2014 and entered into force on 17 April 2014.

Decree Law 111-B/2017 introduced in the Portuguese legislation the European Union Directives, and puts forward several modifications to the existing legal framework. Among other things, the new Public Procurement Code introduced the following amendments:

- a* the most economically advantageous tender becomes the rule criterion for awarding;
- b* the value of the performance bond is reduced to a maximum of 5 per cent of the contract price;
- c* a simplified procedure for the provision of health and social services is foreseen; and
- d* the report obligations of the awarding authority on practices susceptible of distorting competition rules are enhanced.

V THE CONTRACT

i Payment

Remuneration mechanisms diverge considering the different sectors of activity and the different PPP projects.

In the road sector, different solutions were put in place regarding the concessionaires' payment mechanism. Real toll systems and shadow toll systems coexisted under different projects but the shadow toll systems were generally replaced by road availability payments and real toll payment systems. In addition, some real toll payment mechanisms were substituted by road availability solutions under the recent renegotiation process on the PPP projects of the road sector. Upside-sharing mechanisms were set out thereunder to encourage concessionaires to promote traffic in their concessions.

Payments due under the PPP projects in the health sector are linked to the clinical services provided in accordance with a list of medical acts and complexity levels, and also to the availability of the hospital facilities. Both concessionaires are subject to payment deductions if any contractual requirements are not totally fulfilled, and additional revenues can be obtained through the performance in the hospital facilities of other related activities (the revenues of which are to be shared with the awarding entity).

Water supply concessions are generally paid by consumers – both at bulk and retail level – in accordance with the water consumption, the applicable tariff being determined in accordance with the concession agreement.

ii State guarantees

The law establishes a type of sovereign guarantee which may be granted by the Portuguese government to secure payments by the state and related parties, such as state-owned companies or government departments. The maximum amount of the guarantees that may

be provided in any given year must be approved and set out in the relevant state budget. However, PPP projects in Portugal usually do not include any type of sovereign guarantee to secure payments from the government or other public entities.

iii Distribution of risk

According to Decree Law 111/2012 of 23 May 2012 (as amended by Decree Law 170/2019 of 4 December 2019), project risks are to be shared between the public and private partners according to their capacity to manage such risks. Moreover, a PPP project should imply an effective and significant transfer of risks to the private partner. The concession contract, which is the most common form of PPPs, allocates the relevant project risks between the contracting authority and the project company. The risks that remain with the contracting authority are usually covered by the financial rebalance mechanism, which is a key concept in all concession-based transactions in Portugal.

Typical financial balance events include unilateral variations by the contracting authority, force majeure events, specific change of law and construction delays caused by the contracting authority.

Traditionally, archaeological and ground risks were borne by the public partner. That was, however, not the case in the PPP1 Poceirão-Caia high-speed rail project closed in May 2010 (which was cancelled as part as the austerity-led review of PPP projects) and in the PPP hospital projects, where that risk was partially assumed by the project company and transferred by the latter to the contractor.

Nationalisation, expropriation or requisition of private property can only take place on the grounds of public interest and provided that private entities are duly compensated. Public interest may also constitute grounds for termination of the concession contract by the contracting authority, in which case the contracting authority shall compensate the project company for all the damages caused (which may include loss of profit). Some concession contracts set out the method for calculating the damages incurred by the project company in case of termination by reason of public interest. Such calculation usually takes into account the status of construction.

Other political risks, such as war, civil disturbance or strikes may be considered as events of force majeure and, therefore, the project company shall be relieved from its obligations under the concession contract to the extent affected by the relevant event of force majeure. Force majeure events may trigger the financial balance mechanism and, hence, the project company (and consequently, the construction contractor) shall be compensated. In the case of prolonged force majeure or if the restoration of the financial balance of the concession proves too onerous, the concession contract may be terminated.

Changes in law may also be treated as a political risk. Only a specific change in law entitles the project company to financial rebalance. The risk of change in general law is typically assumed by the project company.

In water concession projects additional events may give cause to apply the financial rebalance mechanism, as it is the case of water consumption levels below certain limits or additional infrastructure investment requirements.

The project company generally passes on to the contractor all design and construction obligations, liabilities and risks under a construction contract, which is fully back-to-back with the concession contract.

The contractor usually undertakes to perform the design and construction obligations on a turnkey and fixed-price basis and, hence, it bears the risk of price escalation of the material, equipment or workers. In some cases, the contractor is allowed to revise the price annually to reflect inflation.

Other risks that are transferred by the project company to the contractor under a classic concession-based construction contract include the delay in the completion of the works, approval risk, the risk of damage to the works and defects during the defects liability period.

The risks generally covered by the financial balance under the concession contract do not entitle the contractor to suspend the works or in any way relieve the contractor of its obligations under the construction contract. The contractor shall, however, be entitled to compensation in accordance with the 'back-to-back, if and when' principle, (i.e., the contractor will only receive compensation for any of the relevant events to the extent the project company is compensated for those same events under the concession contract).

With regard to limitation of liability, under general Portuguese law, any party is liable before the other for the breach of its obligations under the relevant contract. All damages caused by such breach must be compensated, including all direct damages and loss of profit but excluding indirect or consequential damages. Portuguese law expressly forbids prior general waivers of the right to compensation, although specific waivers after the occurrence of the fact giving rise to the right to compensation are permitted. It is possible, however, for the parties to agree an amount of liquidated damages for breach of obligations, provided that it represents a reasonable estimate of the damages that may result from such breach. Caps on liability are also generally admitted.

Portuguese project concessionaires usually have unlimited liability under the respective contracts. In recent years, the subcontracts executed by concessionaires with construction and operation and maintenance contractors set out liability caps in line with the commercial practices in other countries.

In contracts where a liability cap is foreseen, the same is often equivalent to the contract price and, since no restrictions are made to the type of damages that are considered for compensation purposes, the relevant legal provisions will apply. In recent projects, contractors have successfully demanded the introduction of tighter liability caps and the exclusion of loss of profit suffered by the project company.

iv Adjustment and revision

The risks that remain with the contracting authority are usually covered by the above-mentioned financial rebalance mechanism. If a financial balance event² arises, causing a deterioration in the levels of the project ratios, the contracting authority agrees to compensate the project company with a view to restoring the financial balance of the concession.

In general, any amendments to the PPP concession contracts should be subject to the procedures set out in Decree Law 111/2012 of 23 May 2012 (as amended by Decree Law 170/2019, of 4 December 2019). These procedures include the creation of a negotiation committee to prepare and execute the negotiations with the private partner to reach a new agreement, which will be subject to a final report and approval process by the Council of

2 i.e., an event that typically triggers a unilateral (but permitted) variation of the terms of the contract by the awarding entity or public party, a third party action or event (e.g., certain force majeure events), the risk of occurrence of which is allocated to the public party under the contract or the law.

Ministers or by the regional government members responsible for Finance and sectorial authority. Other adjustment mechanisms not focused particularly on the payments are also set out, as is the geographic area the clinical services should encompass under hospital PPP projects. In fact, subject to certain constraints, the public health authority can modify the reference area for each type of medical treatment merely by a decision to be notified to the private partner.

v Ownership of underlying assets

Other than assets in the public domain (e.g., the hydric domain, mineral resources, roads, railways) which may not be appropriated by private entities, the ownership of land or other assets may be acquired by the private partner.

However, the exercise of a specific economic activity by use or operation of such assets may require a licence and, in the case of an asset of public domain, the attribution of a right of use (of the relevant asset, normally through a concession regime).

It is usual to set out that the private partner should deliver any assets at the term of the contract, even though such assets are owned by the private partner, provided that the same are required to perform the relevant activity under the agreement. The new Public Procurement Code further provides for new rules on the transfer of movable assets by public entities, pursuant to which the transfer may be temporary or permanent, including, for instance, the lease of the relevant assets to the private partner.

vi Early termination

Concession agreements may be terminated by either party owing to the infringement of the other party's obligations. Also, concession agreements usually foresee the possibility of redemption or early termination on grounds of public interest.

Some concession contracts set out the method for calculating the damages incurred by the project company in such situations, which usually takes into account the status of construction and in some circumstances the financing agreements entered into between the private partner for the purposes of implementing the project.

Termination due to one party's failure to comply with its obligations usually does not entitle the non-compliant party to any compensation rights. However, in some PPP projects – as is the case of the hospital PPP projects – compensation may be due in such situations taking into consideration the significant investments made by the private partner that should revert to the public partner.

VI FINANCE

Most of the PPP projects in Portugal have been financed pursuant to the project finance structure. The use of project bonds or monoline structures to finance projects was not common until recently, but these instruments have now started to be considered as an alternative or complementary financing tool to traditional project finance (particularly in a brownfield context).

The finance package usually comprises a commercial bank credit agreement (as well as a European Investment Bank (EIB) credit agreement and an intercreditor agreement whenever the EIB is also providing finance to the project), an accounts agreement, a forecasting

agreement, security documents and direct agreements between the lenders and the contracting authority or the major project parties, all in a form consistent with international market standards.

The two main types of security that can be created under Portuguese law are mortgages and pledges. Mortgages will entitle the beneficiary, in the event of a default, to be paid with preference to non-secured creditors from the proceeds of the sale of immovable assets or rights relating thereto or of movable assets subject to registration (such as automobiles, ships or planes). Pledges will confer similar rights to those created by the mortgages, but are created in respect of movable (non-registered) assets or credits. Portuguese law does not recognise the concept of a floating charge. Also, it does not permit the creation of security over future assets and, therefore, promissory agreements and assignments in security are entered into to overcome this hurdle. However, since Portuguese law does not recognise the concept of assignment by way of security as existing in most (if not all) common law jurisdictions, the instrument used is a true assignment of rights, with the occurrence of an event of default being either a condition precedent to the assignment or a termination event, depending on the bargaining power of the borrower and sponsors (as applicable). It also should be noted that Portuguese law does not foresee the concept of a security trustee, therefore, there is some uncertainty as to whether a Portuguese court would immediately recognise the authority of a security agent to enforce security interests on behalf of the secured creditors (the collateral takers), on terms similar to those accepted in a common law context.

Also, Portuguese law does not allow for remedies other than outright sale, other than in the case of financial pledges where appropriation of financial collateral is permitted on enforcement of the pledge, provided that the parties have agreed a commercially reasonable mechanism for evaluating the price. Financial pledges may be granted over cash on bank accounts or financial instruments (including shares but not quotas in Portuguese limited liability companies) and, more recently, credits over third parties.

Portuguese project finance documentation generally includes direct agreements between the lenders and the contracting authority and the lenders and any major contractors. All direct agreements contemplate step-in rights in favour of lenders, which may be exercised upon the occurrence of certain events: default of the concessionaire under the underlying contracts and, in certain cases, default of the concessionaire under the finance documents.

Shareholders are generally required to provide on-demand bank guarantees in order to guarantee their equity subscription and other funding obligations. Standby equity commitments to fund general investment, operational costs overruns or loss of revenues are often also supported by on-demand bank guarantees.

In health-sector PPPs, the shareholders have been requested to provide a corporate guarantee that, in the proportion of their shareholding in each project company (the ClinicCo and the InfraCo) and up to a certain amount, any lack of funds in the project and breach of the obligations of the project company.

VII RECENT DECISIONS

No significant dispute under the existing PPP procurement procedures has been registered recently. However, some relevant disputes arose from the performance of those contracts. The main reasons evoked by the concessionaires included the variations imposed by the contracting authorities that were not settled by negotiation under the financial rebalance mechanism. In the first quarter of 2019, the total amount for the restoration of financial

rebalances requested by the concessionaires to the state amounted to approximately €565 million. According to the Stability Programme 2019–2023, presented by the Minister of Finance, the most relevant request of financial rebalance is in respect to one of the road PPPs.

VIII OUTLOOK

The Portuguese economy is still recovering, after the conclusion of the three-year EU–IMF adjustment programme in May 2014. There is, however, some uncertainty associated with political pressure – from left-wing parties supporting the government – to avoid PPP schemes, at least in areas of greater social sensitivity, such as health and public transport. Public investment in several infrastructure projects – mainly in the freight rail and port sectors, as stated in the Strategic Plan for Transport and Infrastructure 2014–2020 – is still expected. Whether under a PPP model, these investments should have a significant positive impact on the Portuguese economy and create many business opportunities for all stakeholders in the relevant sectors. Other opportunities may arise from the recent focus of the Portuguese government in developing the Green Economy and Green Growth in Portugal, in relevant areas such as climate and energy, water and waste management, biodiversity and sustainable cities.

The international public tender launched at the end of 2017 for the construction of the Hospital Lisboa-Oriental Complex, which is intended to replace six hospitals of Lisbon, is expected to reach its negotiation phase soon, with the beginning of the construction works expected in 2020. This project includes the design, construction, financing, operation and maintenance of the hospital, and it is probably the most important project under a PPP model launched in recent years.

Public investment in several infrastructure projects is still expected. On the other hand, according to the State Budget Law for 2020, which is still under discussion, public expenditure on PPP projects will still be considerable (around €1.5 billion), especially in the road, health, railway and security sectors, but it is expected to be slightly reduced compared to 2019.

In addition, the recent changes to the PPP legal framework reveal a clear intention to introduce greater flexibility to the launching and awarding of new PPPs, which may enhance new future projects under a PPP model in the coming years.

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