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#### Implementation of the Programme of Work

(b) Working Party on Public-Private Partnerships

### Standard on People-first Private-Public Partnerships/Concession Model law

#### Note by the Bureau of the Working Party on Public-Private Partnerships\*

#### *Background*

This document contains the standard on People-first PPP/Concession Model Law (hereinafter, the “Model Law” or “law”) developed in phases with the substantive contribution of international experts.<sup>1</sup>

Phase I of the Model Law was developed between September 2017 and May 2020 by an

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\* The present document was submitted after the deadline because of the need to take into account consultations with the member States.

<sup>1</sup> Below is a disclaimer endorsed by the Working Party on PPPs on 30 November 2021 (ECE/CECI/WP/PPP/2021/5/Rev.1, Annex III) to be used in the publication of documents covered by the Working Party’s intellectual property rights (IRP) policy:

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international Project Team<sup>2</sup> in cooperation with the European Bank for Reconstruction and Development (EBRD), and was concluded in November 2020 by the Bureau of the Working Party welcoming the draft as a good basis for going forward.

In November 2020, the Bureau requested the International Specialist Centre of Excellence on PPP Policies, Laws and Institutions to strengthen the following elements in the Phase I document:

(a) A balanced approach to “user-pay” and “government-pay” models;

(b) Further inclusion of the People-first PPP approaches and outcomes; and

(c) Alignment of the definition of People-first PPPs with the UNECE Guiding Principles on People-first PPPs for the Sustainable Development Goals (SDGs).

Phase II of the Model Law was developed between December 2020 and July 2021 by an international group of experts<sup>3</sup> and was concluded in September 2021.

On 17 November 2021, a consolidated version of the Model Law was prepared and submitted by the Bureau to the Working Party, with the latter taking note of the document and requesting its Bureau to:<sup>4</sup>

(a) Engage in a consultation process of at least two months in December 2021 and January 2022 with all interested parties;

(b) Monitor the finalisation of the document before 31 March 2022 in line with the Intersessional Implementation Plan for 2021-2022 of the Committee on Innovation, Competitiveness and PPPs (CICPPP); and

(c) Submit the consolidated version in April 2022 to the CICPPP for approval at its next session in May 2022.

A two-month consultation process was launched in December 2021 and the comments received from various stakeholders were incorporated in this document by the Bureau members from Belgium (Mr. Steven Van Garsse), France (Mr. Frederic Bobay) and the United States of America (Mr. Arthur Smith). The Bureau of the Working Party approved the Model Law on 5 April 2022 and recommended its adoption by the CICPPP.

The document is submitted by the Bureau of the Working Party to the CICPPP for decision.

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<sup>2</sup> The Project Team was led by Mr. Christopher Clement-Davies. See Annex I for details of the Project Team.

<sup>3</sup> The group of experts was led by Mr. Marc Friet. See Annex II for details of the group of experts.

<sup>4</sup> See Decision 2021 – 3.2 in document ECE/CECI/WP/PPP/2021/2.

## Preamble

The purpose of this law is to establish the legal framework for “People-first” Public-Private Partnerships (PPPs) and the contracts that give effect to them in [*host country*], including the rules and procedures governing their selection, preparation, appraisal, procurement and implementation, the contractual principles and institutional arrangements applicable to them, and assist in the orderly and coordinated delivery of PPPs. This law applies to PPPs, with particular emphasis on those with a “People-first” basis, but not to other types of commercial or contractual interface between public and private sectors.

When properly structured and implemented, PPPs can fulfil a range of valuable purposes and objectives for the benefit of society and the common good. They can advance the efficient and cost-effective development, provision and operation of public infrastructure and public services, by harnessing the skills, resources, know-how and/or finance of the private sector most effectively and sustainably on a long-term basis, and structuring projects in ways that allocate the risks and responsibilities involved most appropriately over their life. This can strengthen the efficacy of project delivery (whether of design, construction, rehabilitation, operation and/or maintenance), stimulate new funding and investment opportunities, help bridge the public infrastructure and service gap, raise the quality of public services, improve the public’s access to those services, and so help to achieve wider economic, environmental and social goals. It can enable projects to go ahead when they otherwise might not, advancing job creation and skills transfer. Ultimately, this can help to foster economic growth and social development in ways that promote the United Nations Sustainable Development Goals (SDGs), leading to a better and more sustainable future for all.

This law enshrines and gives effect to the Guiding Principles on People-first PPPs in support of the SDGs, published by the UNECE in 2019<sup>5</sup> (the “People-first PPP Principles”) and other documents endorsed by the Working Party on PPPs. The law is furthermore intended to be in accord with the UNCITRAL Legislative Guide on PPPs and related Model Legislative Provisions. The People-first PPP Principles represent a new model for PPPs, designed to achieve a range of sustainable development outcomes which are critical to the SDGs and which build on the PPP attributes described above, including the following:

- i. Increased access to essential services and decreased social inequality and injustice;
- ii. Improved economic effectiveness and fiscal sustainability;
- iii. Enhanced resilience and responsibility towards environmental sustainability;
- iv. Replicability and the development of further projects; and
- v. Full involvement of all stakeholders in the projects.

PPPs structured and implemented in accordance with the provisions of this law can therefore be expected to promote those outcomes. They should thus represent enhanced “value for money” in the true sense of “value for people”, in terms of their long-term, net value for consumers, government and the wider public, considered over their life cycle in the light of all their significant impacts, for the greater good of all.

## Chapter I. General Provisions

*The Model PPP Law has drawn heavily on both the existing published UNCITRAL materials and their recent revisions as well as the UNECE Guiding Principles on People-first PPP in support of the SDGs, the UNECE Standard on a Zero Tolerance Approach to*

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<sup>5</sup> “Guiding Principles on People-first Public-Private Partnerships in support of the United Nations Sustainable Development Goals” (ECE/CECI/2019/5).

*Corruption in PPP Procurement and the UNECE People-first PPP Evaluation Methodology for the SDGs.*

## Article 1. Scope of the Law

1. **General.** This law establishes the legal framework for PPPs in [host country] and the contracts that give effect to them, the rules and procedures related to their selection, preparation, appraisal, procurement and implementation, and the institutional arrangements applicable to them, all in accordance with the principles of transparency, fairness, stability, proper management, integrity, completion, economy, and long-term sustainability, and the People-first Principles.

2. **All PPPs.** This law applies to all forms of PPP, as defined in this law. It applies to all PPP projects implemented in [host country] after the date this law comes into force, whether carried out at national, federal, sub-national, regional or municipal level (except only in so far as the PPP regulations specifically provide otherwise).

## Article 2. Key Terms and Definitions

In this law, the following terms and expressions shall have the meanings ascribed to them below:

- (i) **“Applicable law”** means the laws of [host country] in force and effect at the relevant time, including all national, regional, and local laws and regulations, and including the country’s international obligations and commitments, and any judgments, decrees, orders or injunctions of any court or tribunal having the force of law.
- (ii) **“Bidder”** means any legal entity or person (or consortium thereof) participating in a tender in accordance with its terms and organised pursuant to this law.
- (iii) **“Economic and financial viability”** means the maintenance of the contractual equilibrium of the commercial and financial terms as reflected in the contract.
- (iv) **“Closed Tender”** means and refers to a tender or selection process where the contracting authority pre-qualifies and/or selects the tenderer(s) permitted to participate by notice and without advertising the tender openly;
- (v) **“Competent body”** means the government, a line ministry, or any public authority either having the legal power and authority under Applicable law or specifically authorised by the government under this law or the PPP regulations to perform certain functions in the field of PPPs.
- (vi) **“Contracting authority”** means any competent body having the requisite legal capacity to enter into a PPP contract pursuant to this law.
- (vii) **“Direct agreement”** means an agreement between the contracting authority and the lenders, typically together with the private partner, setting out the terms on which (amongst other things) the lenders may be entitled to exercise step-in rights, prevent a threatened termination of the PPP contract, receive payments upon its early termination and/or exercise certain other specified rights.
- (viii) **“Feasibility study”** means the report drawn up for the purposes of [preparing and] authorizing a PPP project and which will be complemented with a final assessment before project award
- (ix) **“Government”** means the government of [enacting state] and includes (where the context so requires) any public authority or competent body performing any function or exercising any power under this law.
- (x) **“Identification report”** means the preliminary report that a government develops to assist in assessing whether a potential PPP should be further assessed through a feasibility study.

- (xi.) “**Implementing regulations**” means the government regulations applicable to the planning, preparation, selection, appraisal, procurement and all implementation of PPP (and other related matters) made pursuant to Article 3 from time to time and having binding legal effect.
- (xii.) “**Implementation resolution**” means a resolution referred to in Article 13 confirming a formal decision by a contracting authority to implement a PPP project.
- (xiii.) “**Interministerial Committee**” means the competent body made up of such authorities and/or departments at the national, state, and/or local level as appropriate for overseeing and approving key decisions and documents relating to the initiation, preparation, development, procurement and/or award of PPPs.
- (xiv.) “**Lender**” means any bank, financial institution or other form of lender that provides (or intends to provide) financing to the private partner in connection with a PPP contract, including any related commitments such as guarantees.
- (xv.) “**Official channels**” means the official journal(s) or vehicle(s) of communication used by the government (or any competent body) to publish certain information which it wishes to draw formally to the public’s attention, including in connection with tender proceedings it is organising (such as an official gazette or the official government website).
- (xvi.) “**Open public tender**” means and refers to a tender or selection process where the contracting authority issues one or more public advertisement(s) to which in principle any legal entity or person meeting the specified criteria can respond.
- (xvii.) “**Partnering**” means a procedure for structured and regular exchanges between the Contracting Authority and the private partner aimed at monitoring in a consensual manner the implementation of the PPP project over its life;
- (xviii.) “**People-first Public-private partnership**” means the type of PPP stated in the UNECE Guiding Principles on People-first PPPs in support of the SDGs:  
*“(…) Public-Private Partnerships (PPPs) designed to implement the Sustainable Development Goals and thereby to be “fit for purpose”. It is defined as an enhanced approach for PPPs that overcomes some of the weaknesses in the way the traditional PPP model has been implemented. PPPs are contract delivery tools for public infrastructure provision involving initial private financing. They include two types: “government-pay PPPs” which are primarily funded by taxpayers and “concessions” which are primarily funded by the users of the infrastructure.”*
- (xix.) “**PPP contract**” means a mutually binding contract concluded between the contracting authority and private partner that set(s) forth the terms and conditions for implementing a PPP project, in accordance with the requirements and procedures provided by this law and its Implementing Regulations.
- (xx.) “**PPP guidelines**” means any PPP-related explanatory, guidance, or advisory materials (or similar documents) including templates, model bidding documents and contracts issued and published by the Government from time to time, which may or may not have binding legal effect.
- (xxi.) “**Private initiator**” means any legal entity or person (or consortium thereof) that submits an unsolicited proposal to implement a PPP project in accordance with Article 14.
- (xxii.) “**Private partner**” means any legal entity or person [(including where applicable a public entity acting as a commercial entity)] retained by the contracting authority to implement a PPP project under a PPP contract.
- (xxiii.) “**Public authority**” means any local, national, or supra-national agency, authority, council, ministry, municipality, department, inspectorate, committee, court, official, or public or statutory person or any other executive, legislative or administrative entity of the government or under its control (or, where the context so permits, any combination of them), including a regulatory agency.

- (xxiv.) **“Public infrastructure”** means any (tangible and/or intangible) asset(s) of public interest or benefit designed and operated for the purpose of delivering (directly or indirectly) public services, including physical facilities and systems.
- (xxv.) **“Public-Private Partnership” or “PPP”** means a long term agreement between a contracting authority and a private entity for the implementation of a project, against payments by the contracting authority or the users of the [facility], including both those projects that entail a transfer of the demand risk to the private partner (“concession PPPs”) and those other types of PPPs that do not entail such risk transfer (“government-pay PPPs”) meeting the criteria and requirements set out in Article 4.3.
- (xxvi.) **“Public service”** means an activity performed to or for the benefit of the general public or the public good or otherwise in the public interest which is customarily provided by and/or on behalf of public authorities and/or for which a public authority is primarily responsible.
- (xxvii.) **“Public-Private Partnership unit” or “PPP Unit”** means the dedicated advisory and administrative body in the area of PPPs established pursuant to Article 9, having the functions and responsibilities related to the implementation of PPPs referred to therein.
- (xxviii.) **“Regulatory agency”** means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the public infrastructure or the provision of public services to which the PPP project relates.
- (xxix.) **“Stakeholder”** in relation to a PPP project, means and includes any persons who is or is likely to be involved with or materially affected or impacted by the implementation of the PPP project, whether directly or indirectly, positively or negatively, including the contracting authority, other relevant Public Authorities or Competent Bodies, the private partner, its owners, investors and lenders, contractors and/or suppliers, end-users of the relevant public infrastructure and/or beneficiaries of the relevant public services, the owners of property or assets affected by it, other providers of relevant services, and/or households and the wider community (including indigenous peoples) living in or near its place of implementation.
- (xxx.) **“Sustainable Development Goals” or “SDGs”** means those goals and objectives for sustainable economic, social, and environmental development for the general good adopted and published by the United Nations in the General Assembly resolution 70/1 “transforming our world: the 2030 agenda for sustainable development” (A/RES/70/1), United Nations, 2015, and in the context of this law specifically refers to those goals and objectives related to PPPs (including the People-first PPP Principles) set out therein. In particular, PPPs should increase access to essential public services while lessening social inequality and injustice, be economically effective and bring transformational economic impact, deliver resilient and sustainable infrastructure, be replicable and scalable to allow the development of further projects, and bring all stakeholders together in partnership and consult those affected.
- (xxxi.) **“Tender committee”** means the committee to be set up by the contracting authority [and the PPP Unit] for the purpose of evaluating the bid and proposing the award of the contract to the successful bidder in accordance with Article 19.
- (xxxii.) **“Unsolicited proposal”** means a proposal for a PPP project submitted by the private initiator upon its own initiative to the contracting authority (and/or other relevant competent body) and not in response to a request or solicitation issued by the contracting authority in the context of a selection procedure under this law.
- (xxxiii.) **“Value for Money”** and **“Value for People”**, when used in this law, mean and refer to the overall, long-term, net value of a PPP project to consumers, government, the host country and the broader public, taking into account the long-term quantity and quality of services delivered and whole-life costs and benefits to the economy, including fiscal, environmental and social costs and benefits, in line

with the People-first PPP Principles. It may be precisely measured in accordance with any detailed methodology (if any) set out in the PPP regulations. The underlying concept is that the more fully a PPP project gives effect to the People-first PPP Principles, the higher the value for people; the higher the value for people, the higher the value for money.

### Article 3. PPP Implementing Regulations and Guidelines

1. **Issue.** The Government shall issue the implementing regulations required by this law and may also issue and publish any PPP guidelines it considers appropriate for the development of sustainable PPP projects. The Government may designate one or more Competent Bodies to issue the same on its behalf.
2. **Purpose.** The purpose of the implementing regulations is to develop, adapt, and give effect to certain aspects of the operation and implementation of this law. Implementing regulations shall not contradict or supersede the provisions of this law, and in the case of any discrepancy or ambiguity between them, the provisions of this law shall prevail. The purpose of the PPP guidelines shall be to provide additional guidance and clarification to both public and private sectors as to the interpretation and workings of this law as well as to certain aspects of PPPs and their implementation but shall usually be without legally binding effect.
3. **Revisions and Publicity.** The PPP regulations and guidelines may be revised as necessary by the Government (or any such competent body) from time to time and shall be published through the official channels.
4. **Interpretation.** The provisions of this law should be construed in conjunction with any relevant PPP regulations relating to them (if any) where the context so requires.

### Article 4. PPP Criteria and Fundamental Requirements.

1. **PPP Requirements and Objectives.** Any PPP project undertaken in [*host country*] shall comply with all applicable requirements of this law, including the relevant procedural requirements for the selection, preparation, appraisal, procurement, and implementation of PPPs. It shall also be designed and structured to accomplish the relevant public interest purposes and objectives referred to in the Preamble to this law, and in particular to be compatible with and give effect to the relevant People-first PPP Principles characterised by five specific outcomes: access and equity; economic effectiveness and fiscal sustainability; environmental sustainability and resilience; replicability; and stakeholder engagement.
2. **PPP Main Characteristics.** Reference to PPP in the Model Law apply to both concession and government-pay PPP and where concession is specifically mentioned it does not apply to government-pay PPP. The private partner's compensation is provided either by the contracting authority (in the case of government-pay PPPs) or by the end users (in the case of Concessions) or possibly through a combination of the two. The term of the project is established in such a way that the private partner may amortize applicable costs and make a reasonable profit. PPP projects may involve the creation of tangible or intangible assets that support the delivery of a Public Service.
3. **PPP Criteria.** Any PPP undertaken shall meet the following criteria and/or have the following features (as the same may be further elucidated or explained in the PPP regulations and/or PPP guidelines). It shall:
  - (a) Be long-term in nature (in accordance with Article 8) and implemented on the basis of a contract or contracts.
  - (b) [Have a minimum initial estimated value (if any) established and calculated in accordance with the relevant criteria and methodology set out in the PPP regulations (but subject always to paragraph 3 below)].

(c) Involve the design, development, construction, reconstruction/rehabilitation, operation and/or maintenance of public infrastructure and/or relate to the provision of public services or similar services of general interest.

(d) Involve the long-term participation of a private partner on a risk-bearing basis, and a sharing or allocation of project-related risks as between the public and private partners throughout its term.

(e) Involve an element of private finance, unless deemed unnecessary.

(f) Be implemented in accordance with the terms of the contract relating to it, which shall include appropriate functional specifications and performance indicators.

## **Article 5. Authority to award and enter into PPPs**

1. **General.** Any public authority having the legal right to develop, procure and implement projects involving assets and/or services of the kind comprised in PPPs, in sectors in which PPPs are permitted under Article 6 below, and to enter into contracts with private sector persons in connection therewith, shall be deemed to have the power and authority under this law to award and enter into PPPs, except to the extent that this law, any other Applicable law or the PPP regulations specifically provide otherwise.

2. **Authorisation Mechanism.** The Government shall be entitled, within the scope of its existing competence and powers, to vest the specific power and authority under this law to award and enter into PPPs in certain designated public authorities or competent bodies, and to modify or cancel the same, as it deems necessary and appropriate from time to time.

## **Article 6. Applicable Sectors and Activities for PPPs**

1. **Permitted Sectors and Activities.** PPPs may be undertaken in all sectors engaged in Public Service activity.

2. **Prohibited Sectors and Activities.** PPPs may not be undertaken in the following sectors or areas of activity (except where and to the extent that PPP regulations may provide otherwise):

- *[list any that might be excluded]*

## **Article 7. Parties to a PPP Contract**

1. **Main Parties.** The parties to a PPP contract are the contracting authority and the private partner.

2. **Acknowledgments.** It is acknowledged that, as parties to the PPP contract, the contracting authority may represent or include more than one public authority and that the private partner may have more than one owner or stakeholder.

3. **Additional Parties.** The parties to a PPP contract may agree to include other parties to the contract where they deem it necessary to do so subject to any relevant conditions of this law and Implementing Regulations.

## **Article 8. PPP Term**

1. **[Minimum Term.** Every PPP contract shall have a minimum term of [ ] years (or such other minimum term (if any) as may be determined in accordance with the PPP regulations)].

2. **Duration.** The PPP contract shall set forth its duration, which shall take into account the purposes and objectives of the PPP project identified as part of its appraisal and approval process. It will also take into consideration the project business case, including the depreciation period for any permanent physical assets built or rehabilitated by the private



partner in the PPP project, and any relevant policies concerning the competition and market structures for the infrastructure or service sector concerned, as reflected in any Applicable laws.

3. **Extension of Term.** In exceptional circumstances specified in the PPP contract (or permitted by Applicable law), the duration of the PPP contract may be extended in accordance with its terms for any necessary time period(s), if any, provided for therein, but subject always to any relevant conditions or restrictions in the PPP regulations. [The duration of the PPP contract may also be extended in exceptional circumstances, when such circumstances lead to a substantial impact on the economic/financial terms of the Contract. The implementing regulations may specify an appropriate methodology and principles for determining any such extension.]

4. **Asset Ownership Unaffected.** Where the private partner is permitted by the terms of the PPP contract to own any assets comprised within the PPP project outright and indefinitely, that right of ownership may continue beyond the end of the term of the PPP contract.

## Chapter II. Institutional Arrangements and Roles

*People-first PPPs are an innovative delivery form of global and inclusive contract for long-term participation of the private sector in the delivery of an infrastructure Public Service intended to meet public interest for a long-term period for the project duration. Many underlying conditions deriving from traditional procurement for construction of a public infrastructure or Public Service delivery by the private sector and related contract conditions are applicable to them.*

*In addition, several specific features and conditions aiming at organizing a long-term balance between the stakeholders' interests to be part of durable People-first PPP contracts (including social and economic objectives of the government as developed in This Law) must govern the planning and development of People-first PPP projects.*

*Due to the decisive role that People-first PPPs may play in bridging the public infrastructure service gap and helping to achieve the SDGs, the institutions that will be established to perform PPP planning and development should be carefully authorized and administered. The goal is to create an institutional system that will allocate the most appropriate form for PPP delivery of public infrastructure projects in an orderly and coordinated manner such that the Government's and Contracting Authority's objectives are met. For example, this includes that a process should be established for projects to be in alignment with national or sectoral infrastructure plans as well as with fiscal sustainability goals through quantitative fiscal assessments of the off-balance sheet sovereign debt and contingent liabilities resulting from private financing.*

*To this end, governments should include provisions in the law dealing with the respective powers, roles and responsibilities of different ministries and government bodies (including where appropriate parliamentary bodies) relating to the selection, preparation, approval, procurement and implementation of PPPs. These provisions may need to provide for the interface between them and any relevant procedures and processes involved. The purpose of such provisions, where they are necessary, is to provide administrative clarity and to help ensure that PPPs (and any government programmes for them) are properly integrated with the wider public investment process and other relevant decision-making or regulatory mechanisms and plans. In particular, they should be fully integrated with the country's wider strategic vision for infrastructure development, its long-term planning and prioritization processes and associated budgeting arrangements. These should include the country's long-term sustainable development and SDG plans (such as nationally determined contributions for carbon emissions under the Paris Climate-Change Agreement). Fiscal sustainability is always a critical aspect of these projects, and specific administrative or budgeting provisions may need to be included to provide for it.*

*Some countries choose to give a single public authority (such as a Commission or Cabinet of Ministers) overall responsibility for managing and running the entire PPP system. This*

may then become the “supreme authority” for all its purposes. This can offer certain advantages in terms of coherence, coordination and “single-point responsibility”, which can facilitate decision-making processes and avoid conflicts or competition between different ministries or projects in the PPP area. Whether it is politically or constitutionally workable is another question. Line ministries may not be happy with the new tier of authority over their powers that it can represent.

The processes involved should be transparent and participatory. Accountability for decision-making at different stages and levels should always be clear, tied as appropriate to the challenge/redress of grievance mechanisms. Budgeting mechanisms and procedures, both long and short-term, need careful thought in this context; public sector undertakings and liabilities, including contingent liabilities, need to be properly accounted for and budgeted. A contingency fund may have to be put in place. This all tends to call for particular focus on the role of the Ministry of Finance (or other budget authority, such as a supreme audit institution) to safeguard public finances and the application of fiscal rules. The role of sector regulatory bodies may also need to be allowed for.

To this end, a People-first PPP institutional framework is created under Article 9 to organize in an orderly and coordinated manner the implementation of the four main People-first PPP phases:

- 1) An identification phase leading to the selection and establishment of People-first PPP projects to be prepared by the relevant Contracting Authority.
- 2) A preparation and preliminary evaluation phase enabling the Contracting Authority to identify the economic, fiscal, environmental, financial, legal, and social justifications for developing the project under a People-first PPP delivery form.
- 3) A procurement and contracting phase including the signature and approval of the People-first PPP contract.
- 4) An implementation and operation phase including partnership provisions aimed at monitoring and implementing smoothly the People-first PPP contract.

## **Article 9. Public-Private Partnership Unit and Administrative Coordination**

1. **Interministerial Committee.** The Government shall establish an Interministerial Committee (or equivalent body) and determine its organisational and management structure and its operational regulations.<sup>6</sup>

2. **Interministerial Committee Structure.** The Interministerial Committee shall be comprised of [*the host country specifies the relevant ministries or authorities*]. The chair of the Interministerial Committee shall be [*state position*], who shall be responsible for organising and coordinating the activities and operations. The Interministerial Committee may utilize appropriate support staff with a view to enabling it to perform its functions and responsibilities effectively and efficiently. A record of its composition and staffing shall be kept up to date at all times and publicly available.

3. **Interministerial Committee Functions and Responsibilities.** The Interministerial Committee’s functions and responsibilities [*shall/may*], subject to the PPP regulations, include the following:

- (a) [Approval of the PPP project at its main stages];

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<sup>6</sup> Governments should fully comply with all integrity and transparency requirements. To achieve a high level of integrity and transparency, the activities of project preparation, procurement, and regulation of PPPs should be carried out independently. For this purpose, the UNECE has adopted and made available the UNECE standard “A Zero Tolerance Approach to Corruption in PPP Procurement”.

(b) Establish the government's overall policy on PPP, guided by the Government's wider infrastructure development strategy, SDG compliance priorities and socio-economic growth plans.

(c) Coordinate and promote PPP activity across the relevant Ministries.

(d) Facilitate integrated PPP activity in accordance with applicable national, regional, sectoral, and other infrastructure and service plans.

(e) Oversee and give effect to the Government's PPP policies.

(f) Review and approve proposed policy and strategy changes and refinements relating to PPPs as required by the Government.

(g) Facilitate the coordination of aspects of PPPs as may be provided for in this law or the PPP regulations, such as to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits, or authorisations required for the implementation of PPPs in accordance with relevant statutory or regulatory provisions under applicable; and

(h) Assist with the constructive resolution of problems and issues during the implementation of PPPs.

4. **Creation of PPP Unit.** The Government shall establish the PPP Unit and determine its organisational and management structure and its operational regulations.

5. **PPP Unit Structure.** The PPP Unit shall report functionally to the [Interministerial Committee]. The director of the PPP Unit shall be [*state position*], who shall be responsible for organising and coordinating its activities and day-to-day operations. The PPP Unit shall be appropriately staffed based on a range of skills, expertise, and experience (including a grasp of the People-first Principles), with a view to enabling it to perform its functions and responsibilities effectively and efficiently. Appropriate skills, expertise and experience may include but shall not be limited to competency in PPPs, public infrastructure and service procurement, engineering, economic and financial modelling, public accounting, and budgeting, social and/or environment impact, and public administration. Staff members may be drawn from both the public and private sectors. A record of its composition and staffing shall be kept up to date at all times and publicly available.

6. **PPP Unit Functions and Responsibilities.** The PPP Unit's functions and responsibilities shall include the following:

(a) [Propose methodologies, procedures and guidelines for structuring and implementing PPPs, including the dissemination of international best practice and methodologies and tools facilitating the initiation and the development of sustainable PPPs.]

(b) [Generally, facilitate the preparation, appraisal, award, and implementation of PPPs in accordance with the requirements of this law and People-first Principles and methodologies.]

(c) [Assist in implementing and giving effect to the Government's PPP policies].

(d) [Review and comment on proposed policy and strategy changes and refinements relating to PPPs as required by Government.]

(e) [Prepare (or assist in preparing) official documentation describing the methodologies, procedures and guidelines referred to above, including for the purposes of their publication, and assist with regularly up-dating them.]

(f) [Prepare standard bidding and contract documents for use by contracting authorities.]

(g) [Identify potential improvements and refinements to the structuring and implementation of PPPs, including those related to the People-first Principles and/or the most common issues preventing the development of PPP projects, and make recommendations accordingly.]

(h) [Exercise such powers of appraisal and approval (and/or coordination of approvals), if any, over aspects of PPPs as may be provided for in this law or the PPP regulations.]

(i) [Review and confirm the proper completion of the feasibility study (and other key reports and studies) for individual PPPs and the conformity of preparation work with the law's requirements and procedures, as provided for in this law or the PPP regulations.]

(j) [Assist contracting authorities with the coordination and development of individual PPP projects and PPP-related activities.]

(k) [Maintain an up-to-date registry of all PPP projects, containing relevant details of their registration and that of the related PPP contracts.]

(l) [Act as a point of contact and source of information for parties implementing or seeking to implement PPPs (whether public or private); provide guidance, advice, consultations and/or clarifications to them as necessary.]

(m) [Assist with the quantitative and qualitative assessment of projects, including the potential impact of PPP projects (including any contingent liabilities) on public obligations and/or public debt.]

(n) [Organize and provide training for public sector staff involved in PPPs (including educational sessions and workshops).]

(o) [Keep track of the monitoring and oversight by contracting authorities of the implementation of PPPs for which they are responsible.]

(p) [Advise the Government on administrative procedures related to PPPs.]

(q) [Organise, collate, and continually refine and develop a knowledgebase (including an electronic database) of PPP-related know-how, information, guidelines, assessments, research, studies, precedents, model clauses, opinions, methodologies, and other documentation to aid the regular progress of PPPs and the PPP sector in [*host country*].]

(r) [Ensure that elements of the documentation referred to in this Article are publicly available and/or published as required or appropriate.]

(s) [Assist with the constructive resolution of problems and issues during the implementation of PPPs ("trouble-shooting").]

(t) [Assist generally with the promotion of PPPs in [*host country*] and public education on the subject.]

(u) [Such other functions (if any) as may be provided for in the PPP regulations.]

7. **No Conflict.** Any such roles and responsibilities should, however, be defined and allocated to the PPP Unit in ways which at all times avoid any potential conflicts of interest between them.

## Article 10. Information about PPPs

1. **Comprehensive PPP System Information.** The PPP Unit shall be responsible for preparing, collating, refining, maintaining and (subject to any confidentiality restrictions) publishing up-to-date information about PPPs in such form as it may deem helpful and informative to all stakeholders, other participants in the PPP industry and the general public, and as may be reasonably required to promote the effective operation of the PPP system in [*host country*] and the clarity and transparency of its workings, or as may otherwise be required by Applicable law. All such information shall be subject to a presumption of transparency and disclosure to the general public.

2. **Matters Included.** Such information may include the contents of PPP policy papers, the PPP regulations, the PPP guidelines and practice notes, appraisal and evaluation criteria and procedures (including fiscal transparency considerations), the progress of PPPs being implemented, results of tenders, material contractual terms (subject to any confidentiality

restrictions), recommended contractual terms and conditions, the “pipeline” of future PPP projects being planned or considered, the conclusions reached in reviews, studies and reports, the strategic, environmental and social impact assessments for PPPs, and any other matters it considers appropriate.

3. **Specific PPP Information.** Each contracting authority shall be responsible for collecting, making available and where necessary publishing, such information concerning any PPPs it is implementing or plans to implement as may be required from time to time by the Government or otherwise pursuant to the PPP regulations or Applicable law, including information necessary to ensure that the stakeholders relevant to any such PPP (including local communities) are able to respond to the plans and proposals for it in a timely manner in accordance with their rights under Applicable law.

4. **Tender Information.** Where tenders for PPPs take place in accordance with this law, such information containing such detail as the PPP regulations may specify concerning the relevant pre-qualification or tender requirements and results, the names and identities of any pre-qualified, short-listed, preferred or winning bidders, and (where applicable) the grounds on which they have been selected, shall be posted on the official web-site of the contracting authority and published as required through the official channels without delay, during or following the relevant stage(s) of the tender.

5. **Maintenance of Information.** The contracting authority shall maintain any PPP-related information published on its official website for such period(s) of time and with such public accessibility as may be required by the PPP regulations.

6. **Private Partner’s Information.** The private partner under any PPP shall be responsible for preparing, collating, providing and where necessary publishing such information relating to such PPP as may be required by relevant regulations or Applicable law or otherwise under the terms of the PPP contract.

## Chapter III. Initiation and Preparation of PPPs

*This phase addresses the initial work of documenting, describing and specifying the project and setting out the main functional characteristics of the infrastructure and/or public service to be delivered. The identification of a project and assessing its feasibility are important components to appraising a project and developing an adequate basis for procurement of the opportunity (including providing sufficient information to the proposers/bidders in order to bid). For these reasons, it is important during project preparation to include an appraisal of the possible project delivery options taking into consideration the full project life cycle and assess the main issues, material elements, and key functionalities of a proposed project. These preparatory steps may include the review and/or approval by a relevant Competent Body, such as the PPP Unit or the Interministerial Committee, based upon one or more reports prepared to support such decision making.*

### Article 11. Initiating, Identifying and Preparing PPPs

1. **General.** All work of defining, preparing, appraising, and approving PPPs (including those based on unsolicited proposals) shall be carried out in accordance with the procedures and methodology referred to in this law and/or specified in the PPP regulations.

2. **Initiation of PPPs.** Any proposed PPP shall be initiated by the Contracting authority, except in the case of unsolicited proposals as provided for under Article 14.

3. **Setting Up a PPP Project Team.** The contracting authority shall set up a project team comprising a range of skills, expertise, and experience (including a grasp of the People-first Principles), with a view to enabling it to perform its functions and responsibilities effectively and efficiently. Appropriate skills, expertise and experience may include but shall not be limited to competency in PPPs, programming public infrastructure

and services, procuring construction and/or service contracts, public administration, and comprehension of this law and its implementing regulations and/or guidelines, including the role of the Interministerial Committee and PPP Unit.

4. **Responsibility for Identification and Detailed Preparation of a PPP Project.** The identification and detailed work of preparing any PPP (including one proposed by a private initiator) shall be carried out or managed by the contracting authority, except where and to the extent (if any) that this law or the PPP regulations provide otherwise.

5. **Meaning and Scope of Identification and Detailed Preparation.** In this law, the expression “identification and preparation” refers to the action of starting the process of defining and assessing a potential PPP and seeking any preliminary approvals and consents needed under this law to progress it further, whilst the expression “detailed preparation of a PPP project” refers to and includes the detailed work of documenting, describing and specifying it, and setting out its principal scope, characteristics and features (including its Key Performance Indicators (KPIs)), in sufficient detail for it to be appraised in accordance with this law, to form an adequate basis for detailed proposals by bidders or a private initiator, and for the procedures hereunder for approving and awarding it to be applied. The detailed aspects of such work (including documentation requirements and applicable appraisal criteria used in accordance with Article 12) and the steps and procedures applicable to them (including review and approval requirements) shall be set out in the PPP regulations and may differentiate between different types or scale of PPP and different project characteristics. For the avoidance of doubt, “preparation” shall not typically involve the work of final and definitive design of a PPP project which accompanies its actual implementation, which is generally carried out by the private partner).

6. **Identification Report.** The contracting authority shall develop an identification report. An identification report shall include but not be limited to:

(a) A summary of the scope of the proposed infrastructure and/or services to be improved or created, including their main functionalities and characteristics, including as applicable an assessment of issues that may arise over the life of the project such as proposed technological solutions becoming obsolete and/or socio-economic conditions evolving such that they would impact the project as contemplated

(b) The project’s relative priority with respect to other public infrastructure and service obligations.

(c) Identification of the range of PPP delivery options with factors which would justify the choice between a PPP delivery or traditional public procurement, including but not limited to anticipated cost, complexity, capacity to deliver, sustainability, and social and economic benefits.

(d) The project’s principal anticipated technical and economic features and needs, including an order of magnitude of costs, revenues (if any), funding and financing requirements, and the market for the project.

(e) The acceptability of the proposed infrastructure and/or services to users, local communities, and other stakeholders, [including the main conditions for public acceptance]; and

(f) Any other relevant preliminary information deemed prudent for identifying and/or summarising the proposed project.

7. **Identification Report Approval.** The Identification Report shall be submitted to the PPP Unit [or other applicable Competent Body such as the Interministerial Committee] for its review [and approval] including an indicative assessment of whether it has been prepared in [general] accordance with the requirements of this law [and other applicable regulations and requirements], whether the proposed project is deemed worthwhile and appropriate to be carried out as a PPP, and whether PPP is the anticipated best option by comparison with other procurement methods.

8. **Preparatory Studies.** Except to the extent the PPP regulations provide otherwise, the detailed preparation of a PPP project shall include a comprehensive set of studies to be used to appraise a project, covering its material elements and aspects, including in particular

those referred to in the relevant appraisal criteria set out in Article 12 and showing how those criteria will be satisfied.

9. **Studies to be included.** The work of preparing a PPP project for appraisal shall:

(a) Further elaborate, develop, and detail applicable items contained in the Identification Report.

(b) Assess its anticipated social, economic, and environmental impact, including a cost benefit analysis, a quantitative assessment of the positive and negative externalities, its “value for people”, and long-term sustainability (including the extent to which it gives effect to the People-first PPP Principles).

(c) Without limiting the sub-para (b) above, assess its capital and operating costs, affordability, and long-term sustainability (including fiscal sustainability, budgetary implications and any public-sector contingent liabilities).

(d) Assess the extent to which it will improve the quality and efficiency of the public services to which it relates.

(e) Identify how the PPP project aligns with the Government’s wider sector objectives, plans and strategies for infrastructure and/or service delivery.

(f) Identify the technical requirements and expected inputs and deliverables, including any options relating to technological solutions and their long-term adaptability and affordability.

(g) If practicable at this stage, identify the anticipated KPIs and the indicative payment terms.

(h) Identify relevant stakeholders, any stakeholder consultations to be carried out, any known stakeholder issues and any stakeholder input or suggestions put forward, with particular emphasis on environmental and social impact and any vulnerable or marginalized persons or groups.

(i) Consider the extent to which the project activities can be performed by a private partner under a contract with the contracting authority.

(j) Assess the project’s legal, regulatory, and institutional basis and its feasibility and viability.

(k) Identify the licences, permits or authorisations that may be required in connection with the approval or implementation of the PPP project.

(l) Identify conditions of land use and related issues concerning expropriation or resettlement as applicable.

(m) Identify and assess the main project risks and describe the proposed risk allocation under the PPP contract, together with any steps or options to address or mitigate them.

(n) Identify any proposed forms of Government support and guarantees needed for the implementation of the PPP project, and their budgetary implications.

(o) Determine whether PPP is the best option for carrying out the project through quantitative and qualitative comparison with other procurement methods.

(p) Determine the capacity of the contracting authority to enforce the PPP contract effectively, including the ability to monitor and regulate project implementation and the performance of the private partner.

(q) Describe the preferred choice of procurement process and tender structure.

(r) Include any other relevant background studies, taking account where appropriate of any other PPP project or public service with which the proposed PPP is closely associated or linked.

(s) In the case of Concessions, particular attention shall be paid to the following (but without limiting their applicability to other types of PPP as well):

- (i.) the potential impact of long-term economic and societal changes, including potential changes to individual behaviour, on the scope and pricing of the Public Service
- (ii.) the possible development of other public services that may compete with the Concession project.
- (iii.) the acceptability of the proposed PPP Public service to end users, including the necessity for project promotion and communications strategies that demonstrate the long-term benefits to end users.
- (iv.) the different categories of users, if any, and their specific needs for service delivery (e.g., vulnerable or economically disadvantaged groups, priority users, the necessity for different prices for the service without infringing on the equality of treatment of users and non-discrimination principles, etc.).
- (v.) [methods for adapting the public service to future needs and affordability considerations, taking account of the possibility of substantial changes to the economic or political landscape over the life of the project and the need to resolve resulting issues and maintain the continuity of the public service.
- (vi.) [mechanisms for optimising the long-term service provision and relationship between the main parties to the PPP, including their organisation and staff.]
- (vii.) [mechanisms for reverting the public service to the contracting authority in order to maintain the public service and if justified by the public interest].
- (viii.) means of maintaining the financial and economic equilibrium e in the event of exceptional circumstances.
- (ix.) Selection of a procurement process that is most likely to realize a project that delivers an essential public service adapted to the needs and affordability constraints of the end users for the life of the project.

10. **Review and Approval.** The compliance of such feasibility study and other studies and reports with the relevant appraisal criteria and approval procedures referred to herein shall be subject to review and approval by the PPP Unit [or other applicable Competent Body].

11. **Preliminary Studies.** The work of preparing a PPP project and assessing its feasibility may include other reports prepared and review procedures applied at earlier stages of preparation than the comprehensive feasibility study referred to in paragraph 9. The appraisal criteria to be applied at any such earlier stage shall be derived from the appraisal criteria set out in Article 12, adjusted as necessary and appropriate to suit the more preliminary nature of the information available at such stage.

12. **Consultations.** The work of preparing a PPP project shall be subject at the relevant stages to all requirements for formal consultation with stakeholders, other relevant authorities and the general public, including public hearings where appropriate, as may be required pursuant to Applicable law or the PPP regulations and/or as envisaged by the People-first PPP Principles. The consultation process shall be structured to enable a genuine dialogue to take place concerning all significant issues of concern to stakeholders, and available remedies to be pursued, and to allow suggestions from third parties for improving the PPP project to be put forward. Key points raised by stakeholders shall be accurately recorded and responded to as appropriate.

13. **Changes during Preparation.** A proposed PPP may be re-designed, changed or revised as often and in as many ways as necessary during its preparation under this Chapter III in order to ensure that it is fully compliant with the requirements of this law, including in particular Article 4, this Article and the appraisal criteria and review and approval procedures set out in Article 12.



## Article 12. Appraisal and Approval Procedures

1. **PPP Compliance.** Any PPP implemented pursuant to this law (including pursuant to an unsolicited proposal) must comply with the requirements of Article 4 and the applicable appraisal criteria and approval procedures laid down for this purpose in this law and the PPP regulations.
2. **Approval.** The PPP Unit [or other applicable Competent Body] shall be responsible for reviewing and approving proposed PPPs (and the preparation work carried out for them) submitted to it by contracting authorities in accordance herewith, [and for advising [the relevant competent body] as to whether a proposed PPP meets the appraisal requirements set forth herein]. In particular, it shall be responsible for:
  - (a) Ascertaining whether a proposed PPP is worthwhile being carried out as a PPP project and is expected to meet the purposes and objectives set out for it.
  - (b) Confirming that the PPP project has been prepared in accordance with the requirements of Article 11.
  - (c) Confirming that the PPP project meets the specific appraisal criteria applicable to it.
  - (d) Reviewing the contracting authority's capability for carrying out the proposed PPP and making appropriate recommendations.
  - (e) Reviewing and approving the draft tender documents prepared by the contracting authority to ensure conformity with the approved proposal.
3. **Appraisal Criteria.** The appraisal criteria applicable to any proposed PPP (and referred to in Article 11) shall include such of the following as may be appropriate for this purpose:
  - (a) The PPP project's compliance with the criteria and requirements set out in Article 4.
  - (b) In particular, the PPP project's anticipated socio-economic and public-service net benefits and "value for people" (including inclusivity and accessibility) and the extent to which they satisfy and advance the People-first PPP Principles and the wider public good.
  - (c) The extent and urgency of the need and demand for the PPP project.
  - (d) The PPP project's alignment with the Government's wider sector objectives, plans and strategies for infrastructure and economic development and achievement of the SDGs.
  - (e) Its economic and financial feasibility and viability.
  - (f) Its technical feasibility and strengths (including implementation timescales);
  - (g) Its legal, regulatory, and institutional viability, including the procedures to be used for selection of a private partner and their timing.
  - (h) Its environmental and social sustainability and impact manageability, taking account of its long-term resilience and adaptability.
  - (i) The cost-effectiveness, acceptability, and affordability of the PPP project for both users (including vulnerable groups), on the one hand, and the host country from a budgeting/fiscal and sustainable debt perspective, on the other (including considerations relating to government debt and contingent liabilities).
  - (j) The need and scope for any anticipated public sector payments, finance, guarantees or other support for the PPP project.
  - (k) The appropriateness of the PPP project's proposed (preliminary) risk-allocation and incentive profile.

(l) The cost effectiveness and value-for-money/ value for people of implementing the project on a PPP basis relative to other procurement methods.

(m) Generally, the extent to which the PPP project is expected to meet the purposes and objectives set out for it in the documents drawn up as part of its definition and preparation under Article 11.

(n) Any other relevant requirements of Applicable law relating to public investments.

(o) Any other appropriate criteria arising from Article 11, and consistent with the foregoing as may be specified from time to time in the PPP regulations.

4. **Matters included in Appraisals.** In appraising the PPP project, due regard shall be had (inter alia) to the contents of the feasibility study and any related reports prepared under Article 11 and the extent to which it/they demonstrate(s) compliance with the applicable appraisal criteria, as reviewed and certified by the PPP Unit [or other applicable Competent Body]. Due regard shall also be had to the results of all public consultations and/or public hearings which have taken place at that stage of the appraisal process in relation to the PPP project in accordance with Article 11.

5. **Detailed Procedures in PPP Regulations.** The detailed procedures applicable to the proposed PPP during its identification, detailed preparation and appraisal and approval under this Chapter shall be set out in the PPP regulations and shall include (amongst other things) relevant timescales, documentation and reporting requirements notification and publicity requirements, relevant formalities, the relative weightings and priority of applicable criteria and tests, formal review and approval requirements and appeal procedures.

6. **Responsibility for Accuracy and Publicity of Process.** The Government shall be responsible for determining, revising (as necessary) and publishing all appraisal criteria and approval procedures, and ensuring that the PPP regulations accurately reflect them at all times.

### **Article 13. PPP Implementation Resolutions**

1. **Issue of Resolution.** Where a proposed PPP has complied with the applicable appraisal criteria and approval procedures referred to above, and a decision has accordingly been made by the contracting authority [or other applicable Competent Body] to implement it, a formal resolution to that effect shall be issued by the contracting authority (“implementation resolution”) in the form and substance as may be required by this law and the Implementing Regulations.

2. **Contents.** An implementation resolution shall (subject to the PPP regulations) include the following information and components:

(a) The name and official address of the contracting authority responsible for the PPP project.

(b) A clear description of the public infrastructure and/or public services the subject matter of the PPP project.

(c) The PPP project’s principal commercial, financial and economic characteristics and features.

(d) A summary of the material conclusions reached about the PPP project, identifying the key criteria applied in reaching them, including in particular the extent to which the PPP project is expected to satisfy and advance the People-first PPP Principles, the public benefits or goods expected to result therefrom, and the principal results of the feasibility study.

(e) The rationale for implementing the project as a PPP, as opposed to any other form of procurement, and justifying the proposed PPP structure as the most appropriate basis for implementing it.

(f) The anticipated (approximate) amount and nature of any private financing expected to be used.

(g) The anticipated (approximate) amount and nature of any public funding or other public support (such as guarantees) expected to be used, together with the anticipated amount of any sovereign debt or contingent liabilities which may be implied by the private financing of the project.

(h) The procedures to be used for selection of the private partner and their anticipated timing.

(i) A summary description of the consultation procedures held pursuant to Article 11, the material issues raised, and the conclusions reached in response to them, as well as of the mechanisms available to stakeholders for addressing objections and grievances to the PPP project.

(j) Any other matters which the contracting authority considers relevant.

3. **Publication and Copies.** After a project feasibility study has been appraised and approved, the project shall be registered on the official list of approved PPP projects and the implementation resolution shall (subject to any exceptions permitted by this law) be published on the official website of the contracting authority and in the official channels. In the case of an unsolicited proposal, it shall also be notified and copied to the private initiator. Where a competitive tender is being held pursuant to Chapter IV, a copy of the implementation resolution shall be included with the tender documents released to bidders.

## Article 14. Unsolicited Proposals

1. **Initiation.** A private initiator seeking to implement an unsolicited proposal for a PPP may at any time define and submit its proposal in preliminary form to the relevant contracting authority (and any other competent body authorised by the PPP regulations to receive such proposals), which shall have a discretionary power to consider and review it. An unsolicited proposal shall only be deemed eligible for consideration and review if it does not already appear in selection procedures that have been announced or a plan or pipeline of future PPPs developed on behalf of the contracting authority or the Government and if it is considered of public interest.

2. **Preliminary.** The proposed preliminary unsolicited proposal shall describe the proposed PPP project (including in terms of the infrastructure, technology, and scope of the public service it involves) in sufficient detail to enable it to be given a preliminary review by the contracting authority (and any such other competent body) and shall be accompanied by all documents necessary for this purpose. The contracting authority (and any such other competent body) shall carry out any preliminary review of the proposal that it decides to make, reach a preliminary decision about whether it is considered to be potentially in the public interest and intends to proceed further with it, and notify the private initiator accordingly.

3. **“Open Door”.** The private initiator may enter into discussions and an exchange of information at any time regarding the proposed PPP with the relevant contracting authority.

4. **Preparation.** Following a preliminary decision of the contracting authority to proceed further with the unsolicited proposal, the detailed work of preparation of the PPP project shall then be carried out in accordance with the requirements of Articles 11 and 12, [by the private initiator, by the contracting authority, or with the possible support of the contracting authority (to be given at its sole discretion)]. To this end, the contracting authority shall invite the private initiator to submit as much information on the proposed PPP as is necessary to allow the contracting authority (and any other relevant competent body) to make a proper evaluation of the private initiator’s qualifications and the technical and commercial feasibility of the PPP project, and to determine whether the PPP project is likely to be successfully implemented in the manner proposed on terms acceptable to the contracting authority (and any other relevant competent body). For this purpose, the private initiator shall, if and to the extent

reasonably required by the contracting authority, submit a technical and commercial conceptual study, and satisfactory information regarding the concept, technology and public service contemplated in the proposal, and any other assessments reasonably necessary including preliminary social or environmental impact studies.

5. **Protection of Private Initiator’s Rights.** In considering an unsolicited proposal, the contracting authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from, or referred to in the unsolicited proposal. When the decision to proceed has been made, the contracting authority shall not make use of information provided by or on behalf of the private initiator in connection therewith other than for the evaluation of that proposal, except with the consent of the private initiator, and shall, if the proposal is rejected, return to the private initiator all documents prepared and submitted by it during the evaluation process.

6. **Review, Appraisal, and Implementation.** When in the opinion of the contracting authority all the requirements of the preparation phase have been complied with in accordance with Article 12 and are duly contained in the feasibility study, it shall submit the report to the PPP Unit [or other applicable Competent Body] for approval under the same conditions as the ones applicable to any other PPP project.

7. **Implementation Resolution and Conditions of Conclusion of a PPP Contract.** After the PPP Unit’s [or other applicable Competent Body’s] approval has been received, the award of the PPP contract for the unsolicited proposal by the contracting authority shall be subject to testing the potential competition for the relevant PPP project by organising a competitive tendering procedure in accordance with Article 21, where required by the provisions thereof.

## Chapter IV. Selection of Private Partner

*The provisions in this Chapter are intended to promote transparent and effective competitive procurement procedures except where this law specifically provides otherwise. The fundamental principles behind a transparent and effective competitive procurement process under this law include:*

- (a) *Open access to public procurement.*
- (b) *Equal treatment of candidates and bidders and the pursuit of a fair and credible outcome.*
- (c) *Transparency and confidentiality of procedures.*
- (d) *Free competition.*
- (e) *“Value for People and Society”, comprising the fundamental principle of “Value for Money” (economy and efficiency), alignment with the SDGs, and taking into account, in addition, the satisfaction of the users of the service during the project life cycle and the contribution of the project to economic development in accordance with the government’s objectives; and*
- (f) *Realizing a fair allocation of risks and rewards over the life of the project.*

*Note that in some countries there will be no need to implement this chapter because they will have existing sufficient procurement provisions. If this chapter is implemented, special care should be taken to harmonize where necessary these provisions with other relevant provisions addressing the selection of a private partner, e.g. EU directives, the WTO General Procurement Agreement or similar authority. For example, the treatment of unsolicited proposals as described in this Chapter may not be compatible with some legal frameworks.*

### Article 15. Procedures for Selection of Private Partner

1. **Competitive Tenders Standard.** The contracting authority shall utilize electronic procedures where feasible and select the private partner for a PPP project on the basis of a

competitive tender as set out in Articles 15 – 20, save only where Applicable law permits otherwise, including in the case of unsolicited proposals under Article 21 (to the extent provided therein) and direct negotiations as set out in Article 22.

2. **Existing Procurement Laws.** The public procurement laws and regulations in force in [*host country*] [shall/shall not] apply to the award of PPPs, except where and to the extent that this law (or any subsequent law) specifically provides otherwise.

3. **Detailed PPP Tendering Procedures.** The detailed procedures and requirements (including any specific approval powers) applicable to competitive tenders for PPPs, the nature of the processes involved (e.g. whether paper, electronic or otherwise), the contents of the procurement notices, the pre-qualification and selection of the private partner and the contents of the tender documents shall be as set out in the PPP regulations, shall be designed to promote effective and fair competition leading to sustainable long-term outcomes, and shall be governed by the fundamental principles of transparency, equal treatment, non-discrimination, and efficient use of resources (including the cost and expense of bidding).

4. **Applicable Criteria.** The tender criteria and evaluation methodology applicable to the pre-qualification and selection of the private partner and award of the PPP contract shall be as set out in the tender documents and may include any of the following, as the contracting authority considers relevant for the particular PPP project:

5. **Pre-Qualification/Selection:** relevant experience and track-record, technical and professional proficiency and capabilities, financial and human resources, appropriate (dedicated) managerial and organizational capacity and skills covering the full range of relevant PPP tasks (including environmental responsibilities), ethical standards, legal capacity and standing, solvency, structure of consortium, relative consortium strengths.

6. **Tender Evaluation and Contract Award:** value propositions, technical quality (including soundness and innovativeness) of proposal, quality of services and measures to ensure their continuity, operational feasibility, relevant environmental and socio-economic criteria, risk allocation, pricing terms (including the value of the proposed tolls, and tariffs, fees or contracting authority payments, as the case may be, evaluated on an appropriate basis), other commercial terms, costs (whether capital or operational), the nature and extent of any public sector support sort, qualifications to terms and conditions of contract, structure and quality of management team, strengths of financial plan and availability of committed finance; together with such other matters as may be specified in the PPP regulations from time to time. The tender criteria and evaluation methodology shall be clear, transparent, non-discriminatory, reasonably appropriate for each PPP and consistent with the criteria applied and conclusions reached in appraising and approving the PPP project pursuant to Article 12 (as reflected in its implementation resolution).

7. **Non-Discrimination.** The contracting authority shall not discriminate as between local and foreign bidders for or participants in PPP projects or accord them unequal treatment, in connection with the award or subsequent implementation of any PPP, save only to the extent (if any) otherwise permitted under the PPP regulations or Applicable law.

## Article 16. Tender Process and Procedures: General

1. **Choice of Tender Process.** The detailed aspects of the tender process to be used for the award of each PPP shall be set out in the tender documents prepared and made available to potential bidders in accordance with Article 17. They shall also be summarised in the public announcement of the tender.

2. **Open and Closed Tenders.** An open public tender shall ordinarily be used, with or without a pre-qualification stage, and involving either a one- or two-stage structure (following any pre-qualification). Alternatively, a closed tender may be used, but only in exceptional cases of national defence or national security, or such other exceptional circumstances as may be provided for herein, where the use of an open public tender could reasonably be expected to give rise to serious concerns about state secrets, government confidentiality and/or other demonstrable adverse consequences for the national interest and therefore the feasibility of the processes involved.

3. **Competition under Closed Tenders.** Where a closed tender is used, the contracting authority shall nevertheless take all reasonable steps to structure and organise it in a way which fosters genuine competition and shall invite offers from as many different sources as is practicable in the circumstances.
4. **Eligible Participants.** Participants in tenders can in principle be any persons with legal capacity (whether domestic or foreign) under Applicable law, including companies, partnerships and natural persons, or combinations or consortia of such persons, but subject always to any relevant restrictions under this law or the PPP regulations as to such participation.
5. **Consortium Qualifications.** Where bidding consortia participate, the information required from them to demonstrate their requisite qualifications shall relate to each consortium as a whole, as well as to individual members. The contracting authority shall consider the capabilities of each of the consortium members and assess whether the combined qualifications of all of them are adequate to meet the needs of all phases and aspects of the PPP project.
6. **Decisions Compliant with Tender Documents.** Decisions by the contracting authority concerning pre-qualification, selection or rejection of bidders and award of the PPP contract shall be made on the basis of applying only those criteria, requirements and procedures set forth in the relevant tender documents.
7. **Communications with Bidders.** The tender documentation shall provide as necessary for the organisation of transparent communication processes and methods with bidders, allowing as required for (inter alia) conferences, meetings and procedures for written communication, provision of comments on and proposed amendments to the tender documents (including the draft PPP contract), discussions of and modifications to technical requirements and specifications, discussion of risk allocation and commercial terms, clarification of financing proposals and other matters.
8. **Tender Security.** The tender documents may require the provision of tender security, such as bid bonds, by the bidders, in an amount and on terms which are reasonable in the circumstances. In that event, the tender documents shall precisely specify the circumstances in which any such tender security may be forfeited by bidders. A bidder shall not forfeit its bid security in any circumstances other than those specified.
9. **Certain Procedural Aspects.** No bidder may participate in more than one pre-qualification or tender submission, except where and to the extent that the tender documents so permit (including, for example, in the case of sub-contractors). Pre-qualification or tender submissions may be changed or revoked at any time before the relevant deadline for their submission in accordance with the relevant tender procedures.
10. **Final Clarifications and Negotiations.** The tender documents may (or may not) allow for a final process of clarification or negotiation between the public and a bidder of certain aspects of the most favourable bid, judged by the relevant evaluation criteria and methodology, including amendments to the terms and conditions of the draft PPP contract, provided that any final amendments to the bid or the draft PPP contract are consistent with the overall tender and evaluation process, and would not have led to the selection of a different bidder if they had been made or agreed to at an earlier stage.
11. **Exceptional Procedures.** It is acknowledged that the tender documents may contain specific provisions modifying aspects of the tender procedure otherwise applicable in specific circumstances, such as (a) where only a single bidder prequalifies or submits a compliant expression of interest or bid (e.g. by allowing the contracting authority to re-tender the PPP project or alternatively proceed with it on the basis of direct negotiations where it is satisfied that the process has already been sufficiently competitive), or (b) qualifying or restricting the right and ability of different bidders to combine together during the tender process for the purposes of submitting a joint bid. The PPP regulations may also provide specifically for situations of this kind.
12. **Confidentiality.** Subject and without prejudice to Article 10, the contracting authority and the tender committee shall treat all proposals submitted in tender procedures conducted in accordance with this law in such a manner as to avoid the unnecessary

disclosure of their content to competing bidders or to any other person not authorized to have access to this type of information. Any discussions, communications, and negotiations between the contracting authority and/or the tender committee and a bidder shall be confidential (subject as aforesaid). Unless required by law or by a court order, during any such tender procedures no party thereto shall disclose to any other person any technical, price or other confidential information in relation to such discussions, communications, and negotiations without the consent of the other party.

13. **Records.** The contracting authority shall keep an appropriate record of information pertaining to the selection and award proceedings for the PPP project in accordance with the requirements of the PPP regulations.

## Article 17. Tender Documents, Requirements, and Information

1. **Contents of Tender Documents.** The contracting authority shall prepare the tender documents for any tender held in accordance herewith, which shall contain such information as may be required by the PPP regulations for the relevant tender structure being used, including as appropriate the following:

(a) A description of the envisaged PPP and the public infrastructure, facility, or services to which it relates.

(b) An indication of other essential elements of the PPP project that need to be identified at the relevant stage of the tender process, such as the services to be delivered by the private partner, the financial and commercial arrangements envisaged by the contracting authority (such as payment mechanisms and funding sources) and the nature and extent of any public sector support to be provided to the PPP project.

(c) A comprehensive and precise description of the applicable tender procedures.

(d) Project functional requirements and KPIs, as appropriate, including the contracting authority's requirements regarding safety and security standards, environmental protection, and the People-first Principles.

(e) A draft of the PPP contract or, where preparing a full draft would not be practicable in the circumstances, a summary containing the main proposed terms and conditions and reflecting the allocation of key risks, including an indication of which terms, if any, are deemed to be non-negotiable.

(f) The detailed tender criteria and methodology, including relative importance or weighting, to be applied to the pre-qualification (if any) of bidders, the evaluation of bids and proposals and the final selection of the private partner and award of the PPP contract; and any relevant thresholds, if any, set by the contracting authority for identifying non-responsive proposals.

(g) Details on the communication process and methods for bidders, including any bidder conferences and process, if any, for making comments or requesting clarifications to the tender terms and conditions and/or documentation.

(h) Identification of any required tender security including the circumstances for forfeiture.

(i) Sufficient information to allow competent and/or qualified bidders to submit responsive bids in a timely manner, including identification of the deadline for submissions.

2. **Full Data.** The contracting authority shall provide in the tender documents (and/or in any supporting documents or data-room organised in connection therewith) all such information in its possession relating to the proposed PPP and the assets it will comprise, on a fully transparent basis, as can reasonably be considered to be necessary to enable bidders to participate effectively and on a properly-informed basis in the tender (or the relevant stage thereof), but subject always to any applicable confidentiality restrictions (if any).

3. **Amendments to Tender Documents.** The contracting authority may, save where this law or the PPP regulations provide otherwise, and whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise or amend any element of the tender documentation or the request for proposals during the tender process, including the draft PPP contract, provided it:

(a) refrains from making material changes to the project such that the prequalification, evaluation criteria, and/or minimum requirements of the project would change;

(b) notifies the PPP Unit [or other applicable Competent Body] of any amendments to the tender documents [and such body approves the amendments];

(c) notifies all bidders of any such amendments without delay; and

(d) where necessary, the deadline for the submission of proposals shall be prolonged to allow time for any such amendments and any responses to them.

The contracting authority shall indicate in its record of the selection proceedings to be kept pursuant to this law the justification for any such revision or amendment.

4. **Review of Tender Documents.** The tender documents and any amendments thereto shall be subject to the review and approval of the PPP Unit [or other applicable Competent Body]

## Article 18. Tender Committee

1. **Formation and Structure.** The contracting authority and the PPP Unit (and/or another competent body where the PPP regulations so require) shall form a tender committee for the purposes of conducting the PPP tender, evaluating tender bids and proposals, communicating with bidders, and determining the preferred or winning bidder. The composition, powers and procedures of the tender committee shall be determined in accordance with the PPP regulations (including a mechanism for addressing any conflicts of interest of its members).

2. **Members.** The tender committee shall have an odd number of members [with a portion or all its members being independent of the PPP project team]. The contracting authority (and/or other competent body, as aforesaid) shall appoint its chairman. Other members shall be appointed as required by the PPP regulations but may include such independent consultants and experts as may be deemed necessary.

3. **Minutes.** The tender committee shall keep minutes of all its meetings, which shall be subject to the approval of all members present and signed by the chairman and secretary of the committee.

4. **Records.** The tender committee shall document the tender process and evaluation in reasonable detail and give reasons for its selection and award decisions.

5. **Interpretation.** References in this Chapter IV to the contracting authority may be construed as including references to the tender committee where the context so requires.

## Article 19. Tender Stages

1. **Tender Stages.** A tender shall include the following stages, subject to and in accordance with the PPP regulations:

(a) Tender announcement and request for expressions of interest and/or pre-qualification submissions;

(b) Expressions of interest and/or pre-qualification submissions and short-listing of bidders;

(c) Formal invitation to tender (one or two-stage);

(d) Preparation and submission of tender proposals (one or two-stage);



(e) Evaluation of tender proposals and selection of the winning or preferred bidder;

(f) Finalisation of the terms and conditions of the PPP contract and all other required aspects of the PPP project with the winning or preferred bidder; and

(g) Award and conclusion of the PPP contract.

2. **Tender Announcement.** A tender announcement shall be followed by a request for expressions of interest and/or prequalification and subsequently (unless a single-stage tender is used) an invitation to tender, which shall each contain all information reasonably required to enable bidders to participate in that stage of the tender.

3. **Single-Stage Tenders.** A single-stage tender may be used where the PPP regulations so permit, combining the pre-qualification and tender submission stages into one.

4. **Closed Tender Exceptions.** A closed tender may be held where this law and the PPP regulations so permit, without the need for any tender announcement stage, tender participants being informed about the tender by written notice.

5. **Pre-Qualification Procedure.** For the purpose of limiting the number of suppliers or contractors from which to request proposals, the contracting authority may engage in pre-qualification proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged PPP. In that case, the following provisions shall apply (subject to the PPP regulations):

(a) The invitation to participate in the pre-qualification proceedings shall be published in accordance with the requirements of the PPP regulations, containing all such information required thereby as may be necessary to enable bidders to submit responsive applications by the specified deadline.

(b) The contracting authority shall make a decision with respect to the qualifications of each bidder that has applied for pre-qualification, based on the criteria specified in the invitation to participate, and shall then invite all pre-qualified bidders to submit proposals for the PPP in accordance with the tender procedures and requirements.

(c) Where the contracting authority has reserved the right in the invitation to participate to request proposals from only a limited number of bidders that best meet the pre-qualification criteria, it shall rate the bidders accordingly and draw up a short-list of bidders that will be invited to submit proposals, up to the maximum number specified (but at least three, if possible). Those bidders shall then be invited to submit proposals for the PPP project in accordance with the tender procedures and requirements.

6. **Contents of the Request for Proposals.** The contracting authority shall provide a set of the request for proposals and related documents to each bidder (or pre-qualified bidder, as the case may be) invited in accordance with this law to submit proposals for the PPP project that pays the price, if any, charged for those documents. The request for proposals shall contain all such information as may be required by Article 17.1 and the PPP regulations to enable bidders to submit responsive proposals for the PPP project in accordance with the tender procedures and requirements by the deadline for submission of the same.

7. **Comparison and Evaluation of Offers or Proposals.** The contracting authority shall compare and evaluate each offer or proposal submitted for the relevant PPP in accordance with the evaluation criteria set forth in the tender documents, any relative weight accorded to each such criterion or the descending order of importance of the same. For this purpose, the contracting authority may establish thresholds with respect to the technical, financial, commercial, and quality aspects of the offers or proposals. Offers or proposals that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the procedure.

8. **Two-Stage Request for Proposals.** The contracting authority shall adopt a tender structure involving a two-stage request for proposals where the PPP Unit assesses that discussions with bidders are needed to refine aspects of the description of the subject-matter of the procurement and to formulate them with the requisite detail, in order to obtain the

most satisfactory solution to its procurement needs. In that case, the following provisions shall apply (subject to the PPP regulations):

(a) Prior to issuing its final request for proposals, the contracting authority shall issue an initial request calling upon the bidders to submit, in the first stage of the procedure, their initial proposals and comments relating to project specifications, performance indicators, financing requirements or other relevant characteristics of the PPP project and the main contractual terms proposed by the contracting authority.

(b) The contracting authority may convene meetings and hold discussions or dialogue with bidders whose initial proposals have not been formally and properly rejected as non-responsive or unacceptable. Discussions may concern any aspect of the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders.

(c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial request for proposals by deleting, adding to or modifying any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the PPP project, including the main contractual terms, and any specified criteria for evaluating and comparing proposals and ascertaining the successful bidder. Any such deletion, modification or addition shall be communicated in the invitation to submit final proposals.

(d) In the second stage of the proceedings, the contracting authority shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with the tender procedure.

(e) The contracting authority shall rank all responsive proposals on the basis of the evaluation criteria set out in the tender documents and invite the bidder that has attained the highest rating for final negotiation of the terms of the PPP contract (but excluding any terms, if any, that were stated to be non-negotiable in the final request for proposals).

(f) If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a contract, the contracting authority shall inform the bidder of termination of the negotiations and give the bidder reasonable time to formulate its best and final offer. If the contracting authority does not find that offer acceptable, it shall reject that offer and invite for negotiations the other bidders in the order of their ranking until it arrives at a PPP contract or rejects all remaining proposals. The contracting authority shall not resume negotiations with a bidder with which negotiations have been terminated pursuant to this paragraph.

9. **Competitive Dialogue.** The contracting authority may adopt a tender structure involving a request for proposals with dialogue (“competitive dialogue”) where it is not feasible for it to formulate a detailed description of the proposed PPP needed for the purposes of an open public tender in accordance herewith, and it assesses that dialogue with bidders is needed to achieve the most satisfactory solution to its procurement needs. In that case, the following provisions shall apply (subject to the PPP regulations):

(a) The contracting authority shall invite each bidder that presented a responsive proposal in accordance with the initial tender invitation (subject to any applicable maximum) to participate in the dialogue. The contracting authority shall ensure that a sufficient number of bidders, and if possible, not less than three, is invited to participate in order to ensure effective competition.

(b) The dialogue shall be conducted by the same representatives of the contracting authority concurrently.

(c) The contracting authority shall clearly identify those aspects of the PPP project and the tender documents and process that are to be the subject of the dialogue.

(d) During the course of the dialogue, the contracting authority shall not modify any material aspect of the proposed PPP, any pre-qualification or evaluation criteria, any minimum requirements, any element of the description of the PPP project contained in the request for proposals, or any term or condition of the procurement process that is not itself subject to the dialogue.

(e) Any requirements, guidelines, documents, clarifications, or other information generated during the dialogue that is communicated by the public authority to a bidder shall be communicated at the same time on an equal basis to all other bidders, save only to the extent it contains information which is exclusive to the relevant bidder and its disclosure would breach any applicable confidentiality restrictions.

(f) Following the dialogue, the contracting authority shall request all bidders who have not withdrawn from the process to present their best and final offers with respect to all aspects of their proposals. The request shall be in writing and shall specify the manner, place, and deadline for presenting best and final offers. Unless the PPP regulations and the tender documents otherwise permit, no negotiations shall take place between the contracting authority and the bidders with respect to their best and final offers.

(g) The winning bidder shall be selected from amongst the best and final offers submitted in accordance with this procedure, on the basis of the offer that best meets the needs of the contracting authority as determined in accordance with the applicable tender evaluation and selection criteria set out in the tender documents.

## **Article 20. Conclusion of the PPP Contract**

1. **Winning Bidder.** The winning bidder shall be the bidder who has submitted the most favourable compliant bid according to the evaluation criteria and methodology laid down in the tender documents. A formal announcement and publication of the identity of the winning bidder shall be made by the contracting authority promptly following determination of the same.

2. **PPP Contract Signatories.** The conclusion of the PPP contract shall not take place before the expiry of [fourteen days] from the date of publication of the identity of the winning bidder, inter alia to permit available procedures to be invoked for challenging the determination of the same where it is alleged that the procurement requirements of this law have not been met. The PPP contract shall be entered into by the contracting authority with the winning bidder (or with another private legal entity established by it for this purpose), which shall become the private partner in the PPP project for the purposes of this law. Any such other private legal entity or special purpose vehicle (SPV) established by the winning bidder shall meet any formal or substantive requirements for such entity specified by the tender documents or otherwise agreed with the contracting authority.

3. **Publication of Contract Award.** The contracting authority shall give notice of the contract award on its official website and publish the award through the official channels in accordance with the requirements of Article 10. The notice shall identify the private partner and include a summary of the essential terms of the PPP contract (subject to any applicable confidentiality restrictions).

4. **Public Disclosure of PPP Contracts.** Each PPP contract entered into pursuant to this Article shall also be subject to such public disclosure (but subject always to any applicable confidentiality restrictions) as may be provided for pursuant to this law (including Article 10) or the PPP regulations.

## **Article 21. Conclusion of PPP Contract for Unsolicited Proposals**

1. **Testing Competition.** Following a final decision by the contracting authority to implement an unsolicited proposal for a PPP project pursuant to Article 14 (either on the original or on any modified terms permitted thereby), the contracting authority shall, except in the circumstances set forth in Article 22, promptly initiate a competitive tendering procedure for the proposed PPP in accordance with this law, provided always that it considers that (a) the proposed PPP can be implemented without the use of unique intellectual property, trade secrets or other exclusive rights owned or possessed by the private initiator; and (b) that the proposed concept or technology involved is not truly unique or new.

2. **Requirements for Tendering Procedure.** If the contracting authority initiates a competitive tendering procedure in accordance with paragraph 1 above, it shall publish its implementation resolution for the PPP project on its website and the official channels in accordance with Article 13, together with a summary and description of the proposed PPP and its principal objectives, and any relevant documentation, inviting any third parties to submit expressions of interest in implementing the PPP project within a specified period of time.

3. **Exceptions: Contract with Private Initiator.** If the contracting authority does not consider that conditions (a) and (b) in the proviso to paragraph 1 have been met, or if no third party submits an expression of interest by the specified time limit referred to in paragraph 2, in circumstances where the contracting authority is satisfied that all reasonable steps have been taken to attract competing proposals, the contracting authority and the private initiator may proceed with the award of the PPP project and enter into a PPP contract for this purpose, subject to any direct negotiations permitted by Article 22 and the PPP regulations (and any specific procedure for this situation they may contain, including the need for any further approvals).

4. **Re-Testing Competition.** If the contracting authority is not satisfied that all reasonable steps have been taken to attract competing proposals, it shall be entitled to extend the time period for submitting third party expressions of interest, modify the documentation summarising and describing the proposed PPP as appropriate, and invite further expressions of interest.

5. **Tendering Proceedings.** If any third parties submit expressions of interest by the specified time limit(s) referred to above, the contracting authority shall organise tender proceedings for the PPP project in accordance with this law.

6. **Participation of Private Initiator in Tender.** The private initiator shall be invited to participate in any tender proceedings for the PPP project organised by the contracting authority, which may offer the private initiator any appropriate incentive, benefit, or compensation (if any) as may be provided for in the PPP regulations, in consideration of its development and submission of the proposal, including:

(a) Cash compensation (in a pre-agreed amount) for reasonable and documented costs and expenses incurred by it in connection with the development of the unsolicited proposal before the start of the tender proceedings, up to any specified maximum; and/or

(b) [Where applicable, an adjustment to the evaluation score of the private initiator under the tender documentation (in an amount pre-determined before issue of the tender documents)] and/or

(c) [Where applicable, waiver of certain specified bidding requirements].

7. **Publication and Disclosure of Contract.** Each PPP contract entered into pursuant to this Article shall be subject to the publication and public disclosure provisions of Article 20.

## **Article 22. Direct Negotiations**

1. **Exceptions to Tendering Procedures.** The contracting authority may enter into a PPP contract with the private partner without conducting a competitive tendering process in accordance with this law (fully or at all, as the case may be), on the basis of direct negotiations between them, in and only in the following exceptional circumstances:

(a) [Where only a single bidder has pre-qualified and/or submitted a compliant bid in a tender process organised under Article 19];

(b) Where paragraph 3 of Article 21 so permits;

(c) [when there is an urgent need for ensuring continuity in the provision of the service and engaging in the competitive tendering procedures set forth in this Chapter would be impractical, provided that the circumstances giving rise to the urgency were

neither foreseeable by the contracting authority nor the result of dilatory conduct on its part];

(d) Where the use of the competitive tendering procedures set forth in this law is not appropriate for the protection of the essential security interests of the state; or

(e) Where it has been clearly established to the proper satisfaction and confirmed by the contracting authority (and any competent body authorized by the PPP regulations for this purpose), following presentation of a thorough report to that effect by an independent expert, that there is only one source capable of implementing the PPP project as the private partner (such as in the case of indispensable patented technology or unique intellectual property, trade secrets or know-how, or other exclusive rights owned or possessed by such source), such that a competitive tender would not be feasible.

2. **Procedures Applicable to Direct Negotiation.** The detailed procedures, requirements, and conditions applicable to any such direct negotiations, including in the case of unsolicited proposals under Article 21, shall be specified in the PPP regulations, including in relation to any approvals required for the use of the same, the monitoring by and reporting of their progress and the terms and efficacy of any PPP project implemented as a result.

3. **Further Steps.** Where a PPP contract is negotiated on the basis of such direct negotiations, the contracting authority shall (except where a closed tender is necessarily required):

(a) Cause a notice of its intention to commence negotiations in respect of a PPP contract to be published in accordance with the PPP regulations.

(b) Engage in negotiations with as many persons as the contracting authority judges capable of carrying out the project as circumstances permit.

(c) Establish appropriate evaluation criteria against which proposals shall be evaluated and ranked.

4. **Publication and Disclosure of Contract.** Each PPP contract entered into pursuant to this Article shall be subject to the publication and public disclosure provisions of Article 20.

## **Article 23. Review and Challenge Procedures**

1. **Remedies for Public Authority Breach.** Any bidder or potential private partner that claims it has suffered or may suffer loss or injury as a result of any alleged breach or non-compliance of a decision or action of the contracting authority or other competent body of or with the requirements of this law, the PPP regulations or any other relevant Applicable law, in connection with the selection, preparation, appraisal, procurement or implementation of a PPP project, may challenge the decision or action concerned and pursue any available remedies in accordance with the relevant review and appeal procedures provided by this law or otherwise under Applicable law. The PPP regulations may provide specifically for such procedures.

2. **Grievance Procedures to provide for Effective Challenge.** Any such procedures specifically provided by the PPP regulations shall aim to ensure (inter alia) that any such decision or action can be effectively challenged and reviewed without delay and, if possible, before it is carried into effect in relation to the relevant PPP, and that powers to take appropriate interim or interlocutory measures and steps are accordingly available, with a view to correcting the alleged breach or non-compliance and mitigating the loss or injury concerned at the earliest possible stage. Such measures and steps may (subject to their terms) include the power to open up, review, revise and/or annul any decision, certificate, approval, document, order or resolution made or given hereunder, and/or to suspend or cancel any procedure or course of action being followed under this law. Such procedures may also (subject as aforesaid) include the power to award compensation or damages to the person suffering loss or injury and even to cancel or set aside a PPP project altogether in appropriate circumstances specified therein.

3. **Other Procedures to allow for Interim Measures.** The PPP regulations shall aim to ensure that the detailed procedures drawn up under this law, shall provide for sufficient time, following the taking of key decisions or the issue of key approvals or resolutions thereunder, to allow for the interim or interlocutory measures to be taken.

## Chapter V. PPP Contracts

*A private partner's obligation to develop, finance, construct, rehabilitate, and/or maintain public infrastructure and/or deliver public services in a PPP project calls for a number of special rights and obligations not usually applicable to many other types of contracts between public and private sectors. As a result, PPP contracts often contain contractual and legal conditions designed to reflect their special circumstances and facilitate their success and this Chapter should be read in conjunction with Article 32, which contains special provisions addressing the delivery of public services in PPPs, such as one can find typically in Concessions.*

### Article 24. Main Terms and Conditions of PPP Contracts

1. **Contract Terms as agreed by the Parties.** PPP contracts shall contain such terms, consistent with the implementation resolution and tender documents for the relevant PPP, as the parties to them may deem appropriate and agree between them, or as may otherwise be prescribed by law (expressly or by implication), including terms relating to the following:

- (i.) Recitals identifying the key premises upon which the parties are entering into the PPP contract.
- (ii.) The parties to the PPP contract.
- (iii.) The subject matter of the PPP contract, including the nature and scope of works to be performed and services to be supplied and the public infrastructure and/or the public services to which it relates.
- (iv.) The (relevant) technical and economic characteristics and requirements of the public infrastructure comprised in the PPP project.
- (v.) The specific rights and obligations of the parties in relation to the PPP project's implementation, including the nature and extent of exclusivity, if any, of the private partner's rights.
- (vi.) Identification of the applicable contract documents, including an order of precedence where needed.
- (vii.) Any conditions precedent to the parties' rights and obligations (in whole or part).
- (viii.) The duration of the PPP contract and any mechanism for extending it (subject to Article 8).
- (ix.) Applicable performance levels, volumes and/or standards for the works, good and/or services to be provided by the private partner, including KPIs and where applicable guarantees and any obligations of the private partner to modify public service levels to meet actual demand and ensure their continuity and provision under essentially the same conditions for all users.
- (x.) The rights of the contracting authority to monitor the project and ensure that the project is being properly operated and/or that the services are being delivered to the stated requirements.
- (xi.) Applicable performance penalties and other remedies payable by the private partner for failing to meet the requisite performance levels, volumes and/or standards.

- (xii.) Where applicable, the private partner's rights (if any) to charge third parties (including end users) for its works, goods and/or services, any conditions applicable thereto (such as the amounts and methods of payment), any mechanisms for revising or modalities for varying them, and provision for any public subsidy where applicable.
- (xiii.) Any payments (if any) to be made to the private partner by the contracting authority and/or any other public authority for its works, goods and/or services (such as availability payments, "shadow tolls", output-based payments, other types of performance-based payment, off-take payments or otherwise), the methods and formulae for calculating them, any other conditions applicable thereto, any mechanisms for revising or modalities for varying them, and any relevant cost breakdowns and the applicable payment procedures;
- (xiv.) Any payments to be made by the private partner to the contracting authority (or the Government) for the PPP project (whether lump sum, regular, periodic or otherwise), including PPP fees and (where applicable) revenue sharing, and/or its obligations to collect tariffs on behalf of the Government.
- (xv.) Any requirements relating to the incorporation of the private partner (including a special-purpose vehicle formed in accordance with this law) and its corporate structure, requisite parties, and capitalisation, and to subsequent changes to them.
- (xvi.) Right of the contracting authority to review and approve certain contracts to be entered into by the private partner, or aspects therefor, such as contracts between the private partner and its major contractors and/or shareholders and/or affiliates.
- (xvii.) The nature of and responsibility for funding and/or financing the PPP project (whether by means of public support, private finance, debt, equity and/or other sources).
- (xviii.) Responsibility for obtaining relevant licenses, permits and consents from other public authorities and/or assisting with the processes involved.
- (xix.) Coordination of activities comprised in the PPP project with other public authorities.
- (xx.) Procedures for regular interfacing and co-operation between the parties, with a view to promoting collaboration and the amicable resolution of potential differences and disputes.
- (xxi.) Requirements for regular interfacing and consultation with project stakeholders, including those impacted by or making use of the project.
- (xxii.) Applicable design and construction (or reconstruction/ rehabilitation) obligations, requirements, and procedures (including where applicable procedures for the review and/or approval of plans and designs, resolving issues, testing and final inspection, approval and acceptance of the facility, and any requirements for the expansion or extension of an existing facility).
- (xxiii.) Applicable operational and maintenance obligations, requirements, and procedures.
- (xxiv.) Time periods for performance of specific obligations (and any mechanisms for extending them).
- (xxv.) Procedures for determining or certifying completion of specific obligations.
- (xxvi.) Identification of the respective physical assets and/or real property rights including responsibilities for acquisition, transfer, use and maintenance of the same for the PPP project and access to it, including any easements.
- (xxvii.) Responsibilities for protecting and securing the PPP project and the site.

- (xxviii.) The nature and allocation of property rights and interests relating to the PPP project, the site and the assets it comprises (including any assets which the private partner may be allowed to own outright or indefinitely).
- (xxix.) The nature of any supporting infrastructure, transport linkages and/or utility supplies, and responsibility for their provisions and maintenance.
- (xxx.) Development and use of facilities ancillary or incidental to the PPP project and any revenues generated from them.
- (xxxi.) Employment and labour-related (including “local content”) requirements.
- (xxxii.) Requirements to comply with Applicable laws.
- (xxxiii.) The monitoring, review, inspection and approval rights and powers of the contracting authority throughout the term of the PPP contract.
- (xxxiv.) Information-provisions and the extent of the private partner’s obligation to provide the contracting authority and/or other competent body with reports and other information on the PPP project including any applicable procedures.
- (xxxv.) Obligations of each of the parties to engage with stakeholders and address their legitimate grievances through appropriate grievance mechanisms.
- (xxxvi.) Sub-contracting and the private partner’s responsibility and liability for its sub-contractors.
- (xxxvii.) Remedies available in the event of default by either party, including any “step-in rights” (as detailed in Article 29) granted to the contracting authority.
- (xxxviii.) Any “step-in rights” (defined as aforesaid) granted to the private partner’s lenders.
- (xxxix.) The private partner’s rights to grant financial security interests in and over its PPP-related assets and rights.
  - (xl.) Ownership and use of intellectual property.
  - (xli.) Transfer of assets and ownership and any provisions relating to their re-transfer as appropriate at the end of the contract term.
  - (xlii.) The rights and obligations of the parties with respect to confidential information and the disclosure of project information.
  - (xliii.) Mechanisms and procedures for exempting the parties from liability and/or providing appropriate protection and/or compensation (including by modifying the PPP contract) to allow for the impact of events beyond the control of the affected party, such as force majeure, change in law and other exceptional events.
  - (xliv.) Any variation (and related cost adjustment or recovery) mechanisms and procedures for making of other amendments to the PPP contract.
  - (xlv.) Termination of the agreement, including grounds for termination, procedures, the effect of lender step-in rights, and provision for any compensation payments.
  - (xlvi.) Appropriate steps to be taken with a view to minimizing the adverse impact of any early termination on the continuity of public service provision in connection with the PPP project.
  - (xlvii.) Responsibilities relating to expiry of the term, including any hand-over of the PPP project assets (except where the private partner owns them outright) and related training and transfer obligations, and where appropriate decommissioning and associated financing responsibilities.
  - (xlviii.) Insurance requirements (including if relevant insurance relating to climate-change events).



- (xlix.) Environmental and social obligations, including any specific requirements relating to the SDGs and the People-first PPP Principles, together with obligations to manage, monitor and report on relevant impacts and to implement corrective actions as necessary throughout the life of the project.
  - (l.) Governing law and dispute-resolution and/or avoidance/settlement mechanisms, including any arbitration provisions and procedures.
  - (li.) Liability and indemnities.
  - (lii.) Waivers of sovereign immunity.
  - (liii.) Representations and warranties.
  - (liv.) Such other terms as the parties may agree.
2. **Available Contract Structures.** The parties to a PPP contract shall be entitled to agree on such contractual and commercial forms and structures as seem to them most appropriate for the PPP project concerned, and which they consider to be best suited to give effect to its principal characteristics and features, including any which are known and used as a matter of recognized international best practice.

## Article 25. Amendment and Termination of PPP Contracts

1. **Termination of Contract.** The PPP contract shall terminate upon the expiry of its term (subject to any provisions expressed to survive termination). An early termination may occur where the agreement so permits and in accordance with Applicable law.

2. **Amendments and Termination by Agreement.** The parties may amend or vary any terms of the PPP contract or terminate it by mutual consent at any time, but subject always to its provisions, the terms of any direct agreement and any conditions or restrictions under Applicable law or the PPP regulations, including as to any further consents or authorisations required.

(a) [*Alternative 1:* In particular, any amendment or modification (other than one already provided for in clear and precise terms in the contract) which would materially alter any of the [fundamental or essential elements or aspects] of the PPP project or its terms and conditions, and which played a significant part in either its appraisal and approval under Article 12 and/or the decision to award the project to the private partner pursuant to any competitive tendering process held under this law, shall require the approval or endorsement of the competent body designated for this purpose (if any) herein or in the PPP regulations before such amendment or modification becomes effective. Such approval or endorsement may be subject to further specific conditions (including in certain cases even the re-tendering of the PPP contract). The basis on which any such competent body may give or withhold its approval or endorsement, and specify further conditions, shall be set out or reflected in the PPP regulations.]

(b) [*Alternative 2:* In particular, any amendment or modification (other than one already provided for in clear and precise terms in the contract) which would render the contract substantially different in character from the one initially concluded shall require the approval or endorsement of the competent body designated for this purpose (if any) herein or in the PPP regulations before such amendment or modification becomes effective. An amendment or modification shall be deemed to be substantial where it meets one or more of the following conditions:

- (i.) The total value of the remuneration of the private partner resulting from the amendment or modification would exceed [ ] per cent of the total value of all remuneration which the private partner is expected and entitled to receive from the PPP project over its term, assessed on a comparable, present value basis. Where several successive amendments or modifications are made, such value shall be assessed on the basis of the net cumulative value of the successive modifications, over a period of [ ] [months/years].

- (ii.) The amendment or modification shall not introduce conditions which, had they been part of the initial contract award procedure for the PPP project, would have allowed for the admission of bidders other than those initially selected or for the acceptance of a proposal other than that originally accepted or would have attracted additional participants in the contract award procedure.
- (iii.) The modification extends the scope of the works to be carried out and/or services to be supplied by the private partner under the contract by more than [ ] per cent.
- (iv.) Where a new private partner replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under this law].

3. **Unilateral Termination.** Where it so provides, the PPP contract may also be terminated unilaterally, by written notice from one party to the other, upon the occurrence of certain specified events (such as material unremedied breach of contract, insolvency, certain types of change in law or prolonged force majeure) and subject to the satisfaction of any relevant specified conditions specified in the agreement, such as the lapse of certain time periods, compliance with applicable procedures or, where Applicable law so requires, the decision of a competent court or tribunal.

4. **Termination Compensation.** Where the PPP contract so provides, either party shall be entitled to compensation from the other upon its early termination for any reason, in an amount and on a basis calculated in accordance with its terms and Applicable law. Due consideration shall be given by the parties concluding a PPP contract to the principles upon which any such compensation should be calculated, which may include or take account of (by way of illustration and without any double counting) any of the following:

- (a) The fair, and where applicable non-amortized, value of any assets transferred to the contracting authority.
- (b) Appropriate compensation for the value of equity investments in the PPP project and/or the returns expected by equity investors over the term of the agreement.
- (c) Amounts necessary to discharge outstanding debt obligations at the time of termination.
- (d) Compensation for costs and losses suffered by either party as a result of early termination, including lost profits.
- (e) The amount of any outstanding liabilities of either party at the time of its termination.

The parties to the PPP contract shall be entitled to agree such terms for the payment of such compensation as seem to them most appropriate in all the circumstances, and which are consistent with Applicable law and any relevant constraints it may impose, such as the need to avoid unjust or undue enrichment or any disproportionate penalties for breach of contract.

5. **Other Termination Steps.** The PPP contract may provide, as appropriate, for any of the following upon or following its termination or expiry:

- (a) Mechanisms and procedures for the transfer of assets to the contracting authority.
- (b) The compensation to which the private partner may be entitled in respect of assets transferred to the contracting authority or to a new private partner or purchased by the contracting authority.
- (c) The transfer of technology required for the operation and maintenance of the PPP project.
- (d) The training of the contracting authority's personnel or of a successor private partner in the operation and maintenance of the PPP project.

(e) The provision, by the private partner, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the PPP project to the contracting authority or to a successor private partner.

(f) Mechanisms and procedures for the decommissioning of the PPP project, including the preparation of a decommissioning plan, the parties' respective obligations for carrying it out and their financial obligations in that respect.

## Article 26. Property and Related Matters

1. **Provision of Necessary Property.** The contracting authority shall be responsible for ensuring the effective provision to the private partner of any and all existing land, buildings, facilities, structures, parcels or plots of land, easements, rights of access and egress, and all other real property-related assets, which are needed by it for the purpose of implementing the PPP project (whether or not owned or controlled by the contracting authority), in accordance with the requirements of the PPP contract, except where such assets have already been acquired by the private partner or the PPP contract provides otherwise.

2. **Rights of Access.** The contracting authority shall also make available to the private partner, or, as appropriate, assist it to enjoy the right to enter upon, transit through, do work or fix installations upon property of third parties, as appropriate and required for the purpose of implementing the PPP project in accordance with Applicable law.

3. **Transfer of contracting authority Property.** The contracting authority shall be entitled to transfer to the private partner the use and occupation (with or without ownership) of any available real property in its possession and/or under its control or operational management and which it is not precluded by law from transferring, including public infrastructure and any related land, buildings or similar property, which is needed for the purposes of the PPP project, in accordance with the terms of the PPP contract and any related documents.

4. **Third Party Property.** Where any property or assets referred to above are in the ownership or possession of third parties, the contracting authority shall (or shall procure that any other relevant public authority shall) either:

(a) Acquire or obtain the same by agreement with the relevant third parties;

(b) Arrange for their compulsory acquisition or alienation in accordance with Applicable law (and subject always to the requirements thereof, including as to appropriate planning, consultation, compensation, relocation, and monitoring duties); and/or

(c) Otherwise acquire or procure such other legal rights over and to such assets in accordance with Applicable law as may be necessary for the purposes of the PPP project and the discharge of its responsibilities under this Article.

5. **Grant of Legal Interests and Rights.** The parties to the PPP contract shall be entitled to grant each other such legal interests and rights, consistent with Applicable law and the terms of the PPP contract, in or related to any property the subject matter of the PPP project, as may be necessary to implement the PPP project. Such interests and rights may include (for example) outright ownership, leases, sub-leases, licenses, easements, rights of use and such other rights and interests as the parties may agree. All such rights and interests shall be provided or allowed for as appropriate under the terms of the PPP contract and/or any related agreements.

6. **“Back-to-Back” Interests and Rights.** The private partner shall be entitled to grant third parties equivalent or similar interests and rights in or related to any property to in this Article to those granted to it hereunder (including sub-contracts, sub-leases, sub-licenses, etc.) as may be necessary to implement the PPP project and permitted by the terms of the PPP contract and Applicable law.

7. **Identification of Assets.** The PPP contract may, if appropriate, identify which assets comprised in the PPP project are or shall be public property and which are or shall be the

property of the private partner, and provide for the specific treatment thereof during its term or upon its termination or expiry. In particular, it may identify which assets belong in the following categories: (a) assets, if any, that the private partner is required to return or transfer to the contracting authority or another entity; (b) assets, if any, that the contracting authority may, at its option, purchase from the private partner; and (c) assets, if any, that the private partner may retain or dispose of.

## **Article 27. Types of Payment under PPP Contracts**

1. **Payments to Private Partner: General.** The PPP contract may provide for such payments to be made to and/or levied and retained by the private partner, for the performance of its responsibilities, in such form and amounts and subject to such conditions as may be agreed by the parties to the PPP contract and not prohibited by Applicable law. These may include (as applicable to Concession and/or government-pay PPPs, as the case may be):

(a) Payments from end users, such as tolls, tariffs, fees, and other forms of usage or “direct user” payments, subject to any applicable legal or regulatory restrictions.

(b) Payments from the contracting authority to the private partner, such as availability payments, other performance-based payments, shadow tolls, capacity payments, off-take payments, subsidies, and other forms of regular or periodic payment or “revenue stream”, subject to any applicable legal or regulatory restrictions.

(c) Any other legally available and permissible forms and types of payment.

The PPP contract may provide as appropriate for the methods and formulas for the establishment and adjustment of any such payments.

2. **Payments to contracting authority.** The PPP contract may also provide that the private partner shall make certain payments to the contracting authority, such as PPP fees, rents, royalty payments, revenue, or profit shares, whether lump-sum or periodic, or such other form of payment consistent with Applicable law as may be agreed by the parties to the PPP contract.

3. **Combinations of Payment.** The PPP contract may provide for a combination of any of the types or forms of payment referred to above.

## **Article 28. Liability of Parties to the PPP Contract**

1. **General.** The parties to the PPP contract shall have such liability for any breach of its provisions and be subject to such remedies (including damages and penalties) as may be provided for under its terms and/ or Applicable law.

2. **Sub-Contracts.** The private partner shall be entitled to sub-contract, sub-lease, or sub-license its rights and obligations under the PPP contract to third parties in accordance with the terms of the contract and shall have such liability for the acts and omissions of any such third parties as may be provided thereunder.

## **Article 29. Step-in Rights and Substitution of Parties to the PPP Contract**

1. **Step-In Rights Permitted.** The parties to the PPP contract shall be entitled to include provisions in the contract and/or any related documents (including in a “direct agreement” with the lenders) which allow the contracting authority and/or the lenders, in specifically-defined circumstances and subject to Applicable law, temporarily to take over and manage, in whole or part, the operation of the facility and/or provision of the services comprised in the PPP project (“step-in rights”) during the term of the PPP contract, to ensure their continued operation and/or provision, and the effective functioning of the PPP project, subject to the agreed conditions and procedures. Such conditions and procedures may (inter alia) require the parties to take all reasonable care to exercise any step-in rights in

such a way as to avoid or minimise any material adverse impact on the provision of any relevant public services to end users or their use of any relevant public infrastructure.

2. **Lenders' Associated Rights.** It is acknowledged that the lenders' step-in rights under their direct agreement may include:

(a) The right to prevent any threatened termination of the PPP contract by the contracting authority from proceeding for specified periods of time and subject to specified conditions;

(b) The right to substitute the private partner, in whole or part, temporarily with another legal person, who shall be entitled to exercise the rights and obliged to perform the duties of the private partner under the PPP contract for a period of time, without transferring the PPP contract to another party;

(c) The right to replace the private partner altogether with another private partner on behalf of the lenders for the duration of the PPP contract term, and to transfer the PPP contract (and all the rights and obligations thereunder) to it; and/or

(d) The right to be paid termination compensation payments directly from the contracting authority in satisfaction of amounts owing to them in relation to the PPP project.

3. **No Further Tender.** It shall not be necessary for the contracting authority to hold any further public tender where any such step-in or substitution rights are exercised, provided that the relevant requirements and procedures are complied with.

## Chapter VI. Support, Protections and Guarantees

### Article 30. Protection of Parties' Interests under the PPP Contract: Miscellaneous

1. **Exclusivity.** The contracting authority may grant the private partner exclusive rights to perform the activities specified in the PPP contract (subject always to Applicable law), in order to strengthen the technical, financial, and/or economic viability of the PPP project and facilitate the achievement of its objectives, including the public benefits envisaged for it.

2. **Licences and Permits.** The private partner shall have primary responsibility for obtaining and maintaining the necessary licences and permits for the PPP relating to its own activities, in accordance with Applicable law. The contracting authority shall provide all appropriate assistance to the private partner in connection therewith, including assistance with coordinating and facilitating their application and grant, and shall obtain or provide any relevant licences or permits in accordance with their terms for which it is itself responsible.

3. **No Undue Interference.** The contracting authority shall not take any steps or measures which would have the effect of unduly interfering with, obstructing or prejudicing the private partner's freedom to control and manage the assets and activities comprised in the PPP project and to exercise its rights and perform its obligations thereunder, including its rights to receive and enjoy the revenues and returns on investment properly derived therefrom, save only as permitted by the express terms of the PPP contract and/or Applicable law.

4. **Adequate Returns from Payments.** The parties to the PPP contract shall be entitled to agree on and include such payment terms, and such mechanisms for revising and adjusting them from time to time, as can be reasonably expected to provide adequate compensation and returns to the private partner (and its investors and lenders) for its (and their) costs, expenses, investments and commitments in connection with the implementation of the PPP project, based upon the efficient performance of the private partner in accordance with the contract's terms.

5. **Exceptional Events.** PPP contract may also contain such provisions as the parties thereto may agree identifying or listing certain types of "special event", including changes in law, *force majeure*, or other exceptional events, which may trigger certain consequences

under the contract designed to protect the party affected by such event and compensate it for the costs or losses sustained as a result, including financial or economic costs or losses, such as:

- (a) Relief from liability of a party prevented from performing its obligations under the agreement.
- (b) Amendments to the terms of the PPP contract, including (by way of illustration) amendments changing the scope of work, the time for performance, applicable standards or the contract's duration.
- (c) Adjustments to charging and payment rates, amounts, and levels.
- (d) Obligations to provide financial compensation.
- (e) Unilateral rights of early termination of the PPP contract and the payment of related compensation.

6. **Essential Shareholders.** Except as otherwise provided in the PPP contract (but subject always to the PPP regulations), a controlling interest in the private partner or the interest of a shareholder whose participation therein is reasonably deemed to be essential for the successful implementation of the PPP project, may not be transferred to third parties without the consent of the contracting authority. The PPP contract shall set forth the conditions under which the consent and approval of the contracting authority may be given.

### **Article 31. Government and Public Support for PPPs**

1. **General and Specific Forms of Support.** The contracting authority and/or the Government shall be entitled to provide, contribute, or make available to or for the benefit of any PPP such forms and means of public support, assets and/or commercial or financial commitments, as may either be generally permitted or available under Applicable law and/or as the PPP regulations may specifically provide for from time to time, such as:

- (a) Any of the forms of payment provided for in this law.
- (b) Construction and/or operational grants.
- (c) Subsidies.
- (d) Contributions of physical assets and property.
- (e) Guarantees and incentives, including guarantees of PPP revenues, whether from end users, off-takers or otherwise.
- (f) Guarantees of minimum quantities of off-take or consumption by the contracting authority.
- (g) State or municipal financial guarantees.
- (h) Loans and other forms of funding or investment.
- (i) Compensation or direct responsibility for certain types of costs and risks.
- (j) Tax and customs benefits and exemptions.
- (k) Other guarantees and/or indemnities and/or incentives.

2. **Support to be Compliant.** Any such support, assets and/or commitments must be consistent with the appraisal and approval criteria applied under Article 12, the implementation resolution, and the tender documents for the PPP project for which they are to be used. The terms and conditions applicable to any such support, assets and/or commitments shall be set out in the PPP contract (and/or in any related agreement).

## Article 32. Protection of Public Service Provision and Contract Equilibrium

*A PPP shall be based on a series of contractual clauses and underlying legal requirements as identified in Article 24, however, this Article contains additional provisions that, if applicable, are designed to maintain the integrity of the public service in PPPs and the fair equilibrium between the respective rights and obligations of the parties under the PPP contract throughout the life of the project.*

### 1. Conditions for the operation of PPPs.

(a) Equality of treatment for the users, continuity of the public service, and-if justified by the public interest-the adaptability of the public service to the needs of the project and users over time may be provided for as appropriate in the contract. More particularly:

- (i) **Equality of treatment.** All users of the service in equivalent circumstances should be offered the same service on the same basis and for the same price without discrimination.
- (ii) **Continuity.** The private partner should ensure the continuous delivery of the public service in accordance with the applicable performance parameters, save only where exceptional circumstances specified in the contract (such as force majeure) permit otherwise. A failure to do so may give rise to contractual and/or statutory remedies, including a right of the contracting authority temporarily to step in and take over the operation of the facility in order to ensure such delivery.
- (iii) **Monitoring and restoring contractual equilibrium.** Unexpected changes in economic, political, and/or financial circumstances which adversely impact the economic and financial viability of the Project (subject to any specified thresholds) may be addressed through contractual mechanisms which allow the parties to restore the economic and financial viability of the Project and provide for appropriate relief and/or compensation. These events may include certain changes in law, changes in the tax and/or customs regime, unforeseen economic circumstances that cause hardship, and/or events of force majeure, as the contract may provide.
- (iv) **Adaptability.** The private partner may be given certain obligations in the contract to change and adapt the public services as necessary in response to changing public needs during the term of the project, and/or to make proposals for the same to the contracting authority for its consideration. The terms of the contract may entitle the contracting authority, when public interest justifies it, to impose such changes and adaptations unilaterally, but subject to the economic equilibrium safeguards and mechanisms and other relevant conditions set out in the contract's terms (such as extensions of deadlines and/or increases in tariffs) and/or otherwise provided by Applicable law.

### (b) General Economic and Financial Provisions and Tariffs in Concessions.

The Project's economic and financial assumptions, and its investment and service provision requirements, as reflected in the PPP contract, should be designed in such a way as to make the PPP project practically, economically, and financially viable (including an appropriate return for the private partner). More particularly:

- (i) **Tariffs and Charges.** The PPP contract should include principles and mechanisms for setting, calculating, and/or adjusting tariffs and charges payable under the contract so as to enable a reasonably efficient private partner to perform its obligations and deliver the public services over the life of the contract.

- (ii) **Monitoring and restoring contractual equilibrium.** Unexpected changes in economic, political and/or financial circumstances which adversely impact the economic and financial viability of the Project (subject to any specified thresholds) may be addressed through contractual mechanisms which allow the parties to restore the economic and financial viability of the Project and provide for appropriate compensation. These events may include certain change in law, changes in the tax and/or customs regime, unforeseen economic circumstances that cause hardship, and/or events of force majeure, as the contract may provide.
- (c) **Maintenance programmes.** The PPP project contract may include a maintenance and monitoring programme with respect to the delivery and operation of the public service and associated assets, subject to any requisite contracting authority approval. This may require the private partner to renovate, refurbish, and/or replace the relevant infrastructure on a multiyear basis with regular programme up-dates.
- (d) **Cooperation.** The parties should, based inter alia on the common objective of satisfying the end users of the service, meet on a regular basis and in a structured manner to monitor the implementation of the contract and the project's practical, commercial and financial performance.
- (e) **Reversion of the Assets.** In order to ensure the continuity of public services to the requisite standard on a hand-over of the PPP project to the contracting authority, whether at the end of its term or before, a PPP contract-especially one relating to a service-provision Concession-may need to contain specific provisions relating to:
- (i) **Asset Transfer.** The identification of all assets to be transferred to the contracting authority on a termination or expiry of the contract, including fixed assets and infrastructure, movable assets, inventory, know-how, IP, supplies and equipment necessary for the continued delivery of the public service, and the condition in which such assets must be in (typically good operating condition, free of defects and of any liens, encumbrances, or other security). The transfer and/or training of staff may also need to be provided for. The contract may also distinguish between assets to be transferred without compensation and others which the contracting authority has an option to purchase from the private partner.
- (ii) **Early Termination.** These provisions may also apply on an early termination of the contract before the expiry of its term, including where the contracting authority has a right of "public interest" termination, exercisable without fault on the part of the private partner.

### Article 33. Protection of Lenders' and Investors' Rights and Interest

1. **General.** The PPP contract and/or any direct agreement may, for the avoidance of doubt, provide for such protections for and the rights and powers of the private partner's lenders and investors as the parties thereto may agree, consistent with Applicable law, as may be necessary and appropriate to ensure the successful financing of the PPP project.
2. **Direct Agreements Permitted.** Such protections, rights and powers may (*inter alia*) set out the detailed procedures and conditions applicable to the exercise of any step-in rights and rights of substitution and/or replacement of the private partner (in accordance with Article 29), together with any other specific entitlements of the lenders permitted thereby (such as direct payment of termination compensation or insurance proceeds).
3. **Permitted Security.** Subject to any restrictions that may be contained in the PPP contract, the private partner may grant or create any form of security interest over any of its assets, rights and interests comprised in or related to the PPP project, which are available under Applicable law, as may be required to secure any financing needed for the PPP project. These may include (by way of illustration) property mortgages, security over movable and immovable property and over tangible and intangible assets, enterprise mortgages, fixed and floating charges, assignments, pledges of bank accounts, pledges of



the proceeds of the PPP project or of receivables owed to the private partner, and other available forms of security. No such security may be created over public property, or any other property, asset or rights needed for the provision of a public service where and to the extent that such security is prohibited by Applicable law.

4. **Shareholder Security.** The private partner's shareholders and other owners may grant or create any form of security interest over their shares or ownership interests in the private partner that may be available under Applicable law.

5. **No Replacement of Private Partner without Consent.** Save as otherwise provided in paragraphs 3 and 4 above and in Article 29, the rights and obligations of the private partner under the PPP contract may not (subject to its terms) be assigned and transferred to any third party in place of the private partner without the contracting authority's consent. The PPP contract shall set forth the conditions under which such consent and approval may be given, including valid acceptance by the relevant third party of all obligations transferred to it, their enforceability against it and evidence of its technical, managerial and financial capability to perform them. Provided always that no such restriction shall prevent the private partner from sub-contracting or sub-leasing its rights and obligations under the PPP contract in accordance with its terms.

### **Article 34. Protection of End Users and the General Public**

1. **Detailed PPP Procedures: End Users and the General Public.** Any detailed procedures specified in the PPP regulations relating to the selection, preparation, appraisal, procurement and implementation of PPPs shall take due and reasonable account as appropriate of the legitimate needs and best interests of members of the general public and end users of the public services to which the relevant PPPs relate and who stand to be affected by the same.

2. **Grievance Procedures.** Such procedures shall provide as appropriate for the adoption of suitable mechanisms for lodging formal objections or other complaints or grievances by members of the general public and end users to or about any aspect of such implementation by which they may be materially adversely affected, including where appropriate a regulatory or parliamentary ombudsman procedure. No such mechanisms shall in any manner limit or prejudice any other rights and remedies available to such members of the general public or end users under Applicable law in relation to any PPP or its selection, preparation, appraisal, procurement or implementation. Any such procedures shall take account as appropriate of such other rights and remedies.

3. **Private Partner's Operational Grievance Mechanism.** Where the PPP project involves the provision by the private partner of services to the public or the operation of infrastructure facilities accessible to the public, the contracting authority shall require the private partner to establish simplified and efficient mechanisms for handling claims submitted by the members of the public receiving the services or using the infrastructure facility, as well as other parties affected by the PPP project. The PPP contract shall provide for any such requirements. The private partner shall maintain accurate and complete records of the operation of any such mechanisms and the claims submitted and handled thereunder.

4. **Rules for Use of Infrastructure Facility.** Where the PPP project involves or relates to the use by third parties or members of the public of an infrastructure facility, the private partner shall have the right to issue and enforce rules governing such use of the facility, which shall be subject to any requisite approvals of the contracting authority or other relevant public authority (such as a regulatory body). The PPP contract may provide for the making of any such rules and their enforcement.

## Chapter VII. Governing Law and Dispute Resolution

*PPP contracts are often long term, complex partnerships for the provision of a public service. PPPs should therefore set out clearly the necessary provisions to maintain the contracted public service for the life of the project but include provisions that allow the parties to resolve differences in how the project is to be delivered. In all cases, such provisions should allow for resolution in accordance with any stated objectives or principles of the project, the contractual documentation, and in the spirit of partnering and dispute avoidance where possible.*

### Article 35. Governing Law

1. **Governing Law of PPP Contract.** The PPP contract shall, subject to Applicable law, be governed by the system of law chosen by the parties, but subject to a presumption that, save in exceptional circumstances, the law of [*host county*] shall apply. The law of [*host country*] shall apply where the PPP contract does not provide otherwise.
2. **Governing Law of Other Contracts.** Other contracts and documents entered into in relation to the PPP project (including any direct agreement) shall be governed by the systems of law chosen by the parties to them, taking account of any Applicable law requirements.

### Article 36. Dispute Avoidance and Alternative Dispute Resolution

1. **Dispute Resolution Mechanisms as agreed.** Any differences or disputes arising out of the contracts or documents relating to a PPP project shall be resolved or settled through the mechanisms, processes and procedures agreed by the parties thereto, but subject always to any specific requirements relating thereto under Applicable law.
2. **Freedom of Choice.** The parties to such contracts and documents may (subject as aforesaid) freely choose the mechanisms, processes, and procedures for resolving such differences or disputes, including mediation, binding or non-binding expert appraisal or determination, national or international commercial arbitration or investment arbitration, and the procedural rules relating to the same.
3. **Partnering.** The parties may agree on a partnering process to promote the long-term development and success of the project, which may include (for example):
  - (a) Meetings organized on a regular basis.
  - (b) Involvement of personnel with the necessary skills, specialisms, and levels of responsibility for the parties to resolve issues.
  - (c) The establishment of any necessary procedures designed to foster a spirit of partnership, based on a consensus of the parties.
  - (d) A duty to disclose any potential issues and discuss any actual or potential disputes during partnering meetings before any other dispute resolution steps may be taken.
4. **Dispute Board.** The parties may agree on the establishment of a formal disputes board to promote the long-term development and success of the project, which may (for example) bring in outside experts, hold regular meetings and consider issues in dispute and facilitate their resolution.
5. **Mediation.** The parties may agree on the establishment of a mediation process to promote the long-term development and success of the project, which may include (for example):
  - (a) An optional or mandatory mediation process that may be invoked before referring a matter to arbitration.

(b) One or more senior or other authoritative experts selected by the parties to facilitate the mediation.

(c) The establishment of any necessary additional procedures by the facilitator(s) to structure the mediation, including the extent of due process to be used in the proceedings.

6. **Arbitration.** The parties may also (but subject always to Applicable law) agree on the use of arbitration, including domestic and/or international arbitration and related mechanisms, for the final determination/resolution of disputes, *inter alia* to enhance the long-term development and success of the project and allay any potential concerns (if any) about other available forms of judicial proceeding, which may include for example) the following:

(a) A requirement(s) that disputes first go to a dispute board and/or mediation prior to arbitration.

(b) Three or more arbitrators selected by the parties to conduct the arbitration.

(c) The establishment of any necessary additional rules or procedures based on accepted international arbitration standards.

7. **Waiver of Sovereign Immunity.** The contracting authority shall not be entitled to any state or sovereign immunity in relation to any differences or disputes under any such contract or document which it has properly agreed to waive thereunder.

## Chapter VIII. Implementation and Monitoring of PPPs

### Article 37. Monitoring and Reporting on the Implementation of PPPs

1. **Supervision by Contracting Authority.** Subject to the terms of the relevant PPP contract, the contracting authority shall be entitled to exercise such powers of supervision and monitoring of any PPP as may be necessary to satisfy itself that it is being implemented in accordance with its terms, including by means of regular reports, reasonable access to the site and physical assets comprised in it, access to and copies of any documentation relating to it and independent audits.

2. **Contracting Authority Reports.** Each contracting authority shall prepare regular reports on the implementation of the PPP projects for which it is responsible, as required by the PPP regulations or otherwise by the Government from time to time, which shall be made available to the Government and copied where required to the PPP Unit [or other applicable Competent Body]. Copies of all such reports shall generally be publicly available.

3. **Additional Information.** Each contracting authority shall also provide any additional specific information to the Government and/or the PPP Unit [or other applicable Competent Body] as it may reasonably require from time to time in relation to the implementation of any PPPs for which such contracting authority is responsible.

4. **Contracting Authority Records.** Each contracting authority shall maintain accurate and complete records in reasonable detail of the procedures followed, decisions made, and conclusions reached by it in connection with the identification, selection, preparation, procurement, and implementation of any PPP for which it is responsible.

### Article 38. PPP Database and Register

1. **PPP System Database.** The Government or the PPP Unit shall maintain a detailed database covering all PPPs implemented in [*host country*] [after the date of this law], containing such information as may be required by the PPP regulations. The database shall be designed to provide a reasonably comprehensive, up-to-date, and clear compendium of material information about the PPP projects that have been or are being implemented in [*host country*] at any one time.

2. **Database Publicly Available.** The PPP database shall be publicly available, subject to any applicable confidentiality or non-disclosure restrictions permitted by the PPP regulations or Applicable law.

## Chapter IX. Transitional and Final Provisions

### Article 39. Entry into Force

1. **Effective Date.** This law shall enter into force on [ ] but shall not (save to the extent otherwise provided herein, including under paragraph 2 or in the PPP regulations) apply to any PPPs or equivalent or similar projects implemented, or tenders or similar procedures held and substantially completed for their award, or agreements or binding commitments entered into by the contracting authority in relation to them, before that date.
2. **Monitoring Antecedent Projects.** The Government shall be entitled to require that any existing PPPs (or equivalent or similar projects) implemented before the date of entry into force of this law become subject to the monitoring and reporting requirements provided for in Article 37 (but without limiting any rights of cost recovery that the parties to any relevant agreements may have as a result of meeting any such requirements).

### Article 40. Legislative Acts to be Invalidated upon Entry into Force of this Law

1. **Invalidation.** The following legislative Acts shall be invalidated upon entry into force of this law: [*specify*]
2. **Conflict with Antecedent Laws.** In the event of any conflict or inconsistency between this law and any extant prior laws relating to or applying to PPPs in [*host country*], the provisions of this law shall prevail (unless specifically provided otherwise).

### Article 41. Consequential Revisions to Existing Legislation

1. **Disapplication of Specific Laws.** The provisions of the following laws shall not apply to PPPs awarded or implemented after the date of entry into force of this law pursuant to Article 39 above, subject to the additional qualifications specified below:
2. [*Alternative 1*] **Specific Amendments to Existing Laws.** The following amendments shall be made or be deemed to have been made to the following existing laws and legislative acts in order to give effect to the provisions of this law: [*specify*]
3. [*Alternative 2*] **Deadline for Consequential Revisions.** The Government shall, within a period of [ ] months from the date of entry into force of this law, amend, modify or repeal any other Applicable laws relating to or affecting PPPs as necessary to bring the same into conformity with this law.

[ENACTMENT FORMALITIES TO BE SET OUT BELOW]

End of document

## Annex I

### List of Participating Members of the Project Team in Phase I

**Team Leader:** Christopher Clement-Davies

#### A. List of Drafting Group Members

<i>Name</i>	<i>Title</i>	<i>First name</i>	<i>Last name</i>	<i>e-Mail</i>	<i>Organisation</i>
Motoko Aizawa	Ms.	Motoko	Aizawa	<a href="mailto:motoko@motokoaizawa.com">motoko@motokoaizawa.com</a>	Independent Consultant. Former World Bank expert
Roman Churakov	Mr.	Roman	Churakov	<a href="mailto:Roman.Churakov@hsf.com">Roman.Churakov@hsf.com</a>	Herbert Smith Freehills
Christopher Clement-Davies	Mr.	Christopher	Clement-Davies	<a href="mailto:c.clement-davies@virginmedia.com">c.clement-davies@virginmedia.com</a>	C. Clement-Davies. (Independent Consultant and Investor)
John Crothers	Mr.	John	Crothers	<a href="mailto:Crothers@gide.com">Crothers@gide.com</a>	Partner at Gide Loyrette Nouell
Bruno de Cazalet	Mr.	Bruno	de Cazalet	<a href="mailto:cazaletconsult@gmail.com">cazaletconsult@gmail.com</a>	Independent Consultant
Alexander Dolgov	Mr.	Alexander	Dolgov	<a href="mailto:alexander.dolgov@squirepb.com">alexander.dolgov@squirepb.com</a>	Squire Patton Boggs Moscow LLC
Richard Ginks	Mr.	Richard	Ginks	<a href="mailto:richard.ginks@linklaters.com">richard.ginks@linklaters.com</a>	Partner at Linklaters
Thomas Hamerl	Mr.	Thomas	Hamerl	<a href="mailto:Thomas.Hamerl@cms-rrh.com">Thomas.Hamerl@cms-rrh.com</a>	Partner, CMS
Vladimir Kilinkarov	Mr.	Vladimir	Kilinkarov	<a href="mailto:vladimir.kilinkarov@dentons.com">vladimir.kilinkarov@dentons.com</a>	Dentons/PhD, Of Counsel, Head of Russian PPP Practice
Ian McGrath	Mr.	Ian	McGrath	<a href="mailto:ian.mcgrath@dentons.com">ian.mcgrath@dentons.com</a>	Dentons, Istanbul
Konstantin Makarevich	Mr.	Konstantin	Makarevich	<a href="mailto:konstantin.makarevich@squirepb.com">konstantin.makarevich@squirepb.com</a>	Squire, Patton, Boggs
Olga Revzina	Ms.	Olga	Revzina	<a href="mailto:olga.revzina@hsf.com">olga.revzina@hsf.com</a>	Herbert Smith Freehills
Chris Shugart	Mr.	Chris	Shugart	<a href="mailto:chris@shgrt.com">chris@shgrt.com</a>	Independent Consultant
Wim Timmermans	Mr.	Wim	Timmermans	<a href="mailto:timmermans@tsiblaw.com">timmermans@tsiblaw.com</a>	Timmermans & Simons Int'l Business Lawyers, the Netherlands
Don Wallace	Mr.	Don	Wallace	<a href="mailto:wallace@ili.org">wallace@ili.org</a>	International Law Institute (ILI)

<i>Name</i>	<i>Title</i>	<i>First name</i>	<i>Last name</i>	<i>e-Mail</i>	<i>Organisation</i>
Irina Zapatrina	Ms.	Irina	Zapatrina	<a href="mailto:irina.zapatrina@gmail.com">irina.zapatrina@gmail.com</a>	Chairman of the Board, Ukrainian PPP Centre
Alexei Zverev	Mr.	Alexei	Zverev	<a href="mailto:zvereva@ebrd.com">zvereva@ebrd.com</a>	EBRD

## B. List of Project Team Members

<i>Name</i>	<i>Title</i>	<i>First name</i>	<i>Last name</i>	<i>e-Mail</i>	<i>Organisation</i>
Motoko Aizawa	Ms.	Motoko	Aizawa	<a href="mailto:motoko@motokoizawa.com">motoko@motokoizawa.com</a>	Independent Consultant. Former World Bank expert.
Amer Al Adhadh	Mr.	Amer	Al Adhadh	<a href="mailto:aldoctor@gmail.com">aldoctor@gmail.com</a>	US Department of Commerce CLDP, Adjunct Faculty at Georgetown University
Saidi Amiri	Mr.	Saidi	Amiri	<a href="mailto:saidi0077@gmail.com">saidi0077@gmail.com</a>	President, Tanzania Investment Centre
Wilfried Bassale	Mr.	Wilfried	Bassale	<a href="mailto:wilfriedbassale@gmail.com">wilfriedbassale@gmail.com</a>	Senior associate, Lawyer, Etude d'Avocats Me Frabretti & associés
Patrick Blanchard	Mr.	Patrick	Blanchard	<a href="mailto:pmmocblanchard@gmail.com">pmmocblanchard@gmail.com</a>	President, PM BLANCHARD CONSULTING
Tomas Brizuela	Mr.	Tomas	Brizuela	<a href="mailto:tbrizuela@stp.gov.py">tbrizuela@stp.gov.py</a>	Head of PPP Procurements Department, part of The Technical Planning Secretary of Economic and Social Development, of the Paraguayan Government
Raushana Chaltabayeva	Ms.	Raushana	Chaltabayev	<a href="mailto:raushana.c@unicaselaw.kz">raushana.c@unicaselaw.kz</a>	Unicare, Law firm
Shaimerden Chikanayev	Mr.	Shaimerden	Chikanayev	<a href="mailto:schikanayev@gratanet.com">schikanayev@gratanet.com</a>	Partner, GRATA Law Firm
Rubayet Choudhury	Mr.	Rubayet	Choudhury	<a href="mailto:rubayet.choudhury@dlapiper.com">rubayet.choudhury@dlapiper.com</a>	Legal Director, Finance and Projects Group at DLA Piper
Roman Churakov	Mr.	Roman	Churakov	<a href="mailto:Roman.Churakov@hsf.com">Roman.Churakov@hsf.com</a>	Herbert Smith Freehills
Christopher Clement-Davies	Mr.	Christopher	Clement-Davies	<a href="mailto:c.clement-davies@virginmedia.com">c.clement-davies@virginmedia.com</a>	Clement-Davies Independent legal and policy adviser, consultant and investor

<i>Name</i>	<i>Title</i>	<i>First name</i>	<i>Last name</i>	<i>e-Mail</i>	<i>Organisation</i>
Anthony Coumidis	Mr.	Anthony	Coumidis	<a href="mailto:a.coumidis@mcbainscooper.com">a.coumidis@mcbainscooper.com</a>	Director Engineering & Environmental Initiatives
John Crothers	Mr.	John	Crothers	<a href="mailto:Crothers@gide.com">Crothers@gide.com</a>	Gide
Predrag Cvetkovic	Mr.	Predrag	Cvetkovic	<a href="mailto:pepicvetkovic@gmail.com">pepicvetkovic@gmail.com</a>	Present, European PROGRES Program
Giovannella D'Andrea	Ms.	Giovannella	D'Andrea	<a href="mailto:giovannella.dandrea@lexia.it">giovannella.dandrea@lexia.it</a>	Lexia
Bruno de Cazalet	Mr.	Bruno	de Cazalet	<a href="mailto:cazaletconsult@gmail.com">cazaletconsult@gmail.com</a>	Independent Consultant
Natalia Diatlova	Ms.	Natalia	Diatlova	<a href="mailto:n.diatlova@maximalegal.ru">n.diatlova@maximalegal.ru</a>	Partner, Maxima Legal LLC
Alexander Dolgov	Mr.	Alexander	Dolgov	<a href="mailto:alexander.dolgov@squirepb.com">alexander.dolgov@squirepb.com</a>	Squire Patton Boggs Moscow LLC
Daniel Escauriza	Mr.	Daniel	Escauriza	<a href="mailto:descauriza@stp.gov.py">descauriza@stp.gov.py</a>	PPP Projects Director, PPP Unit part of The Technical Planning Secretary of Economic and Social Development, of the Paraguayan Government
Marc Fornacciari	Mr.	Marc	Fornacciari	<a href="mailto:marc.fornacciari@dentons.com">marc.fornacciari@dentons.com</a>	Dentons, Paris
Marc Frilet	Mr.	Marc	Frilet	<a href="mailto:marc@frilet.com">marc@frilet.com</a>	Global Construction & Infrastructure Legal Alliance (GCILA)
Dominique Gatel	Mr.	Dominique	Gatel	<a href="mailto:dominique.gatel@veolia.com">dominique.gatel@veolia.com</a>	Veolia Secretariat General/Vice President, Public Affairs/ Water
Richard Ginks	Mr.	Richard	Ginks	<a href="mailto:richard.ginks@linklaters.com">richard.ginks@linklaters.com</a>	Senior partner at Linklaters
Bill Halkias	Mr.	Bill	Halkias	<a href="mailto:bhalkias@attikesdiadromes.gr">bhalkias@attikesdiadromes.gr</a>	Managing Director, Attica Tollway Operations Authority
Sulaiman Hallal	Mr.	Sulaiman	Hallal	<a href="mailto:sulaiman.hallal@me.com">sulaiman.hallal@me.com</a>	VP of Business Operation, Metito Utilities Ltd.
Thomas Hamerl	Mr.	Thomas	Hamerl	<a href="mailto:Thomas.Hamerl@cms-rrh.com">Thomas.Hamerl@cms-rrh.com</a>	Partner, CMS
Carla Hancock	Ms.	Carla	Hancock	<a href="mailto:carla.hancock@dlapiper.com">carla.hancock@dlapiper.com</a>	Legal Director, DLA Piper
Louise Huson	Ms.	Louise	Huson	<a href="mailto:Louise.huson@dlapiper.com">Louise.huson@dlapiper.com</a>	Senior Professional Support Lawyer, DLA Piper
Rufin Serge	Mr.	Rufin	Itoba	<a href="mailto:itobarufin@yahoo.fr">itobarufin@yahoo.fr</a>	Secrétariat permanent

<i>Name</i>	<i>Title</i>	<i>First name</i>	<i>Last name</i>	<i>e-Mail</i>	<i>Organisation</i>
Wilfrid Itoba		Serge Wilfrid			du Comité de privatisation, Ministère de l'économie, des finances, du budget et du portefeuille public
Tomasz Jedwabny	Mr.	Tomasz	Jedwabny	<a href="mailto:tomek.jedwabny@gmail.com">tomek.jedwabny@gmail.com</a>	Partner/Owner at JedwabnyLegal and partner at Arcliffe LLP
Daler Jumaev	Mr.	Daler	Jumaev	<a href="mailto:daler.jumaev@pamirenergy.com">daler.jumaev@pamirenergy.com</a> , <a href="mailto:farida.mamadaslamova@pamirenergy.com">farida.mamadaslamova@pamirenergy.com</a>	CEO, Pamir Energy Company
Vicky Kefalas	Ms.	Vicky	Kefalas	<a href="mailto:VKefalas@ccc.net">VKefalas@ccc.net</a>	Investment Committee Member, EUROPEAN FUND FOR STRATEGIC INVESTMENTS (EFSI)
Vladimir Kilinkarov	Mr.	Vladimir	Kilinkarov	<a href="mailto:vladimir.kilinkarov@dentons.com">vladimir.kilinkarov@dentons.com</a>	Dentons/PhD, Of Counsel, Head of Russian PPP Practice
Tham Lai Leng	Ms.	Tham	Lai Leng	<a href="mailto:tll@meinhardt-infra.com.sg">tll@meinhardt-infra.com.sg</a>	Executive Board Member, Director of Finance & Administration, Meinhardt Infrastructure Pte Ltd
Shijian Liu	Mr.	Shijian	Liu	<a href="mailto:shijian.liu@vstam.com.cn">shijian.liu@vstam.com.cn</a>	Junhe located in Beijing/NDRC
Veronica Lupu	Ms.	Veronica	Lupu	<a href="mailto:lupuveronica@hotmail.com">lupuveronica@hotmail.com</a>	Lawyer
Atef Majdoub	Mr.	Atef	Majdoub	<a href="mailto:atef.majdoub@pm.gov.tn">atef.majdoub@pm.gov.tn</a>	Head of the Office of the President of the Government Director General of the Concessions Monitoring Unit
Konstantin Makarevich	Mr.	Konstantin	Makarevich	<a href="mailto:konstantin.makarevich@squirepb.com">konstantin.makarevich@squirepb.com</a>	Squire, Patton, Boggs
Svetlana Maslova	Ms.	Svetlana	Maslova	<a href="mailto:maslova@gsom.pu.ru">maslova@gsom.pu.ru</a>	Head of the Center for PPP Studies, Graduate School of Management, St. Petersburg University
Ian McGrath	Mr.	Ian	McGrath	<a href="mailto:ian.mcgrath@dentons.com">ian.mcgrath@dentons.com</a>	Dentons, Istanbul
Marija Musec	Ms.	Marija	Musec	<a href="mailto:Marija.Musec@bmslegal.hr">Marija.Musec@bmslegal.hr</a>	Partner
Sreejith Narayanan	Mr.	Sreejith	Narayanan	<a href="mailto:Sreejith.Narayanan@ilfsindia.com">Sreejith.Narayanan@ilfsindia.com</a>	IL&FS Transportation Networks Limited
Jörg Nowak	Mr.	Jörg	Nowak	<a href="mailto:joerg.nowak@orca-consulting-group.com">joerg.nowak@orca-consulting-group.com</a>	ORCA Consulting Group GmbH



<i>Name</i>	<i>Title</i>	<i>First name</i>	<i>Last name</i>	<i>e-Mail</i>	<i>Organisation</i>
Rafael Pérez Feito	Mr.	Rafael	Pérez Feito	<a href="mailto:RPerezF@fcc.es">RPerezF@fcc.es</a>	International Operations Director, FCC Aqualia, FCC Servicios Ciudadanos
Manuel Protásio	Mr.	Manuel	Protásio	<a href="mailto:mp@vda.pt">mp@vda.pt</a>	Head of the Projects – Infrastructure, Energy & Natural Resources, Vieira de Almeida & Associados
Olga Revzina	Ms.	Olga	Revzina	<a href="mailto:olga.revzina@hsf.com">olga.revzina@hsf.com</a>	Herbert Smith Freehills
Peter Rowen	Mr.	Peter	Rowen	<a href="mailto:rowan@btinternet.com">rowan@btinternet.com</a>	Independent short-term Consultancy, Head - Centre of Excellence – Climate Resilience and Sustainability, Deloitte
Anastasia Rusinova	Ms.	Anastasia	Rusinova	<a href="mailto:anastasiya.r@lgls.ru">anastasiya.r@lgls.ru</a>	"Legal Studio" Law Firm Associate office GRATA International in Saint-Petersburg
Chris Shugart	Mr.	Chris	Shugart	<a href="mailto:chris@shgrt.com">chris@shgrt.com</a>	Independent Consultant
George Smyrnioudis	Mr.	George	Smyrnioudis	<a href="mailto:gesmyr@yahoo.com">gesmyr@yahoo.com</a>	Infrastructure Advisory Services Leader, Ernst & Young Business Advisory Solutions
Irina Viktorovna Taranova	Ms.	Irina Viktorovna	Taranova	<a href="mailto:taranovairina@yandex.ru">taranovairina@yandex.ru</a>	Professor of the Economic Analysis and Audit Department, Stavropol State Agrarian University
Wim Timmermans	Mr.	Wim	Timmermans	<a href="mailto:timmermans@tsiblaw.com">timmermans@tsiblaw.com</a>	Timmermans & Simons Int'l Business Lawyers, the Netherlands
Eleni Tyrogianni	Ms.	Eleni	Tyrogianni	<a href="mailto:etirogia@attikesdiadromes.gr">etirogia@attikesdiadromes.gr</a>	
Marius van Aardt	Mr.	Marius	van Aardt	<a href="mailto:marius.vanaardt@sembcorp.com">marius.vanaardt@sembcorp.com</a>	Managing Director, Sembcorp Silulumanzi
David Joachim Lubbertus van Ee	Mr.	David Joachim Lubbertus	van Ee	<a href="mailto:david.vanee@nautadutilh.com">david.vanee@nautadutilh.com</a>	Lawyer and Equity partner NautaDutilh
Marianne Viola	Ms.	Marianne	Viola	<a href="mailto:marianne.viola@gmail.com">marianne.viola@gmail.com</a>	Director –Infrastructure & Energy, Lloyds Banking Group London
Don Wallace	Mr.	Don	Wallace	<a href="mailto:wallace@ili.org">wallace@ili.org</a>	International Law Institute (ILI)
Lars Wellejus	Prof	Lars	Wellejus	<a href="mailto:Wellejus@fb3.fra-uas.de">Wellejus@fb3.fra-uas.de</a>	Frankfurt University of Applied Sciences
Parwana Zahib-Majed	Ms.	Parwana	Zahib-Majed	<a href="mailto:parwana.zahib-majed@dlapiper.com">parwana.zahib-majed@dlapiper.com</a>	Legal Director, PPP Projects Group of DLA

<i>Name</i>	<i>Title</i>	<i>First name</i>	<i>Last name</i>	<i>e-Mail</i>	<i>Organisation</i>
Irina Zapatrina	Ms.	Irina	Zapatrina	<a href="mailto:irina.zapatrina@gmail.com">irina.zapatrina@gmail.com</a>	Piper Chairman of the Board, Ukrainian PPP Centre
Alexei Zverev	Mr.	Alexei	Zverev	<a href="mailto:zvereva@ebrd.com">zvereva@ebrd.com</a>	EBRD

**Annex II****List of Participating Members of the Group of Experts in Phase II****Group Leader:** Marc Frilet

<i>Name</i>	<i>Title</i>	<i>First name</i>	<i>Last name</i>	<i>e-Mail</i>	<i>Organisation</i>
Primah Atungonza	Ms.	Primah	Atungonza	<a href="mailto:p.atugonza@afdb.org">p.atugonza@afdb.org</a>	African Development Bank
Buchman Louis	Mr.	Louis	Buchman	<a href="mailto:l.buchman@lexforce.paris">l.buchman@lexforce.paris</a>	Lexforce
Bueno Júlio César	Mr.	Julio César	Bueno	<a href="mailto:jbueno@pn.com.br">jbueno@pn.com.br</a>	Pinheiro Neto Advogados
Jean-Christophe Barth-Coullaré	Mr.	Jean-Christophe	Barth-Coullaré	<a href="mailto:jcbarth@wapp.org">jcbarth@wapp.org</a>	World Association of PPP Units & Professionals (WAPPP)
Deron Laure	Ms.	Laure	Deron	<a href="mailto:laure.deron25@gmail.com">laure.deron25@gmail.com</a>	Cathaylex Avocat
Einbinder Fred	Mr.	Fred	Einbinder	<a href="mailto:fred.einbinder@hotmail.com">fred.einbinder@hotmail.com</a>	Franco-American Attorney, Professor and Consultant
Fizelson Roger	Mr.	Roger	Fizelson	<a href="mailto:fizelsonr@cica.net">fizelsonr@cica.net</a>	Confederation of International Contractors' Association
Hernández-García Roberto	Mr.	Roberto	Hernández-García	<a href="mailto:rhernandez@comad.com.mx">rhernandez@comad.com.mx</a>	Comad SC
Hummel Gregory	Mr.	Gregory	Hummel	<a href="mailto:gregory.hummel@bclplaw.com">gregory.hummel@bclplaw.com</a>	Bryan Cave Leighton Paisner
Marchais Bertrand	Mr.	Bertrand	Marchais	<a href="mailto:marchaisbpatrice@gmail.com">marchaisbpatrice@gmail.com</a>	Business Development Advisor Europe, Multilateral Investment Guarantee Agency (MIGA), World Bank Group, Paris
Perry James	Mr.	James	Perry	<a href="mailto:jperry@ps-consulting.fr">jperry@ps-consulting.fr</a>	PS Consulting
Piron Vincent	Mr.	Vincent	Piron	<a href="mailto:Vincent.piron@gmail.com">Vincent.piron@gmail.com</a>	Piron Consulting
Sauvaget Guillaume	Mr.	Guillaume	Sauvaget	<a href="mailto:gsauvaget@ps-consulting.fr">gsauvaget@ps-consulting.fr</a>	PS Consulting
Touroude Richard	Mr.	Richard	Touroude	<a href="mailto:tourouder@fnfp.fr">tourouder@fnfp.fr</a>	Association of French International Contractors
Vallée Maude	Ms.	Maude	Vallée	<a href="mailto:m.vallee@afdb.org">m.vallee@afdb.org</a>	African Legal Support Facility (ALSF)
Van Wassenaeer Arent	Mr.	Arent	Van Wassenaeer	<a href="mailto:arent@thefaithfulgoose.com">arent@thefaithfulgoose.com</a>	The Faithful Goose b.v.