

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 43: REFINANCING

DBFOM CONTRACT

INTRODUCTION

There are opportunities for a PPP Co's investors to re-arrange their debt, and make significant savings, especially after construction is complete. This drafting provides for the Authority to share in this gain. For this to work, the Authority needs to know when there is to be a refinancing, and needs some control.

Financial advice should be sought (usually from the NDFA) to ensure that the post refinancing financial and contractual structure reflects the best interest of both the Exchequer and the State Authority.

Return of Risk –

Where the public sector provides equity or debt this may impact on the previous risk sharing profile and may alter the accounting treatment of the project (Eurostat).

Additional Permitted Borrowings –

These are additional amounts borrowed under the Senior Credit Providers Agreements above the level contemplated at financial close. Distinction should be made between additional borrowing to meet the changing needs of the client and additional permitted borrowing undertaken where project failure by the Special Purpose Company (SPC) or the banks (when they exercise their step in rights) is imminent. In the case of the latter the additional permitted borrowings should not be included in the definition of senior debt in determining compensation on termination for operator default. Adopting this approach gives the Senior Credit Providers the incentive to step-in to rescue the project instead of simply adding additional finance and then, if unsuccessful, relying on a termination payment to repay all their original debt and the additional permitted borrowings. This style of borrowing may also be referred to as rescue refinancing.

When considering a refinancing request the Authority should carefully evaluate whether the proposal could:

- Create contingent liabilities for the Authority not envisaged in the original contract arrangement;

- Leave the project in a financially vulnerable position without a significant financial buffer, available to the PPP Co., to address adverse operating conditions at some later point in the contract.

State Authorities should be aware that previous contracts achieved a 50% share of the gains received from a refinancing exercise. The State Authority should automatically receive a share of the senior debt refinancing and should request the tender to identify as part of their tender submission the share of the Junior debt they are willing to supply to the State Authority.

Where the PPP Co. refinances their project (when their project is performing below the projected levels in the original financial close base case) then they can apply the benefits of the refinancing exercise to restore this base case prior to sharing with the Authority. Note: If as a result of this action the future performance of the project exceeds expectations then the Authority may wish to consider making a provision to receive those benefits previously foregone.

SoPC3 GUIDANCE

SoPC3 provides the following commentary regarding Refinancing (Section 35) [of the SoPC3 Guidance – see below] and the related issue of the rationale behind ensuring that the funding agreements between the Lenders and the Contractor are not amended (Section 21.3) [below]:

21.3 CERTAINTY OF COMPENSATION PAYMENT AMOUNTS

21.3.1 *Compensation payments where there has been a voluntary termination (see Section 20.5.2 (Compensation on Voluntary Termination) [of the SoPC3 Guidance]), a termination for Authority Default (see Section 20.1.3 (Compensation on Termination for Authority Default) [of the SoPC3 Guidance]), force majeure (see Section 20.3.2 (Compensation on Termination for Force Majeure) [of the SoPC3 Guidance]), corrupt gifts and fraud (see Section 20.4.3 (Compensation on Termination for Corrupt Gifts and Fraud) [of the SoPC3 Guidance]) or wilful breach of the refinancing provisions (see Section 20.6.2 (Compensation on Termination for Breach of the Refinancing Provisions) [of the SoPC3 Guidance]) are all calculated in whole or in part by reference to the level of the Contractor's Senior Debt outstanding at the time of the termination payment.*

21.3.2 *Authorities should be concerned to ensure that the level of Senior Debt outstanding at any time is not inflated in a way that will significantly and unexpectedly increase the Authority's liability on termination. The Contract should always ensure that the amount of Senior Debt and Junior Debt cannot be artificially inflated.*

21.3.3 *The Contractor may, during the course of the Contract, refinance or reschedule its debt obligations. This may be either to lower its financing costs and increase its return (see Section 35 (Refinancing) [of the SoPC3 Guidance]) or to attempt to save the Project if it is in difficulties due to construction delays, cost overruns or temporary poor performance. In the latter case, it is in the interests of all parties to ensure that a rescheduling of debt can take place as quickly as possible, without the need for the Contractor and/or Senior Lenders to obtain consents from the Authority. To reflect this principle, Section 35 (Refinancing) [of the SoPC3 Guidance] states that any Refinancing that does not increase the Equity IRR above that projected in the Base Case shall not require the prior consent of the Authority. If the Project is in difficulty and in need of rescue, the Senior Lenders will also be reluctant to rescue the Project unless they*

know that any rescheduled or new Senior Debt required to rescue the Project will be compensated if the Authority chooses to terminate voluntarily, or termination occurs as a result of Authority Default, Force Majeure or Corrupt Gifts.

21.3.4 *The Senior Lenders will only agree to reschedule or commit new Senior Debt to the Project as a last resort. In recognition of this and to protect the Authority from Senior Debt levels being artificially inflated, the amount of compensation payable by the Authority in respect of Senior Debt on early termination should only include additional Senior Debt if it was incurred either under a “standby” facility committed at financial close or alternatively if this constitutes Additional Permitted Borrowing. This provision does not preclude Senior Lenders otherwise relying upon compensation payable to equity investors upon early termination for recovery of rescheduled or increased levels of Senior Debt.*

21.3.5 *In certain termination scenarios, the amount payable will be adjusted for any Additional Permitted Borrowing advanced by Senior Lenders (on a rescue refinancing) – see Section 20.1.3 and definitions in Section 1.8.1 and Annex 4, “Permitted Borrowing” [of the SoPC3 Guidance].*

21.3.6 *Following the making of any Additional Permitted Borrowing if the project terminates early on the grounds of Authority Voluntary Termination or Authority Default or Force Majeure, the Authority will pay to the Contractor:*

- *the Senior Debt, plus the Additional Permitted Borrowings less any Distribution made while the Additional Permitted Borrowing is outstanding (the “New Senior Debt Amount”). The Senior Lenders are protected even if the New Senior Debt Amount exceeds the aggregate amount which would have been payable (to both debt and equity) had no Additional Permitted Borrowing been made (the “Original Aggregate Compensation Amount”);*
- *if the New Senior Debt Amount is greater than the Original Aggregate Compensation Amount, the Shareholders and Subordinated Lenders will receive no termination payment;*
- *(if the Original Aggregate Compensation Amount is greater than the New Senior Debt Amount, the Shareholders and Subordinated Lenders will, broadly, be paid the excess.*

21.3.7 *Distributions made while such Additional Permitted Borrowing is outstanding will reduce the amount payable to the Senior Lenders in various circumstances (and it may be that the Senior Lenders would therefore cash collateralise any such amount which would otherwise have been distributed until the Additional Permitted Borrowing is fully covered). The amount of the Additional Permitted Borrowing which may be lent in this way is 10% of the initial principal commitment, reducing to 5% at such time as the initial principal senior debt is 50% paid down.*

There is also a requirement in the Direct Agreement for the Authority to be notified of any such Additional Permitted Borrowing, and the reasons for it, and to be notified, on an ongoing basis, of Distributions then made.

21.3.8 *Senior Lenders, of course, remain able to advance new monies to the Contractor with the express consent of the Authority, but this Additional Permitted Borrowing provision will offer the Senior Lenders flexibility to rescue projects in difficulty without having to obtain the prior consent of the Authority and without having to step-in to the project. Authorities should not give their consent to other increases to their liabilities on termination (see Section 21.3) until such time as the Contractor/Senior Lenders have exhausted their rights to put more money into the project by way of Permitted Borrowing. See further Sections 20.1.3.8 to 20.1.3.11 [of the SoPC3 Guidance]. The Authority should also consider the relationship between these provisions and Section 35 (refinancing) [of the SoPC3 Guidance] if a request is received to increase the Authority’s termination liabilities beyond the extent permitted for Permitted Borrowings.*

Required drafting is set out below:

21.3 Changes to Financing Agreements

No amendment, waiver or exercise of a right under any Financing Agreement shall have the effect of increasing the Authority's liabilities on early termination of this Contract unless:

- (a) the Contractor has obtained the prior written consent of the Authority; or*
- (b) it is a Permitted Borrowing.*

35. REFINANCING

35.1 INTRODUCTION

35.1.1 *The key principles underlying the Government's approach to Refinancing are as follows:*

- Refinancings carried out in accordance with this guidance can be of benefit to both the Contractor and the Authority; accordingly, proposals for refinancings made by the Contractor should be welcomed and considered positively by the Authority.*
- A refinancing will normally constitute a material change to the financial and economic structure of a PFI project as originally agreed at Financial Close between the Authority and the Contractor. An Authority should therefore have the right to be fully informed of any refinancing, and approval rights over refinancings other than those which were part of the original Financial Close Base Case financing plan or do not lead to a gain for investors compared to the original Base Case.*
- A long term contractual commitment by an Authority to purchase a service, at a pre-determined price, with contractual certainty for financiers through, for example, the operation of termination provisions, is likely to be central to the original financing of the Project and to any refinancing gain arising. The Contractor could not itself achieve such fine terms of finance, particularly as regards gearing and pricing, without such contract terms. The Authority has a natural right to share in gains which are made possible by the strength of this contractual credit.*
- An increase in returns to investors in the Contractor due to improved efficiency or performance, over and above what was anticipated when the contract was let should be for the investors' account unless it falls within the scope of benchmarking, market testing, upside sharing or similar provisions of the Contract. However, improvements to loan margins, and beneficial changes to the term and leverage of any debt finance raised to fund the project are not viewed as mainly due to efficiency improvements and, consequently, any benefits that arise from such changes should be shared between the Authority and investors.*
- As the PFI/PPP market matures and its stability is assured, finer terms have and should continue to become available. In the broadest sense, both the public sector and the private sector will contribute in bringing about this improvement. Through refinancings, projects are able to gain access to these finer terms as they become available and, given their joint contribution to this state of affairs, both the public sector (in this case the Authority) and the private sector (in this case investors in the Contractor) should share in the benefits arising. The Public Accounts Committee has highlighted the importance of the public sector sharing equitably in "windfall gains" associated with a PFI project. This has particular relevance to changes in available terms of finance which are often heavily influenced by factors external to the Project.*
- A 50:50 sharing of refinancing gains between the Authority and the Contractor gives a reasonable balance between these factors.*
- Refinancing gains should be measured by reference to the Project as it is performing at the time of refinancing, to enable the investors to benefit from improvements in efficiencies achieved by the Contractor to date and forecast to be achieved in the future; but if the Project is performing below the levels projected in the original Financial Close*

Base Case financial model, the investors are entitled to apply the benefits of refinancing to restore this Base Case projected performance prior to sharing with the Authority.

35.1.2 *This Section takes account of the NAO report “The Refinancing of the Fazakerley PFI Prison Contract” published in June 2000, as well as subsequent recommendations of the House of Commons Public Accounts Select Committee.*

35.2 WHAT IS A REFINANCING?

35.2.1 *During the life of the Project, the Contractor may wish to replace, augment or change the structure, nature or terms of the financing solution that it put in place at Financial Close for the purposes of financing the Project. Where such restructurings or changes will have the effect of increasing or accelerating distributions to investors or of reducing their commitments to the Project, these effects are individually and collectively referred to as Refinancing Gains.*

35.2.2 *A non-exclusive list of transactions which could be undertaken by the Contractor following financial close and which could give rise to a Refinancing Gain is set out below:*

- *reduction in interest margins;*
- *reduction or release of reserve accounts;*
- *release of contingent junior capital;*
- *extension in the maturity of debt;*
- *increase in the amount of debt; and*
- *refinancings undertaken without the direct involvement of the Contractor, for example through a special purpose holding company, but which rely upon rights being granted in respect of the cash flow, assets or contracts of the Contractor.*

35.2.3 *Authorities should ensure that they review all finance documents prior to Financial Close and are provided with conformed copies of these at Financial Close. Authorities should further ensure that, if the Project is financed through an intermediate holding or associated company structure, the contractual restrictions on Refinancing are drafted to reflect this.*

35.2.4 *Refinancing is likely to be a matter for consideration by the Authority at different times during the life of a Project, notably when developing Contract terms in advance of the competition, when appraising bids submitted in response to the ITN and during the Contract period itself. The complexity of refinancings means that it is important that Authorities seek appropriate advice when considering the subject and they should consult with their respective sponsoring Departments, Private Finance Units or HMT if there is any doubt about how the principles can best be applied in individual projects. It is also very likely that Authorities will need to seek the assistance of appropriate external advisers in respect of the financial and legal issues arising from refinancings both to ensure that this Guidance is properly reflected in project documentation and in any negotiations with the private sector on proposed refinancings.*

35.3.1 General

35.3.1.1 *An Authority should have approval rights for refinancings other than those which were part of the original Financial Close Base Case financing plan or which do not lead to a gain for investors compared to the original Base Case. The latter will include refinancings undertaken to rescue a Contractor from financial difficulty – so called “rescue refinancings”.*

35.3.1.2 *Refinancing of PFI projects is one way in which both the Authority and investors in the Contractor can share in the benefits of a successful project. Accordingly, Authorities should be receptive to proposals from the Contractor to refinance, and are encouraged to consent to such proposals. However, when evaluating a refinancing proposed by the Contractor, an Authority should consider carefully whether the effects of such proposal could:*

- *increase the risk facing the Authority without conferring on it commensurate reward;*

- *reduce incentives for the Contractor to achieve sustained service standards, particularly in later years;*
- *undermine the financial stability of the Contractor, thereby endangering the provision of services.*

35.3.1.3 *When considering a request for consent to a refinancing the Authority should assess the Contractors' proposals objectively. There may be occasions where, for good reasons, the Authority refuses to consent to a refinancing, despite the Contractor offering to share the gain arising in line with the principles set out above. In this situation, the Authority should be prepared to give its reasons to the Contractor for not consenting in a transparent manner. The Authority should also not unduly delay its response to any proposal.*

35.3.1.4 *A refusal to consent might arise, for example, where the Contractor proposes a new financing structure that the Authority perceives to be inherently much less flexible than the structure it replaces and the Authority places a high value on flexibility.*

35.3.1.5 *Generally, refinancings which increase the risks borne by the Authority (for instance, by replacing equity with debt) will also result in greater gains for sharing. The Authority's consent to a refinancing should be forthcoming if its 50% share of the gain arising from the refinancing is reasonable compensation for the increased risks it is being asked to bear as a result of the new financing structure, for example through contracting with a more highly geared counter-party.*

35.3.1.6 *Where a proposed refinancing involves an increase in termination liabilities, Contractors will need to secure the Authority's consent both to the refinancing itself and to the change in termination liabilities as these rights are separate and distinct.¹ In practice, many Authorities are likely to consider the Contractor's proposals on both a refinancing and any changes in termination liabilities on currently. An Authority should not use its separate approval rights over increases in termination liabilities to agree a greater than 50% share of the refinancing gain. In consequence, an Authority will be unlikely to agree to a refinancing that increases its termination liabilities unless the additional refinancing gain available to be shared, relative to a refinancing which does not involve such increase in termination liabilities, is judged to represent better value.*

35.3.1.7 *Increases in Senior Debt arranged for a PFI project, whether through the Contractor or otherwise having security (or other rights) over and/or recourse to the assets, contracts or cash-flow of the Contractor, beyond the original capital value of the Project should not be approved by the Authority without it first seeking appropriate professional advice.*

35.4 EXEMPTIONS

35.4.1 *The following transactions should not be subject to Authority consent or gain sharing:*

35.4.1 Junior Capital

35.4.1.1 *Disposals of investments or commitments of junior capital in the Contractor which are equity or equivalent, such as shareholder subordinated debt, which in terms of rights is equity in all but name². Similarly exempt, are transactions involving dividends paid on equity and debt service on shareholder subordinated debt, once such dividends and payments have left the security net of all creditors having rights in relation to the cash-flow, assets or contracts of the Contractor.*

35.4.2 Base Case Refinancings

35.4.2.1 *Authorities should, as always, be seeking to generate strong competition in their procurements. Since successful PFI projects are more likely to generate refinancing opportunities, the effect of this competition should be to encourage the Contractor to*

anticipate the gain from some refinancings within its original bid price. Such refinancings which are clearly and fully included within the original Financial Close Base Case financial model and taken into account in the calculation of the Unitary Charge should therefore be exempt from Authority consent and gain sharing up to the amount included in the Financial Close Base Case.

35.4.2.2 *To guard against the Contractor seeking to use this exemption to bypass the Refinancing Gain sharing provisions, the Authority and its advisers should conduct due diligence over the Base Case prior to financial close so as to clarify and agree any refinancing assumptions that have been demonstrably taken into account in the Unitary Charge bid at the time of BAFO, i.e. that a reasonable return on equity will only be achieved if and to the extent that these refinancings take place³. If an Authority receives a bid that claims to take into account future refinancings, the Authority should consult with its Department, relevant Private Finance Unit or HMT before selecting a preferred bidder.*

35.4.3 Corporate Finance

35.4.3.1 *Transactions originally undertaken on a strictly corporate finance basis should not be subject to the Refinancing provisions contained within this Section. The Authority (and its advisers) will need to conduct due diligence over the structure and nature of a bid being put forward on a "corporate finance" basis to satisfy itself that the funding solution being proposed is a corporate financing and not a structure designed to bypass the Refinancing provisions. Although bids should be reviewed on a case by case basis, the following represent features of a corporate financed bid:*

- *the bidding vehicle is a prime contractor with credible financial standing or the bidding vehicle is supported by credible guarantees from a member of its group;*
- *no direct agreements between the Authority and the bidder's funders;*
- *no assignments, acknowledgements or other documentation is given by the Authority in favour, or for the benefit of the bidder's funders;*
- *no reference to third party finance, or associated features such as interest rate hedges (whether equity, debt or other forms of finance) appear within the Contract, or other documents or letters entered into by the Authority;*
- *there is no third party creditor due diligence process;*
- *there is no movement in bid price once the bid is submitted following ITN for reasons of terms of finance.*

35.4.3.2 *This exemption from Refinancing Gain sharing applies only to the extent that such corporate finance arrangements are implemented at Financial Close, since the benefits to an Authority of a corporate finance approach (e.g. in terms of the Authority not bearing risk on terms of finance after receipt of bid) cannot be retrospectively introduced and are fundamental to the justification of this exemption. If the Contractor subsequently seeks to introduce limited recourse finance to a Project which has initially been corporate financed, it is likely that at least one of the features above will cease to apply and a renegotiation of the relevant terms of the Contract to reflect the new financial structure, financial model and allocation of benefits will be necessary at the time. The Authority should seek appropriate professional advice in such circumstances.*

35.4.4 Interest Rate Hedging

35.4.4.1 *Gains derived from fixing of interest rates for part or all of the Contract period at a lower rate than had been assumed at Financial Close, and hence used to calculate the Unitary Charge, should be exempt from Authority consent or gain sharing, subject to three conditions:*

- *if the Contractor wishes any interest rate hedging contracts to qualify as part of Senior Debt for the purposes of termination compensation under the Contract, these must be approved by the Authority;*

- *it is clear within the Contract that the Contractor bears all interest rate risks after Financial Close; and*
- *the Unitary Charge has been determined by reference to market interest rates for the full term of the Contract. If a Contractor elects not to hedge the interest rate on its Senior Debt over its full term from Financial Close, the interest rate at which it does partially hedge its Senior Debt will not necessarily be appropriate for determining the Unitary Charge, and Authorities must seek suitable financial advice on this matter at the time.*

35.4.5 Taxation and Accounting Policies

35.4.5.1 *Changes in taxation or in the Contractor's accounting policies, such as depreciation are not considered to be Refinancings. However, Authorities and their advisers must take care to ensure that the tax and accounting assumptions within bids are not unduly conservative or likely to change, for example under codes of practice already announced by the professional accounting authorities, but not yet implemented or by reference to precedents already agreed with the Inland Revenue which may be applicable to the Contractor.*

35.4.5.2 *Whilst they are not regarded as refinancings, changes in taxation or in the Contractor's accounting policies which involve amendments to project agreements to which the Authority is a party, or otherwise require its consent under separate provisions of the Contract, will quite clearly be subject to the Authority's approval in their own right at the time and subject to the usual critical examination as to their likely impact on risk, incentives and value for money. If the Authority is any doubt about the implications of such proposed changes, they should consult their respective Departmental Private Finance Unit or HMT.*

35.5 METHOD OF CALCULATING, SHARING AND PAYING BENEFITS

35.5.1 *The Contract should include the provisions in Section 35.8 below which specify how the benefits of any refinancing will be determined and shared between the Authority and investors in the Contractor. These provisions do not set out the detailed basis and method of calculating the gains, as these will vary from project to project and so need to be agreed between the parties at the time of the refinancing.*

35.5.2 *The high level principles for calculating, sharing and paying gains are set out below. It is mandatory that investors submit a bid which reflects these principles, however it may be appropriate in certain limited circumstances for the Authority to consider alternative bids as offering better value for money – for example where there is a substantial residual value or demand risk (e.g. tram projects), or where there is substantial third party income. In these situations the Authority should consider inviting bids on an alternative basis but should always ensure that a bid is also received on the basis of the provisions set out in this guidance. In such cases the Authority should always ensure that it evaluates both bids.*

35.5.1 Calculation

35.5.1.1 *The Refinancing Gain is derived from the changes in Distributions projected to take place after the refinancing, by comparison with the position immediately before the refinancing.*

35.5.1.2 *These changes can be both positive and negative. If, for example, the Contractor raises additional amounts of debt, the additional debt will probably be paid out as an immediate Distribution (e.g. to prepay amounts outstanding under Subordinated Financing Agreements), and hence will be an increase compared to the pre-refinancing position. Thereafter, however, as the amount of debt has increased, debt service payments will also be greater and hence future Distributions will be lower than the pre-refinancing position.*

35.5.1.3 *These positive and negative changes in the Distributions should be discounted to their net present value at the refinancing date: the result of this calculation is the Refinancing Gain.*

35.5.1.4 *Thus the Refinancing Gain is not necessarily an actual cash sum as at the refinancing date, and the payment of the Authority's share has to take this into account.*

35.5.1.5 *Insofar as payment of the Authority's share of the Refinancing Gain is tax-deductible, the benefit of this to the Contractor should be taken into account in the calculation.*

35.5.2 Discount Rate

35.5.2.1 *The discount rate to be used in the calculation set out in 35.5.1 is the original base case equity internal rate of return (IRR), since: This is the Threshold Equity IRR used for sharing the Refinancing Gain (cf. Section 35.5.3);*

- *if the investors did not undertake the Refinancing, this is the rate they would be earning from capital invested in the project, so the benefit of refinancing should be evaluated against that benchmark; and it is the effect of the Refinancing on equity returns which is being measured.*

35.5.2.2 *It is not appropriate to use alternative discount rates such as:*

- *the Equity IRR expected by investors in the project at the time of refinancing;*
- *the Project IRR;*
- *Senior Debt interest rate.*

35.5.2.3 *The equity IRR which an investor in the project at the time of the refinancing would expect (i.e. the then current market for investment returns) should not be used because it is not feasible to find an objective way of determining this rate in advance, and would provide opportunities to construct a rate at the time which is unduly favourable to one party or the other.*

35.5.2.4 *The project IRR should not be used because the purpose of the discount calculation is to look at the effect of changes in the debt structure or terms, which were not considered in the original project IRR calculation.*

35.5.2.5 *Similarly, using the debt interest rate as a discount rate is also inappropriate, because in many cases this would lead to an artificial reduction of the Refinancing Gain to zero.*

35.5.3 Sharing

35.5.3.1 *The Refinancing Gain should be shared 50:50 between the Authority and the Contractor. But the sharing of the Refinancing Gain with the Authority should only apply if the projected performance of the Project, at the time of refinancing, is above that included in the original Financial Close Base Case financial model.*

35.5.3.2 *In consequence, the original Base Case investor rate of return is of key significance to the Authority which, during the course of its due diligence, must satisfy itself of the reasonableness of this figure as the key threshold above which Refinancing Gain sharing applies. This may be a critical issue if competition has been weak, such that either the Base Case return is higher than can be justified or, conversely, the return is artificially depressed by the use of overly conservative assumptions (for example in relation to accounting policies, changes to which are exempt from gain sharing (see Section 35.4.5 above)).*

35.5.4 Payment

35.5.4.1 *The Authority's share should be taken either as:*

- (i) a cash sum at the time of Refinancing; and/or*
- (ii) by a reduced Unitary Charge.*

35.5.4.2 *In determining the appropriate form of Refinancing Gain sharing, the Authority should take note of the form and timing of Refinancing Gain obtained by the investors (i.e. if investors receive their return through prepayment of subordinated debt, the Authority should (other than in exceptional circumstances and cleared by the Authority's sponsoring Department or Private Finance Unit) also receive its share of Refinancing Gain through an initial cash sum).*

35.5.4.3 *Often, Refinancing Gains will be both immediate (e.g. by release of a reserve which can then be paid out as a Distribution) and long-term (e.g. by increasing the debt repayment period or reducing interest margins). In these cases, a mixture of cash lump sum and reduced Unitary Charge may be appropriate.*

35.5.4.4 *An Authority may elect (having discussed with its sponsoring Department or PFU) to receive its share of a Refinancing Gain through increased scope of services, subject to suitable value for money tests and the application of any relevant procurement procedures.*

35.5.4.5 *Where the Authority's share of Refinancing Gains is to be paid by way of a reduced Unitary Charge, the reduction in Unitary Charge should not be at risk to project performance even though the investors' share, which may well be projected to come through future dividend distributions, will be at risk.*

35.6 AUDIT RIGHTS AND TRANSACTION COSTS

35.6.1 *The Authority will need to ensure it has the right of access at any time (either before or after the Refinancing) to audit the financial model used by the private sector for the Refinancing and calculation of the Refinancing Gain, the underlying assumptions for the data and projections used in the model and to review documentation resulting from the refinancing, whether or not a refinancing appears to be subject to Authority consent and gain sharing.*

35.6.2 *These rights are important to enable the Authority to confirm whether the Refinancing is subject to its consent, to verify any calculations in respect of the sharing of Refinancing Gains, and to assess the impact (if any) of the refinancing on the Authority's termination liabilities and other considerations highlighted above, including any adverse impact on the private sector's incentive to sustain service standards throughout the term of the Contract, particularly in later years.*

35.6.3 *The Authority should be reimbursed by the Contractor for its reasonable costs of engaging suitable advisers to review refinancing proposals and to support the Authority in connection with implementing an agreed refinancing. The Refinancing Gain available for sharing will be calculated after deducting the reasonable third party costs incurred by the Contractor and the Authority in connection with the transaction.*

35.7 JOINT VENTURE PFI PROJECTS

35.7.1 *In some PFI projects, the Authority may elect to take equity in the Contractor by way of a shareholding and/or as a provider of subordinated debt. In the context of refinancing, the Authority has interests in the Project both as an investor in the Contractor and as counterparty to the Contract. Accordingly, the Authority will potentially take the benefit of any Refinancing Gain in both capacities, through a payment to it as Authority under the Contract and by way of an increase in Distributions to investors.*

20.6 TERMINATION FOR BREACH OF THE REFINANCING PROVISIONS

20.6.1 INTRODUCTION

20.6.1.1 *The Contract must deal comprehensively with termination as a result of a breach of the refinancing provisions by the Contractor.*

20.6.1.2 *A balance must be struck between the Authority's proper desire to incentivise the Contractor to be open and transparent in relation to refinancing, and the Senior Lenders' fear of losing their funding for reasons beyond their control due to the actions of the Contractor.*

20.6.2 COMPENSATION ON TERMINATION FOR BREACH OF THE REFINANCING PROVISIONS

20.6.2.1 *Equity investors should acknowledge that their relationship with the Contractor renders them responsible for the Contractor's acts – the level of return they expect reflects the greater risks that equity holders accept.*

20.6.2.2 *Regardless of whether or not the Assets have any alternative use, the level of compensation payable on termination for breach of the refinancing provisions should be the same as the level proposed on a termination for corrupt gifts or fraud (see Section 20.4.4 (Compensation on Termination for Corrupt Gifts and Fraud)). Required drafting is as follows:*

20.6.1 Termination by the Authority for Breach of the Refinancing Provisions

(a) If the Contractor wilfully breaches Clause 35.1 (Refinancing) [of the SoPC3 Guidance] then the Authority may terminate the Contract at any time on or before its Expiry Date by complying with its obligations under paragraphs (b) to (d) below.

(b) If the Authority wishes to terminate the Contract under this Clause, it must give notice to the Contractor stating:

(i) that the Authority is terminating the Contract under this Clause 20.6.1 (Termination by the Authority for breach of the Refinancing provisions) [of the SoPC3 Guidance];

(ii) that the Contract will terminate on the date falling [30] days after the date of receipt of the notice; and

(iii) whether the Authority has chosen to exercise its option under paragraph (c) below.

(c) On termination, the Authority shall have the option to require the Contractor to transfer to the Authority all of its right, title and interest in and to the Assets.

(d) The Contract will terminate on the date falling [30] days after the date of receipt of the notice referred to in paragraph (b) above;

20.6.2 Compensation on Termination for Breach of the Refinancing Provisions

On termination under Clause 20.6.1(d) above, the Authority shall pay the Contractor an amount equal to the amount payable under Clause 20.4 (Termination on Corrupt Gifts and Fraud) in accordance with [Section 21(Calculation and Payment of Early Termination Payments) [of the SoPC3 Guidance]].

CORE CONTRACT DRAFTING

43. REFINANCING

43.1 Part 11 (Refinancing) of [Clause 43 - Schedule] (Payment Mechanism) shall have effect in respect of any Refinancing.

43.2 Breach of Refinancing Provisions

- (a) If PPP Co wilfully breaches Clause 43.1 (Refinancing) (other than in respect of its obligations pursuant to paragraph 4 of Part 11 (Refinancing) to [Clause 43 – Schedule] (Payment Mechanism)) then the Authority may terminate the Agreement at any time on or before its Expiry Date by complying with its obligations under paragraphs (b) to (d) below.
- (b) If the Authority wishes to terminate the Agreement under this Clause, it must give notice to the PPP Co stating:
 - (i) that the Authority is terminating the Agreement under this Clause 43.2 (Termination for breach of the Refinancing provisions); and
 - (ii) that the Agreement will terminate on the date falling [●] ([●]) days after the date of receipt of the notice.
- (c) The Agreement will terminate on the date falling [●] ([●]) days after the date of receipt of the notice referred to in paragraph (b) above.
- (d) If this Agreement terminates pursuant to this Clause 43.2, the provisions of Clause 54.5 (Termination for Breach of Refinancing Provisions) shall apply.

43A. AMENDMENTS TO THE FUNDING AGREEMENTS

43A.1 Entitlement to Amend

For the avoidance of doubt, it is acknowledged that the PPP Co may enter into any amendment, variation or waiver of the terms of a Funding Agreement without submitting the relevant document or proposed course of action to the Authority's Representative pursuant to the Commercial Review unless the document or proposed course of action would:

- (a) have the effect that the performance by the PPP Co or any other party to any of the Funding Agreements or the Credit Providers' Direct Agreement of any of its or their respective obligations under such agreement would be liable to be accelerated; or
- (b) have a material adverse effect on the ability of the PPP Co to comply with its obligations under this Agreement; or
- (c) have the effect of inhibiting the ability of the PPP Co to comply with the terms of this Clause 43A or Clause 43 (Refinancing).

43A.2 Submission of Documents

The PPP Co shall submit to the Authority's Representative at the end of each Contract Year copies of any document entered into and details of any course of action taken with respect to the Funding Agreements during that Contract Year which were not submitted to the Authority's Representative pursuant to the Commercial Review during that Contract Year.

43A.3 No Increased Liability

Notwithstanding any other provision of this Agreement no liability or obligation of the

Authority under this Agreement (whether present, future, actual or contingent) shall be increased by any document or proposed course of action referred to in Clause 45A.1 (Entitlement to Amend) unless such matter has been the subject of an Approval issued pursuant to the Commercial Review under Clause 45A.1 (Entitlement to Amend), Clause 43 (Refinancing), [Clause 34 – Schedule A] (Variations) or such matter is a Permitted Borrowing.

[CLAUSE 43 - SCHEDULE]

Payment Mechanism

Part 11

Refinancing

The following definitions shall have the following meanings unless the context requires otherwise:

Distribution means:

- (a) whether in cash or in kind, any:
 - (i) dividend or other distribution in respect of share capital;
 - (ii) reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;
 - (iii) payments under the Junior Debt Documents (whether of principal, interest, breakage costs or otherwise);
 - (iv) payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms;
 - (v) the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms, or
- (b) the early release of any [Contingent Funding Liabilities], the amount of such release being deemed to be a gain for the purposes of any calculation of Refinancing Gain;

“EEA” means from time to time the European Economic Area as created by the Agreement on European Economic Area 1992 or any successor or replacement body, association, entity or organisation which has assumed either or both the function and responsibilities of the European Economic Area;

“Equity IRR” means the projected blended rate of return to the Sponsors over the full Contract Period, having regard to Distributions made and projected to be made;

“Exempt Refinancing” means:

- (a) any Refinancing that was fully taken into account in the calculation of the Unitary Charge;
- (b) a change in taxation or change in accounting treatment;
- (c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of:
 - (i) breach of representations and warranties or undertakings;
 - (ii) movement of monies between the Project Accounts in accordance with the Senior Credit Providers Agreement as at Financial Close;
 - (iii) late or non-provision of information, consents or licences;
 - (iv) amendments to Principle Sub-Contracts;
 - (v) approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Funding Agreements);

- (vi) restrictions imposed by the Senior Credit Providers on the dates at which the Senior Debt Amount can be advanced to the PPP Co under the Senior Credit Providers' Agreement and which are given as a result of any failure by the PPP Co to ensure that the Works are performed in accordance with the agreed Programme and which are notified in writing by the PPP Co or the Senior Credit Providers to the Authority prior to being given;
 - (vii) changes to milestones for drawdown set out in the Senior Credit Providers' Agreement and which are given as a result of any failure by the PPP Co to ensure that the Works are performed in accordance with the agreed Programme and which are notified in writing by the PPP Co or the Senior Credit Providers to the Authority prior to being given;
 - (viii) failure by the PPP Co to obtain any consent by statutory bodies required by the Senior Credit Providers' Agreement; or
 - (ix) voting by the Senior Credit Providers and the voting arrangements between the Senior Credit Providers in respect of the levels of approval required by them under the Senior Credit Providers' Agreement;
- (d) any amendment, variation or supplement of any agreement approved by the Authority as part of any Variation under this Agreement;
 - (e) any sale of shares in the PPP Co by the shareholders or securitisation of the existing rights and/or interests attaching to shares in the PPP Co; or
 - (f) any Qualifying Bank Transaction;

"Financial Close" shall have the meaning given to it in the Senior Credit Providers' Agreement;

"Insurance Undertaking" has the meaning given to it in the Insurance Act 1989.

"Net Present Value" means the aggregate of the discounted values, calculated as of the estimated date of a Refinancing, of each of the relevant projected Distributions, in each case discounted using the Threshold Equity IRR;

"Pre-Refinancing Equity IRR" means the nominal post-tax Equity IRR calculated immediately prior to a Refinancing;

"Project Accounts" means accounts referred to in and required to be established under the Senior Credit Providers' Agreement;

"Qualifying Bank" means a bank that is licensed pursuant to the Central Bank Act 1971 to carry on banking business in the State and to accept deposits in the State;

"Qualifying Bank Transaction" means:

- (a) the syndication by a Senior Credit Provider, in the ordinary course of its business, of any of its rights or interests in the Senior Credit Providers' Agreement;
- (b) the grant by a Senior Credit Provider of any rights of participation, or the disposition by a Senior Credit Provider of any of its rights or interests (other than as specified in paragraph (a) above), in respect of the Senior Credit Providers' Agreements in favour of (i) any other Senior Credit Provider (ii) any institution which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the State or any other EEA member state (iii) a local authority or public authority in the State (iv) a trustee of a charitable trust which has (or has had at any time during the previous two years) assets of at least [●] ([●]) Euro] (or its equivalent in any other currency at the relevant time) (v) a trustee of an occupational pension scheme or stakeholder pension scheme where the trust has (or has had at any time during the previous two years) at least [●] ([●]) members and assets under

management of at least $[\bullet]$ Euro (or its equivalent in any other currency at the relevant time) (vi) an EEA or Swiss Insurance Undertaking (vii) a Regulated Collective Investment Scheme (viii) any Qualifying Institution or (ix) any other institution in respect of which the prior written consent of the Authority has been given;

- (c) the grant by a Senior Credit Provider of any other form of benefit or interest in either the Senior Credit Providers' Agreement or the revenues or assets of the PPP Co, whether by way of security or otherwise, in favour of (i) any other Senior Credit Provider (ii) any institution specified in paragraphs (b)(ii) to (vii) above (iii) any Qualifying Institution or (iv) any other institution in respect of which the prior written consent of the Authority has been given.

"Qualifying Institution" means [];

Comment: Usually defined by reference to PPP Co's loan agreement.

"Qualifying Refinancing" means any Refinancing that will give rise to a Refinancing Gain that is not an Exempt Refinancing;

"Refinancing" means:

- (a) any amendment, variation, novation, supplement or replacement of any Funding Agreement;
- (b) the exercise of any right, or the grant of any waiver or consent, under any Funding Agreement;
- (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Funding Agreements or the creation or granting of any other form of benefit or interest in either the Funding Agreements or the contracts, revenues or assets of the PPP Co whether by way of security or otherwise; or
- (d) any other arrangement put in place by the PPP Co or another person which has an effect which is similar to any of (a)-(c) above or which has the effect of limiting the PPP Co's ability to carry out any of (a)-(c) above;

"Refinancing Gain" means an amount equal to the greater of zero and $[(A - B) - C]$, where:

A = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of the Contract following the Refinancing;

B = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of the Contract following the Refinancing; and

C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Threshold Equity IRR;

provided that any such amounts arising as a result of a Refinancing of the Junior Debt Documents shall be calculated separately from those amounts arising as a result of a Refinancing of the Senior Credit Providers' Agreements.

"Regulated Collective Investment Scheme" means a collective investment scheme established as an investment company, unit trust, common contractual fund or investment limited partnership which has been authorised by the Irish Financial Services Regulatory Authority pursuant to either the

UCITS or Non-UCITS Notices, as appropriate;

“Relevant Person” means a Sponsor and any of its Associated Companies;

“Threshold Equity IRR” means []%.

1. The PPP Co shall obtain the Authority’s prior written consent to any Qualifying Refinancing and both the Authority and the PPP Co shall at all times act in good faith with respect to any Refinancing.
2. The Authority shall be entitled to receive a [●]% share of any Refinancing Gain arising from a Qualifying Refinancing in relation to Senior Credit Providers’ Agreements and a [●]% share of any Refinancing Gain arising from a Qualifying Refinancing in relation to Junior Debt Documents.

Comment: Junior Debt is usually provided by equity investors, and is regarded a form of equity. It is unusual for the Authority to obtain a share in a rearrangement of the junior debt: here the PPP Co is invited to the tender the share of junior debt refinancing gain it will share with the Authority.

3. The Authority shall not withhold or delay its consent to a Qualifying Refinancing to obtain a greater than [●]% share of any Refinancing Gain arising in relation to Senior Credit Providers’ Agreements and/or a [●]%share of any Refinancing Gain arising in relation to Junior Debt Documents.
4. The PPP Co shall promptly provide the Authority with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Authority shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain used in connection with that Refinancing whether that Refinancing is a Qualifying Refinancing or not).
5. The Authority shall have the right to elect to receive its share of any Refinancing Gain as:
 - 5.1 a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing;
 - 5.2 a reduction in the Unitary Charge over the remaining term of this Agreement; or
 - 5.3 a combination of any of the above; or
 - 5.4 in such other form agreed between the parties.
6. The Authority and the PPP Co will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain and payment of the Authority’s share of the Refinancing Gain (taking into account how the Authority has elected to receive its share of the Refinancing Gain under Paragraph 5 above). If the parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of the Authority’s share, the dispute shall be determined in accordance with Clause 56 (Dispute Resolution).

The Refinancing Gain shall be calculated after taking into account the reasonable and proper professional costs that each Party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Authority will be paid to the Authority by the PPP Co within [●] Working Days of any Qualifying Refinancing.

ACCOMMODATION CONTRACT DRAFTING

(On Refinancing)

[●]. REFINANCING OF SENIOR DEBT

[●].1 Refinancing

[●].1.6 Where the Operator requires the Minister and the Institute to enter into a new direct agreement pursuant to this clause [●].1 the Operator shall reimburse the Minister and the Institute for any proper internal and professional costs incurred by them in consequence.

[●].1.7 Immediately following a Refinancing, the Operator will calculate the Refinanced Blended IRR by applying the Base Case input data but inputting the Model Adjustments including substituting the Refinanced Rates for the Effective Date Rates and including transaction or similar costs relating to the Refinancing, and shall deliver to the Minister an updated Financial Model showing the calculation of the Revised Blended IRR and, if the Refinanced Blended IRR is greater than the Blended IRR, the Refinanced Unitary Payment.

[●].1.8 In the event of any dispute between the Operator and the Minister as to the changes to be made in producing an updated Financial Model for the purpose of this Clause, the same shall be resolved under the Dispute Resolution Procedure.

KEY DEFINITIONS – USED IN CLAUSE 43 ACCOMMODATION CONTRACT DRAFTING

“Base Case” means the Financial Model at the date hereof or with the agreement of the Parties following any Refinancing, a Prepayment or an Eligible Change;

“Effective Date Rates” means Euribor plus the Margin (in respect of the Base Credit Facility) as such terms are defined in the Senior Loan Agreement (as at the date hereof) and payable by the Operator in respect of Original Senior Debt;

“Model Adjustments” means input data into the Financial Model to reflect the direct effects of the Refinancing, excluding any direct or indirect effect associated with changes in revenues, operating costs, lifecycle costs, construction programme costs, changes to macro-economic assumptions (including tax and accounting regimes), inflation, but including the transaction or similar costs of such Refinancing;

“Refinanced Rates” means the rate of interest payable to Funder in respect of Substitute Funding;

“Refinancing” means a refinancing of the arrangements under the Financing Agreements in respect of Senior Debt such that there is a change in the obligations or entitlements thereunder and includes any New Funding Arrangements or Substitute Funding but excluding any:

- (a) refinancing from the European Investment Bank; or
- (b) syndication or any waiver, variation, amendment, supplement, transfer or novation of the Senior Debt or Junior Debt which does not increase the liabilities of the Operator or the Minister under the Financing Agreements; or
- (c) increase in the Senior Debt and/or the Junior Debt which results from a Minister Change under [Clause 34 – Schedule A].

“Refinanced Blended IRR” or Ref IRR means the percentage number derived from the relevant

formula set out in the definition of Refinanced Unitary Payment;

“Refinanced Unitary Payment” means in respect of any Refinancing the reduced Unitary Payment for each Payment Year over the remainder of the Term commencing with the Payment Year in which the Refinancing occurs in order to produce a Refinanced Blended IRR calculated as follows:

$$\text{RefIRR} = \text{RevIRR} - ((\text{RevIRR} - \text{Blended IRR}) * 50\%)$$

“New Funding Arrangement” means any agreement or agreements entered into after the date of this Agreement in accordance with the terms of Clause 43 (Refinancing) (so far as applicable) the purpose of which is to provide Substitute Funding. If any New Funding Arrangement is substituted for a Financing Agreement the New Funding Arrangement will from the date upon which it is signed and takes effect become known as a Financing Agreement;

“Substitute Funding” means funding procured by the Operator the purpose of which is to replace in whole or in part the funding procured by the Operator under any Financing Agreement in place prior to the date of any New Funding Arrangement;

Comment: The Accommodation Contract channels the refinancing gain share through the Unitary Payment, and is a little more detailed as to how this will work. The Core Contract gives more flexibility as to how it is received: reduced unitary charge, lump sum payment, or other agreed form (such as an increased revenue share). Also, the Accommodation Contract has a specific provision for payment of the cost of dealing with a direct agreement with new lenders.

NRA MODEL CONTRACT DRAFTING

(On Refinancing)

Comment: The NRA Model Contract differs from the Core Contract in allowing more flexibility for “rescue refinancing” to prevent a loan default or in case of force majeure. It also gives detail on the procedure the PPP Co may follow, and gives a long list of reasons for the Authority to refuse consent. The NRA Model Contract only deals with refinancing of senior debt. The drafting for any project will need to take into account the terms of the senior and junior debt documents, for example in relation to the references to events of default in the senior debt documents and the interplay between senior and junior debt documents.

[●] REFINANCING

[●].1 Notice of Refinancing

Subject to Clause [●].5 (Rescue Refinancing), the PPP Co may from time to time propose to the Authority that there should be a Refinancing under the Funding Agreements provided:

- (a) it provides to the Authority notice of such proposed Refinancing at least 60 (sixty) days prior to the proposed Refinancing Date;
- (b) it provides at the same time as the notice of the Refinancing referred to at (a) above is given to the Authority full details of the proposed Refinancing (including, details of the changes, if any, in the Financial Model, any material changes in the PPP Co’s obligations (including, for the avoidance of doubt, contingent obligations) to the Credit Providers, the anticipated Refinancing Benefit and outline details of the changes and/or replacements, as the case may be, to the Funding Agreements contemplated by the Refinancing);
- (c) it provides the Authority reasonable opportunity (being at least 30 (thirty) days) before

- the proposed Refinancing Date to review and comment on the documents being entered into in connection with the Refinancing; and
- (d) no Refinancing shall take place without the Authority's prior consent.

[●].2 Authority Consent

The Authority may only refuse (or, except where otherwise agreed by the Authority, shall be deemed to have refused its consent) to a Refinancing proposed in accordance with Clause [●].1 (Notice of Refinancing) if:

- (a) it considers (acting reasonably) that the information disclosed to it pursuant to Clause [●].1 (Notice of Refinancing) is not a true and complete disclosure of all relevant aspects of the Refinancing; or
- (b) it considers (acting reasonably) that any change or series of changes in the obligations of the PPP Co would result in the Authority's liabilities and/or obligations being increased, or would give rise to a risk which is unacceptable to the Authority having regard to the benefit being received by it (acting reasonably); or

Comment: It may be necessary to include some headroom for a degree of pre-approved increased borrowing. This will then be similar to the provision for 'permitted borrowing' which can increase the Authority's liability on termination under the Core Contract; discussed at DBFOM Contract Clause 54 (Compensation on Termination).

- (c) such Refinancing would result (whether with the lapse of time or expiry of notice or otherwise) in a change in control of the PPP Co for which the Authority's consent is required but has not been given in accordance with Clause [●] (Change in Control); or
- (d) the Authority considers (acting reasonably) that such Refinancing would have a material adverse effect on the ability of the PPP Co to perform its obligations under this Agreement; or
- (e) an Event of Default or an event which with the lapse of time and/or giving of notice, would become an Event of Default has occurred and is continuing; or
- (f) any document being entered into by the Authority in connection with the Refinancing is not, in form and substance, satisfactory to it (acting reasonably); or
- (g) the PPP Co has not provided to the Authority confirmation from an independent firm of accountants (the identity of which has been approved by the Authority in advance in writing) that the Financial Model prepared in connection with the Refinancing is true and correct and that the assumptions and methodologies used in such Financial Model are consistent with the information supplied to the Authority in connection with the Refinancing; or
- (h) any of the other requirements specified by this Clause [●] (Refinancing) have not been satisfied by the PPP Co.

[●].3 Financial Model

- (a) In fulfilling its obligations under this Clause [●] (Refinancing) in connection with a Refinancing, the PPP Co and (in the case of Clause [●].3(a)(i) below only) the Authority:
- (i) shall act in good faith; and
- (ii) in preparing its projections of the Refinancing Benefit shall Re-Optimise the Financial Model and ensure that methods and assumptions used in calculating the Refinancing Benefit are the same as in the Financial Model (except to the extent a change in an assumption is warranted to reflect the Refinancing).

Any difference in any underlying assumption or method being used in the calculation of the Refinancing Benefit to that contained in the Financial Model shall be highlighted and the reason for the difference shall be highlighted. It shall be open to the Authority to seek further clarification as to the reasons for any such difference.

- (b) On the Refinancing Date, the PPP Co and the Authority shall execute a supplement to this Agreement which shall, with effect from the Refinancing Date, replace the Financial Model with the revised Financial Model. Upon the Refinancing Date, the revised Financial Model shall become the Financial Model for the purposes of this Agreement and the replaced Financial Model shall cease to be so regarded.
- (c) The PPP Co shall, on execution of the supplement contemplated by (b) above, comply with its obligations under Clause [●] (Custody of Financial Model) in respect of the replacement Financial Model.

[●].4 Refinancing Benefit

- (a) The PPP Co shall pay to the Authority 50% (fifty percent) of the Refinancing Benefit. The PPP Co shall pay each such amount on the date or dates contemplated by the revised Financial Model, subject to the Authority having the right to elect to receive its share of any Refinancing Benefit as:
 - (i) a single payment in an amount less than or equal to the increased distributions arising from the Refinancing on or about the date of the Refinancing;
 - (ii) an annual payment over the remaining term or part of the remaining term of the Contract including interest at the Funding Interest Rate; or
 - (iii) a combination of any of the above,

and such amount shall be paid irrespective of whether the PPP Co has actually received such Refinancing Benefit (or part thereof) provided that the PPP Co's obligation to pay such sums may be deferred (and they shall not be treated as due for the purposes of this Agreement) to the extent that:

- (A) the making of such payments would give rise to a breach of Clause [●] of the Funding Agreements; and

Comment: This will refer to the provision in the funding agreements restricting distributions.

- (B) no amount in respect of, or relating to, Refinancing Benefit is being received directly or indirectly by any of the Sponsors and/or any member of their Group and/or the PPP Co during the period of such deferral,

and in such circumstances interest shall be applied to such payments at the Funding Interest Rate during the period of such deferral.

- (b) The Authority and the PPP Co will negotiate in good faith to agree the basis and method of calculation of the payment of the Authority's share of the Refinancing Benefit under Clause [●].4(a). If the parties fail to agree the basis and method of calculation of the payment of the Authority's share, Clause [●] (Disputes Resolution Procedure) shall apply.
- (c) Without prejudice to the foregoing, the PPP Co acknowledges that it shall be responsible for, and shall arrange the discharge of, the fees, costs and expenses incurred by the Authority in connection with a Refinancing, to the extent such fees, costs and expenses have been included as "Allowable Costs" in connection with such Refinancing.

[●].5 Rescue Refinancing

- (a) The PPP Co may propose to the Authority that there should be a Rescue Refinancing, provided that:
 - (i) it provides to the Authority notice of such proposed Rescue Refinancing as soon as it is aware that a Rescue Refinancing is proposed and in any event at least 10 (ten) Working Days prior to the Refinancing Date and including in such notice details of the anticipated Refinancing Date;
 - (ii) it provides, at the same time as the notice of the Refinancing referred to at [●].5(a)(i) above is given to the Authority, such details of the proposed Rescue Refinancing as are available to it at that time (including, in each case only to the extent available, details of the changes, if any, in the Financial Model, any material changes in the PPP Co's obligations (including, for the avoidance of doubt, contingent obligations) to the Credit Providers, the anticipated Refinancing Benefit and outline details of the changes and/or replacements, as the case may be, to the Funding Agreements contemplated by the Rescue Refinancing);
 - (iii) it provides to the Authority as soon as reasonably practicable and no later than 7 (seven) Working Days before the Refinancing Date, the documents being entered into in connection with the Rescue Refinancing; and
 - (iv) no Rescue Refinancing shall take place if the Authority, acting reasonably, objects to such Rescue Refinancing prior to the Refinancing Date.
- (b) Immediately following any Rescue Refinancing, the Authority may, at PPP Co's cost, review the Financial Model as updated for actual performance prior to, and taking into account the effect of, the Rescue Refinancing. If such review demonstrates that a Refinancing Benefit would accrue, then the provisions of Clause [●].4 (Refinancing Benefit) shall apply.
- (c) Following any Rescue Refinancing, the PPP Co is required to update the Financial Model existing prior to the Rescue Refinancing in order to take account of the effect of the Rescue Refinancing (excluding, for the avoidance of doubt, actual performance prior to the Rescue Refinancing). Upon such update being Approved, the PPP Co and the Authority shall execute a supplement to this Agreement which shall, with effect from the date of such Approval, replace the Financial Model with the revised Financial Model. Upon the date of such Approval, this revised Financial Model shall become the Financial Model and the replaced Financial Model shall cease to be so regarded.

[●].6 Authority's Right to Object to Rescue Refinancing

- (a) The Authority may only object to a Refinancing proposed in accordance with Clause [●].5 (Rescue Refinancing) (acting reasonably at all times and pursuant to a written explanation detailing its objection) if:
 - (i) it considers (acting reasonably) that the information disclosed to it pursuant to Clause [●].5 (Rescue Refinancing) contains information which is materially untrue or inaccurate in respect of the Rescue Refinancing; or
 - (ii) such Rescue Refinancing would result (whether with the lapse of time or expiry of notice or otherwise) in a change in control of the PPP Co for which the Authority's consent is required but has not been given in accordance with Clause [●] (Change in Control) provided that such consent shall be given or refused within the time period referred to in Clause [●].6(b) ; or
 - (iii) the Authority considers (acting reasonably) that such Rescue Refinancing would have a material adverse effect on the ability of the PPP Co to perform its obligations under this Agreement; or

- (iv) any document being entered into by the Authority in connection with the Rescue Refinancing is not substantially consistent with the information provided to the Authority in relation to such Rescue Refinancing; or
- (v) the PPP Co has not provided to the Authority confirmation that the Financial Model prepared in connection with the Rescue Refinancing is true and correct in all material respects and that the assumptions and methodologies used in such Financial Model are consistent with the information supplied to the Authority in connection with the Rescue Refinancing,

provided, in all cases, that the Authority shall not be entitled to object to a Rescue Refinancing if such Rescue Refinancing becomes necessary solely and directly as a result of a breach by the Authority of its payment obligations (other than disputed payment obligations) under this Agreement.

- (b) Unless the Authority has objected within 5 (five) Working Days after the receipt of the information provided by the PPP Co in Clause [●].5 (Rescue Refinancing), then the Authority shall be deemed to have not objected to such Rescue Refinancing, in which case, the Rescue Refinancing may proceed.
- (c) If the Authority objects to a Rescue Refinancing pursuant to this Clause [●].6, the PPP Co may refer the matter to the Accelerated Disputes Resolution Procedure for determination.

Comment: The clause relating to Amendments to Finance Documents of the NRA Model Contract is substantially the same as Clause 43A of the Core Contract but has the following additional exception in .1(d):

[●] AMENDMENTS TO FINANCE DOCUMENTS

[●].1 Entitlement to Amend

For the avoidance of doubt, it is acknowledged that the PPP Co may enter into any amendment, variation or waiver of the terms of a Funding Agreement without submitting the relevant document or proposed course of action to the Authority's Representative pursuant to the Commercial Review unless the document or proposed course of action would:

- ...
- (d) fall to be considered under any provision of Clause [●] (Refinancing) other than a Rescue Refinancing, which falls to be considered in accordance with the procedure set out in Clause [●].5 (Rescue Refinancing) and Clause [●].6 (Authority's Right to Object to Rescue Refinancing) provided that the PPP Co shall be entitled to amend a Funding Agreement to allow for the deferment or rescheduling of any amounts payable thereunder to the extent it is unable to pay such amounts due to:
 - (i) a breach by the Authority of its payment obligations under this Agreement or any Project Document; or
 - (ii) the occurrence of a Force Majeure Event provided that, in relation to the circumstances contemplated by this Clause [●].1(d)(ii), the amount being deferred or rescheduled is less than the principal and interest payable under the Senior Credit Providers' Agreement for a period of 270 (two hundred and seventy) days commencing on the date of the Force Majeure Event.

KEY DEFINITIONS – USED IN CLAUSE 43 NRA MODEL CONTRACT DRAFTING

“Refinancing” means a refinancing of the arrangements under the Funding Agreements such that there is a change in the obligations or entitlements thereunder, including but not limited to, a change in any of:

- (a) the applicable interest rate; or
- (b) the applicable margin; or
- (c) the timing of any payment (whether of principal, interest or otherwise); or
- (d) the financial covenants applicable to the PPP Co; or
- (e) the amount of Senior Debt Amount (including any consequential changes to the amount of Junior Debt or to the Equity Amount); or
- (f) the payments into, and/or releases from, any charged account established in connection with the Funding Agreements; or
- (g) the internal rate of return being projected for the PPP Co and/or the Sponsors,

but not including:

- (i) any Rescue Refinancing (other than to the extent contemplated by the definition of “Refinancing Benefit”);
- (ii) any Qualifying Bank Transaction;
- (iii) any change in taxation or change in accounting treatment;
- (iv) waivers, consents and similar actions which relate to day to day administration and supervisory matters that are in respect of breaches of representations, warranties, covenants, undertakings, late or non provision of information or amendment to sub-contracts (excluding for the purposes of this sub-paragraph (iv) any of the above that could allow distributions or benefit to the Sponsors to be made at an earlier time or in a greater amount than if the waiver, consent or similar action to the covenant was not made or granted);
- (v) any sale or transfer of the Subordinate Lenders’ existing rights and/or interest under the Junior Debt Documents or securitisation of the Subordinate Lenders’ existing rights and/or interest under the Junior Debt Documents; and
- (vi) any sale of shares in the PPP Co or Holding Company of the PPP Co by the Sponsors or securitisation of the existing rights and/or interests attaching to shares in the PPP Co

unless, in any of the circumstances in (ii) to (vi) above, such circumstance would result in a change to the Funding Agreements such that distributions to the [Sponsors] could be made at an earlier time or in a greater amount than if the change had not occurred.

“Refinancing Benefit” means the net benefit received or to be received by the PPP Co and/or any of the Sponsors as a consequence of a Refinancing (including an amount equal to any benefits received by the PPP Co in excess of the Base Case arising out of a Rescue Refinancing), as calculated using the Financial Model as of the Refinancing Date after deducting Allowable Costs. Such benefit may be expressed by reference to a series of payments or in one lump sum but in any event shall comprise the net present value of the differential between the distributions projected by the Financial Model excluding the effects of the Refinancing and the distributions projected by the Financial Model including the effects of the Refinancing calculated by reference to the appropriate discount rate to be agreed at the time of Refinancing (but in any event such calculation to be by reference to the Base Case).

“Refinancing Date” means the date a Refinancing takes effect.

“Re-Optimise” means ... to revise the Financial Model to calculate the Refinancing Benefit in accordance with Clause [●] (Refinancing) and “Re-Optimising” and “Re-Optimisation” and “Re-Optimised” shall be interpreted accordingly.

[“Rescue Refinancing” means any refinancing, rescheduling, novation, substitution, replacement or other refinancing of the liabilities and obligations under the Funding Agreements when an event has occurred, which with the giving of notice and/or effluxion of time would constitute an [Event of Default] (as defined in the [Senior Credit Providers’ Agreement]), or an event of Force Majeure has occurred and is continuing, the principal purpose of such refinancing being to remedy and address such [Event

of Default] or [Potential Event of Default] or such event of Force Majeure and the consequences thereof and to which the Authority has not objected.]

CROSS REFERENCES

This clause is referred to in the following clauses of the Compendium:

- Clause 21 (Specific Project Undertakings)
- Clause 53 (Effect of Termination)
- Clause 54 (Compensation on Termination)

There are no references to this clause in the Risk Matrix.