

## **PF2 – HoldCo/ SPV Shareholders' Agreement**

~~Consultation draft – July~~

**Standard Form – October** 2013

~~Please also refer to the HMT consultation document  
which accompanies this draft document.~~

**Dated**

**201◆**

- [DEVELOPER EQUITY PROVIDER] (1)**
- [HM TREASURY COMPANY LIMITED] (2)**
- [THIRD PARTY EQUITY PROVIDER] (3)**
- [HOLDING] (4)**

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PF2 – ~~CONSULTATION DRAFT OF~~ STANDARD FORM HOLDCO/SPV SHAREHOLDERS' AGREEMENT

This Agreement is made on ~~◆◆~~ 201~~◆◆~~

Between

- (1) [Developer Equity Provider]<sup>1</sup> (Company No. ~~◆◆~~) whose registered office is at ~~◆◆~~ (Developer);
- (2) [HM Treasury Company Limited<sup>12</sup>] [of ~~◆◆~~] (HMTCO);
- (3) [Third Party Equity Provider]<sup>23</sup> (Company No. ~~◆◆~~) whose registered office is at ~~◆◆~~ (Third Party Equity Provider);
- (4) [Name of HoldCo]<sup>34</sup> (Company No. ~~◆◆~~) whose registered office is at ~~◆◆~~ (Company or HoldCo); and
- (5) [Name of SPV] (Company No. ~~◆◆~~) whose registered office is at ~~◆◆~~ (SPV).

Background

- (A) Pursuant to this Agreement the Developer, HMTCO and the Third Party Equity Provider have agreed to subscribe for shares in the Company and to advance monies to SPV (as debt) and, on completion of the subscriptions and advances referred to in clause 4.1 (*Initial subscriptions of Shares and Shareholder Debt*), the Shares held by each of the parties and the amount of

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<sup>1</sup> Parties - Developer. For ease of reference purposes, this standard form anticipates the "Developer" being a sponsor/construction company related to the building contractor who will carry out the construction works under the main project agreement construction sub-contract. It is recognised that the "Developer" (a) may not be related to the construction sub-contractor and/or (b) it may comprise a number of parties who together submit a bid. In each case this standard form wording will require amendment.

<sup>12</sup> **Parties - HMTCO.** The identity of this entity is to be confirmed. However, it is expected that the entity will be wholly owned by ~~HMT~~HM Treasury. Beyond the funding commitment then, as with the Developer and the Third Party Equity Provider, there will not ~~then~~ be any recourse against the shareholders.

<sup>23</sup> **Parties – Third Party Equity Provider / the equity funding competition.** ~~See the summary note in relation to the approach to third party equity~~For ease of reference purposes, this standard form anticipates the "Third Party Equity Provider" being a person who is not related to the building contractor or FM contractor under the principal sub-contracts. A separate note will be published regarding mechanisms to promote participation by new long term investors. If third party equity is not sought (or secured) on a particular PF2 project then this agreement would need to be amended ~~to reflect two (rather than three) shareholders. Note that "Third Party Equity" could comprise more than one entity.~~

<sup>34</sup> **Parties – Company and SPV.** This document has been drafted on the premise that the Company and SPV are companies which are registered in England and Wales.

Shareholder Debt advanced to the SPV by each of the parties will be as set out in the Data Sheet<sup>45</sup>.

- (B) The Company is a limited liability company registered in [England] [Wales].
- (C) The Shareholders have agreed to establish the Company as a jointly owned company which is intended to carry on the business of a holding company in the manner set out in this Agreement.
- (D) SPV is a limited liability company registered in [England][Wales]. SPV is a wholly owned subsidiary of the Company established for the purposes of SPV entering into the Project Documents to which it is to be a party and undertaking the Project<sup>56</sup>.
- (E) The parties have agreed that the respective rights and obligations of Shareholders in the Company shall be governed by the provisions of this Agreement and that the Company and SPV businesses shall be conducted in accordance with the provisions of this Agreement.

## 1 Definitions and interpretation

This Agreement shall be interpreted according to the provisions of Schedule 40 (*Definitions and Interpretation*).

## 2 Commencement and duration

### *Conditions precedent*

2.1 The obligations set out in clause 13.1 (*Confidentiality and Freedom of Information*) shall commence:

- (a) in relation to the Founder Shareholders, on the execution of this Agreement; and
- (b) in relation to any person becoming a Shareholder after the date of this Agreement (a **New Shareholder**), on the execution of the Deed of Adherence.

2.2 Save as set out in clause 2.1 (*Conditions precedent*), this Agreement shall come into effect:

- (a) in relation to Founder Shareholders, on the completion of the matters set out in clause 4.1 (*Initial Subscriptions of Shares and Shareholder Debt*); and
- (b) in relation to a New Shareholder, on the registration of the New Shareholder as a shareholder in the Company.

### *Termination in relation to a party ceasing to hold Shares in the Company*

2.3 In relation to HMTCo the provisions of this clause 2.3 are subject to the provisions of clauses 5.6 (*Observers at Board meetings*) and 8.4 (*Provision of information to Shareholders and designated third parties*). Immediately following the earlier of the termination of this

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<sup>45</sup> **Recital A - Equity Bridge.** Note that appropriate changes will need to be made if there is an equity bridge.

<sup>56</sup> **Recital D – Formation of SPV and the Company.** The Developer is expected to set up the Company and SPV.

Agreement and it ceasing to hold any Shares a party shall cease to have any rights or obligations under this Agreement save that:

- (a) its obligations under clause 5.3 (*Removal of/ change to nominated Directors*);
- (b) its rights and obligations under clause 8.4**(b)** (*Provision of information to Shareholders and designated third parties*), clause 11 (*Disputes*) and clause 13 (*Miscellaneous*);
- (c) its liability for any breaches prior to it ceasing to hold any Shares;
- (d) any rights or cause of action that arose prior to it ceasing to hold any Shares; and
- (e) its rights to receive any payment in connection with the transfer of its Shares,

shall not be affected.

#### *Termination*

2.4 Save as provided in clause 2.3 (*Termination in relation to a party ceasing to hold Shares in the Company*) this Agreement shall continue in full force and effect until the earliest of the following dates:

- (a) the date on which an effective resolution is passed or a binding order is made for the winding-up of the Company; or
- (b) the date on which all the Shareholders (and HMTCo if it is not then a Shareholder) agree in writing to terminate this Agreement.

2.5 If termination occurs the Company shall (if not already in liquidation) be placed into voluntary liquidation in accordance with clause 12 (*Winding Up*) and, after payment of liabilities, its assets shall be distributed to the Shareholders in the same proportions as the Shareholders' holdings of shares at the time of the determination.

### **3 The business of the Company and SPV and details of the Company and SPV**

#### **3.1**

- (a) The business of the Company is to act as the holding company of SPV.
- (b) The business of SPV is to carry out or procure the carrying out of the privately financed project relating to [*details of the relevant PF project*] (**Project**).

3.2 Details of the Company and SPV following the share subscriptions referred to in clause 4 (*Funding of the Company and SPV and financial matters*) and board appointments referred to in clause 5 (*The Boards of the Company and the SPV*) will be as detailed in Schedule 2 (*Details of the Company and the SPV*).

## 4 Funding of the Company and the SPV and financial matters<sup>7</sup>

### *Initial subscriptions of Shares and Shareholder Debt*

4.1 Immediately upon the execution of this Agreement by each of the parties, the parties shall take or procure to be taken the following steps either by themselves or at meetings of the Board or of the members of the Company/ SPV (as appropriate) to the extent not already taken:

- (a) the parties shall procure that the necessary board and/or shareholder resolutions in respect of the Company and SPV are passed to adopt the HoldCo Articles and the SPV Articles with immediate effect;
- (b) the following subscriptions shall be made in the capital of the Company and advances made to the SPV in relation to Shareholder Debt:
  - (i) the Developer shall subscribe for the number of Shares and shall advance the amount of Shareholder Debt<sup>6g</sup> as set out opposite its name in the Data Sheet;
  - (ii) HMTCo<sup>7g</sup> shall subscribe for the number of Shares and shall advance the amount of Shareholder Debt as set out opposite its name in the Data Sheet;
  - (iii) the Third Party Equity Provider shall subscribe for the number of Shares and shall advance the amount of Shareholder Debt as set out opposite its name in the Data Sheet,
- (c) the Company shall subscribe for the number of shares in SPV as set out opposite its name in the Data Sheet,

following which the Company and SPV shall deliver the relevant definitive share certificates in relation to the allotment of Shares (and any certificates in relation to Shareholder Debt) pursuant to sub-clause (b) and sub-clause (c) and shall insert the names of the allottees in the register of members.

### *Further capital*

4.2

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<sup>7</sup> Clause 4 – funding. If an equity bridge is to be used or Shareholder Debt is to be invested by instalments, appropriate amendments may be required. It should be assumed that HMTCo will invest on the same terms and at the same times as other Shareholders.

<sup>6g</sup> **Clause 4.1(b)(i) – Shareholder Debt.** ~~This~~In the normal course it is anticipated that this will be invested into the SPV. If the Developer wishes to invest Shareholder Debt in the Company which in turn invests in SPV, it should set out its reasons as part of the bid process.

<sup>7g</sup> **Clause 4.1(b)(ii) – Level of HMTCo investment.** The intended level of the proposed HMTCo investment will be stated in the procurement documentation at the outset of the procurement. ~~HMTCo would have the right to invest up to level specified but it would not be obliged to do so until it executes the Shareholders' Agreement.~~ The procurement documentation will provide further information regarding the manner in which HMTCo would undertake due diligence. Any holding will always be a minority interest.

- (a) ~~[Subject to clause 4.5,]~~ No Shareholder shall be required to subscribe for any further Shares or to provide any additional funding for the Company (or guarantees or indemnities on behalf of the Company) which, for the avoidance of doubt, shall include any additional funding by way of shareholder loans and/or required to increase the working capital requirements of the SPV.
- ~~(b) The Company may only allot Shares with the requisite agreement of the Shareholders pursuant to clause 6.2 (Reserved Matters).~~
- (b) ~~(e)~~ The Company shall not allot any Shares to any person (other than a Shareholder) unless that person has first executed a Deed of Adherence in the form set out in Schedule 4 (*Deed of Adherence*).
- (c) ~~(d)~~ If, in the opinion of the HoldCo Board (or the SPV Board as the case may be), the Company (or the SPV) requires further funding, the HoldCo Board (or the SPV Board) shall determine how the Company (or SPV) should obtain such additional funding, whether by way of the allotment of shares, by obtaining additional debt finance, or such other means as the HoldCo Board (or SPV Board) may determine, PROVIDED THAT the foregoing shall be subject to the HoldCo Board (or SPV Board) seeking and obtaining any required approval from the Shareholders for the further funding proposals if any to the extent required under clause 6.2 (*Reserved Matters*).
- (d) ~~(e)~~ Subject to the approval of the Shareholders pursuant to clause 6.2 (*Reserved Matters*), if the Board determines to allot further Shares, such Shares shall be allotted in accordance with the provisions of sub-clauses (f) to (i) below.
- (e) ~~(f)~~ Subject to the provisions of sub-clauses (g) and (h) and clause 4.3 (*Offers to Allot*), on any allotment of Shares the Shares shall be offered for allotment by the Company to Shareholders pro rata to the number of Shares then in issue.
- (f) ~~(g)~~ If the Directors determine to allot Shares in the Company, the Directors shall, of the Shares to be offered, first offer the Shares to the Shareholders pro rata to each Shareholder's existing holdings of Shares (**first offer**).
- (g) ~~(h)~~ To the extent that any Shares are not accepted under the first offer the Directors shall offer the remaining Shares to the Shareholders who have accepted that first offer pro rata to their holdings of Shares following the first offer (**second offer**). To the extent that any second offer is not accepted by any such Shareholder but is accepted by other Shareholders, the Directors shall make such subsequent offers with the necessary changes having been made to those persons who have accepted the second offer until all the Shares have been accepted or (failing acceptance) until there are no persons willing to take further Shares whereupon the Directors may offer the remaining Shares to any Suitable Third Party.
- (h) ~~(i)~~ A Shareholder may accept a first offer, or any other offer made to it, in whole or in part.

#### *Offers to Allot*

- 4.3 Each offer shall be made by the Board by notice in writing (an **Offer to Allot**) and in the case of Shareholders shall be served on Founder Shareholders at their address for service set out



in clause 13.8 (*Notices*) and on New Shareholders at the address for service notified to the Company by such New Shareholder.

- (a) Each Offer to Allot shall:
  - (i) specify the total number of Shares which are on offer;
  - (ii) specify the number of Shares for which the recipient of the Offer to Allot may subscribe;
  - (iii) specify the price per Share;
  - (iv) specify the period during which the offer will remain open for acceptance, which for a first offer shall be fifteen (15) Business Days after the date of service of the Offer to Allot and for all other offers five (5) Business Days after the date of service of the Offer to Allot; and
  - (v) contain a statement to the effect that the offer shall not be deemed to be accepted until the Board has either received notices of acceptance in respect of all the Shares available for allotment or, having received notices of acceptance in respect of less than all the Shares offered for allotment, has elected to issue such Shares notwithstanding that notices of acceptance have not been received in respect of all the Shares offered for allotment.
- (b) After the expiry of each Offer to Allot the Board shall as soon as practicable make such additional offers as may be necessary in accordance with this clause 4 (*Funding of the Company and SPV and financial matters*).
- (c) Each of the Shareholders agrees to approve any resolution put to a general meeting of the Company to renew the authority of the Directors to allot Shares in the Company.

#### *Additional Shareholder Debt*

- 4.4 The provisions of clause 4.2 and clause 4.3 relating to any additional issue of Shares shall apply with the necessary changes to any further issue of/ borrowing of Shareholder Debt.

#### ~~*[Working capital facility]*~~<sup>8</sup>

- ~~4.5 The Developer shall make available a working capital facility to the Company on the terms of the [Working Capital Facility].~~

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<sup>8</sup> ~~Clause 4.5 – Working Capital Facility. If there are a number of projects which form part of a programme of projects (e.g. where an initial financial close may occur in relation to one or more assets but with others to be added once final planning and approvals etc have been obtained) or the Developer's financial model otherwise shows a need for working capital, then it will be necessary for the Developer to put in place a Working Capital Facility to cover the development costs relating to the additional projects/assets or as demonstrated by the financial model. The need for any such Working Capital Facility (and its terms) will be considered on a procurement by procurement basis.~~

## 5 The Boards of the Company and SPV

### *Composition of the Boards and the right to appoint Directors*

#### 5.1

- (a) Each of the Boards shall consist of not less than two Directors, to be appointed in accordance with this Agreement and the HoldCo Articles and the SPV Articles (as the case may be).
- (b) The Shareholders shall be entitled in accordance with the HoldCo Articles and this Agreement to nominate and appoint in writing persons as Directors of the Company and to remove such persons from office. Any Shareholder holding 15%<sup>910</sup> or more of the issued Share capital (a **Material Shareholder**) shall be entitled to nominate one Director for every 15% of the issued Share capital of the Company held by it ~~up to a maximum of three Directors~~.
- (c) The persons nominated and appointed by the parties to act as the initial Directors for the purposes of sub-clause (b) are as set out in Schedule 2 (*Details of the Company and the SPV*).
- (d) In addition to its rights to nominate and appoint Directors under sub-clause (b), each Material Shareholder shall be entitled in accordance with the Articles, to nominate and appoint in writing one or more persons (up to a maximum of three) as alternate ~~directors~~ director(s) to each of its Director appointees and to replace any such ~~persons~~ person(s) as an alternate ~~directors~~ director from time to time.
- (e) The parties shall procure that the Directors of the Company (and any alternate directors) appointed or removed in accordance with this clause 5.1 shall also be appointed and removed, as the case may be, as Directors / alternate directors of SPV.

### *Quorum requirements for Board meetings*

#### 5.2

- (a) Subject to sub-clauses (b) and (c), the quorum for Board meetings of the Company and SPV respectively shall comprise one Director appointed by each Material Shareholder (or their respective alternates).
- (b) If within 30 minutes of the time for the relevant meeting no Director (or alternate) appointed by a Material Shareholder attends a meeting of Directors called in accordance with this clause 5.2, then (unless the relevant Director has given a written waiver in relation to his/her attendance) such meeting shall be adjourned in accordance with article 3.2 (*Proceedings of Directors*) of the HoldCo Articles and when reconvened such adjourned meeting shall, subject to the provisions of article 3.2 (*Proceedings of Directors*), be deemed to be quorate notwithstanding the fact that a Director appointed by that Material Shareholder may not be present.

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<sup>910</sup> **Clause 5.1(b) – Percentage of Shareholding.** ~~Note that this assumes there will be the three shareholders: the~~ The percentage will need to be determined on a transaction by transaction basis by reference to the number of shareholders and their respective shareholdings.

- (c) If a Material Shareholder fails to appoint and maintain in office at least one Director then, if a meeting of the Directors is called in accordance with this clause 5.2 and notice of the meeting is given to that Material Shareholder as if it were a Director, the meeting of Directors shall be deemed to be quorate notwithstanding the fact that no Director appointed by that Material Shareholder is present.

*Removal of/ change to nominated Directors*

5.3

- (a) If a Material Shareholder (the **Appointing Shareholder**) removes any person nominated by it as a Director (such a Director being an **Outgoing Director**) then the Appointing Shareholder shall procure that the Outgoing Director vacates office without any claim to the Company for loss of office or otherwise relating to the Outgoing Director's vacation of office and the Appointing Shareholder shall indemnify the Company against all losses, liabilities and costs which the Company may incur arising out of, or in connection with, any claim by the Outgoing Director for wrongful or unfair dismissal or redundancy or other loss arising out of the Outgoing Director's removal from or loss of office.
- (b) If any Material Shareholder (an **Outgoing Shareholder**) ceases to be a Material Shareholder and any Director ~~is an employee and/or officer of the Outgoing Shareholder or~~ has been nominated as a Director by the Outgoing Shareholder pursuant to clause 5.1 (*Composition of the Boards and the right to appoint Directors*), the Outgoing Shareholder shall procure that any such Director vacates office without any claim to the Company for loss of office or otherwise relating to such Director's vacation of office and the Outgoing Shareholder shall indemnify the Company against all losses, liabilities and costs which the Company may incur arising out of, or in connection with, any claim by such Director for wrongful or unfair dismissal or redundancy or other loss arising out of such Director's removal from or loss of office.
- (c) The provisions of sub-clause (a) and sub-clause (b) above apply with the necessary changes in relation to SPV Directors as if references to the Company were references to SPV.

*Chairman of the Board*

5.4

- (a) There shall be a Chairman of the HoldCo Board and the SPV Board appointed or nominated in accordance with sub-clause (b) or sub-clause (c).
- (b) If the Shareholders unanimously agree to appoint an independent non-executive Chairman then the Chairman shall be appointed either on an annual basis or on such occasions as the Shareholders (acting in their absolute discretion) may unanimously agree, and the period of appointment shall be for such time as the Shareholders may unanimously agree (acting in their absolute discretion) from time to time. The Chairman appointed shall be a Director and his appointment shall be in addition to the appointments of Directors referred to in clause 5.1 (*Composition of the Boards and the right to appoint Directors*). If a Chairman is unable to attend any meeting of the Board or of the Shareholders of the Company/SPV the Directors in attendance shall appoint one of their number as the chair for that meeting to act in his place. An

independent non-executive Chairman appointed under this sub-clause (b) shall not have a vote at either Board or Shareholder meetings.

- (c) If the Shareholders do not agree to appoint an independent non-executive Chairman under sub-clause (b) within [one] month of the date of this Agreement then the Chairman shall be one of the Directors appointed in accordance with clause 5.1 (*Composition of the Boards and the right to appoint Directors*) ~~with the initial Chairman being a Director appointed by [HMTCo/Third Party Equity Provider] (as specified by that Material Shareholder)~~ who shall act as Chairman for six months and thereafter the role of Chairman shall rotate every six months between a Director appointee of each Material Shareholder (by agreement between the Material Shareholders) or, failing agreement, then by the Material Shareholders drawing lots (provided that a Material Shareholder appointee shall not hold the role of Chairman for more than six months in any eighteen month period). A Director appointed as Chairman under this sub-clause (c) shall not have a second vote by reason of his appointment as Chairman.

*Board meetings and Board voting*<sup>11</sup>

## 5.5

- (a)
- (i)
- (A) Prior to the end of the Lock in Period resolutions of the Board shall (1) where the Developer owns a majority of the shares, require a vote in favour from at least one Director appointed by the Developer and at least one Director appointed by another Material Shareholder; and (2) where the Developer does not own a majority of the shares, require a simple majority vote. However, this sub-clause 5.5(a)(i)(A) shall not apply to clause 5.6(e) in relation to any Board vote to exclude the Observer from all or any part of any Board meeting and/or from having sight of Board papers or other information.
- (B) After the end of the Lock in Period, resolutions of the Board shall be determined by a simple majority of votes cast for or against each resolution.
- (ii) Subject to sub-clause (a)(iii), clause 5.4(b) and (c) (*Chairman of the Board*) and clause 6.5 (*Step-aside provisions*), at Board meetings each Director (other than an independent non-executive Chairman appointed under clause 5.4(b)) shall have one vote.
- (iii) If a Material Shareholder has more than one Director appointee but not all its appointees are present at the Board meeting then its Director (s) or their

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<sup>11</sup> Clause 5.5 - director voting. The standard form documents are drafted on the basis of votes per director/alternate. If other voting mechanics (eg director appointees having voting rights in the percentages of their appointees) then the Developer/Bidder will need to put forward any such changes (rationale and detail) for consideration as part of the bid process.

alternate(s) present shall be entitled to vote each relevant absent Director's vote.

- (b) Unless otherwise agreed by all of the Directors, not less than 10 (ten) Business Days' notice (or such other period of notice as may be agreed from time to time by all of the Directors) of each meeting of the Board specifying the date, time and place of the meeting shall be given to all Directors ~~present in the United Kingdom at the relevant time~~. All meetings of the Board shall take place at such location as the Board shall agree and the Material Shareholders shall use all reasonable endeavours to procure that their respective Directors attend each such meeting and to procure that a quorum (in accordance with the provisions contained in this clause 5 (*The Boards of the Company and the SPV*) and in the Articles) is present at each such meeting of which due notice has been given.
- (c) Unless otherwise agreed by the Board:
- (i) meetings of the Directors shall be held not less than quarterly on such dates as they may agree (and failing such agreement on such day as the Chairman shall decide);
  - (ii) a telephone conference call or video conference or a combination of the same, at which all participants are able to speak to and hear each of the other participants and at which for all times at that meeting a quorum of the Directors is able to so participate, shall be valid as a meeting of the Directors;
  - (iii) a resolution (which may be in counterparts) in writing signed by all the Directors entitled to receive notice of a meeting and vote at the meeting shall be as valid and effectual as if it had been passed at a meeting of Directors duly convened and held; and
  - (iv) any Director shall by notice to the Company and each other Director be entitled to convene a meeting of the Directors on not less than ten (10) Business Days notice.
- (d) Unless otherwise agreed by all of the Directors, all papers for meetings of the Board will be sent to all Directors not less than five (5) Business Days prior to the relevant meeting and, unless otherwise agreed by all of the Directors, draft minutes of meetings of the Board will be sent to each Director as soon as practicable after the holding of the relevant meeting.
- (e) The provisions of sub-clauses (a) to (d) shall apply with necessary changes as if references to the Company were references to SPV.
- (f) Unless otherwise agreed by all of the Directors, a meeting of the SPV Board shall follow immediately after a meeting of the HoldCo Board.
- (g) Notwithstanding any other provisions of this Agreement or of the Articles, if a Shareholder (the Relevant Shareholder) is in material breach of its obligations under this Agreement the Directors appointed by it shall be disenfranchised from voting at Board meetings unless and until that breach is remedied and no approval shall be required of the Relevant Shareholder's Directors for any Reserved Matter Board Approval matters. If there is a dispute as to whether a**

Relevant Shareholder is in material breach of its obligations under this Agreement then:

- (i) the Relevant Shareholder shall be deemed to be in material breach if the Material Shareholders (excluding the Relevant Shareholder) each confirm in writing to the Relevant Shareholder that they consider the Relevant Shareholder to be in material breach setting out the basis of that breach;
- (ii) however, the Relevant Shareholder may then refer the question of whether it is in material breach to the dispute resolution procedure in clause 11 (Disputes).

*Observers at Board meetings*

5.6

- (a) HMTCo shall be entitled to nominate (and remove) by notice in writing to the Company (copied to the Directors) from time to time a person as an observer (the **Observer**) to meetings of the HoldCo Board and of the SPV Board. This entitlement to nominate an Observer is a right of HMTCo irrespective of whether or not it holds Shares in the Company.
- (b) HMTCo shall make the nomination referred to in sub-clause (a) having consulted with the sponsor Government department relevant to the [*describe the nature of the relevant PF2 project*] in this case being [*name of sponsor department*]. If the proposed Observer is not an employee or officer of [*name of sponsor department*] or of the [*health trust, local authority etc to which the project relates*] then HMTCo shall inform the other Shareholders of the identity of the proposed appointee and shall have reasonable regard to any representations made by any Shareholder asserting that the proposed Observer appointee would not be appropriate because that proposed appointee is an employee of, or associated with, a direct competitor of the relevant Shareholder.
- (c) HMTCo shall procure that the Observer shall enter into a confidentiality undertaking in favour of the parties in the Agreed Form.
- (d) The Observer shall have no right to vote at Board meetings, but shall have the right to speak and contribute at a Board meeting unless the Board by majority vote decides otherwise from time to time. The Observer shall be entitled to notice of Board meetings as if he/she were a Director.
- (e) The Board may exclude the Observer from all or part of any Board meeting or from having sight of Board papers or other information if the Board considers it reasonable to do so in all the circumstances (and in the event of any disagreement over exclusion then the exclusion shall be decided by a majority vote).
- (f) Notwithstanding the provisions in sub-clause (d) and sub-clause (e), the Observer shall not be entitled to attend all or any part of a Board Meeting or to receive Board papers which relate to any dispute or matter where proceedings have been issued against the [*Authority*] such that the step-aside provisions in sub-clause 6.5(d) apply.

*Director remuneration*

- 5.7 The Company shall pay Director remuneration (if any) as set out in the Business Plan. Variation of any such remuneration shall be a Reserved Matter.

## 6 Management of Company and SPV affairs

### *Management of the Businesses*

- 6.1 The parties shall exercise all rights and powers available to them in relation to the Company and SPV to procure that (in so far as they are able to do so) at all times during the term of this Agreement:

- (a) the business of the Company shall consist exclusively of the HoldCo Business;
- (b) the business of SPV shall consist exclusively of the SPV Business;
- (c) with the exception of:
  - (i) matters for which responsibility is expressly delegated by the SPV Board to the officers of SPV; and
  - (ii) those matters requiring Reserved Matter Board Approval or Shareholder approval pursuant to clause 6.2 (*Reserved Matters*),

all the business of the Company and SPV, other than routine day-to-day business, shall be undertaken and transacted by the Directors;

- (d) no payment will be made by the Company or SPV and no cheque or payment instruction of either the Company or SPV shall be signed other than in accordance with the mandates (general or specific) and procedures authorised by the respective Boards from time to time; ~~and~~
- (e) the Company/SPV will, if it requires any approval, consent or licence for the carrying on of its business in the places and in the manner in which it is from time to time carried on or proposed to be carried on, use all reasonable endeavours to obtain and maintain the same in full force and effect; ~~and~~

- (f) the Company and SPV shall both put in place and maintain appropriate procedures and training to comply with the requirements of the Bribery Act 2010.

### *Reserved Matters*

- 6.2 Subject to clause 6.4 (*Shareholders' and Company undertakings*) the Reserved Matters listed in ~~schedule~~Schedule 8 (*Reserved Matters*) shall not be carried out:

- (a) in the case of those matters ticked in the second column ("Shareholder") without the prior written approval of each Material Shareholder; or
- (b) in the case of those Reserved Matter Board Approval matters ticked in the third column ("Board") without the prior written approval of 1a Director appointed by each of

the Material Shareholders, 1 [all of the Directors who have been appointed by the Material Shareholders]<sup>12</sup>

and each of the Shareholders shall use their respective rights and powers to procure, so far as they are each able, that no such Reserved Matter is carried out unless the required approval has been given.

*Manner of giving Shareholder approval*<sup>1013</sup>

### 6.3

- (a) Subject to sub-clause (b) and to sub-clause (c), the written approvals required from Shareholders referred to in clause 6.2 (*Reserved Matters*) may be given and signed for a Material Shareholder by a Director nominated by it under clause 5.1 (*Composition of the Boards and the right to appoint Directors*).
- (b) Notwithstanding the provisions of HoldCo Article 5 (*Directors' power to authorise conflict situations*), if at a Board meeting (the **Original Meeting**), a matter arises for resolution which a Director reasonably considers gives rise to a conflict of interest between his duty to his appointor /employer and his duty as a Director to promote the success of the Company/SPV he shall, upon declaring such conflict, be entitled to abstain from casting his vote and to refer the relevant matter back to the relevant Shareholder whose decision on the resolution shall be substituted for the decision of the abstaining Director PROVIDED THAT (except in the case of a matter which is Reserved Matter Board Approval matter) such decision is notified to the company secretary in writing and is received by him within fifteen (15) Business Days of the date of the Original Meeting at which the relevant Director notified his intention to make such referral. If no decision is received from the Shareholder within such period, the requisite Board approval shall be capable of being given by one Director appointed by each of the other Material Shareholders (the **Other Directors**) and shall be so given if at the Original Meeting the Other Directors resolved to pass the resolution in question.
- (c) A Material Shareholder may opt out of the mechanism in sub-clause (a) and sub-clause (b) by giving notice under this sub-clause (c) to the other parties. The effect of the notice shall be that, for any matter requiring Shareholder approval, that approval will only then be deemed to have been given when that Material Shareholder has given its specific approval in writing to that matter. A Material Shareholder may opt back in to the mechanism in sub-clause (a) and sub-clause (b) by notice in writing under this sub-clause (c).
- (d) Notwithstanding the provisions of HoldCo Article 5 (*Directors' power to authorise conflict situations*), if a Director considers he has a conflict of interest between his

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<sup>12</sup> Clause 6.2(b) - Reserved Matters. Option for the parties to decide on in terms of what is considered the most appropriate structure for the relevant project.

<sup>1013</sup> **Clause 6.3 – Reserved Matters approval / flexibility.** This clause has been drafted on the basis that, in the normal course, Reserved Matters would be dealt with by the relevant Board appointees giving approval or otherwise (as the case may be) under clause 6.3(a). However, in terms of director's duties, sub-clause (b) addresses conflict of interest situations where the board appointee is conflicted and where the matter can then be referred to the relevant Shareholder for approval (or otherwise), thereby removing the relevant director from having any obligation to vote for or against the relevant matter. Finally sub-clause (c) allows a Shareholder to opt in and out of these arrangements should it wish to do so.



duty to his appointor /employer and his duty as a Director to promote the success of the Company/SPV in relation to any ~~Reserved Matter Board Approval~~ matter then he may refer the matter to his Material Shareholder appointor for approval or otherwise and, if given in writing, the Shareholder approval shall be valid in place of the Director approval.

*Shareholders' and Company undertakings*

- 6.4 Each Shareholder undertakes to each of the other Shareholders that, in its capacity as a Shareholder, it will act in a manner that is consistent with and shall exercise all voting rights and other powers of control available to it in relation to the Company and SPV so as to procure (insofar as it is able by the exercise of such rights and powers) that the SPV complies with the provisions of the Project Documents to which it is a party.

*Step-aside provisions*

- 6.5 Notwithstanding any provision to the contrary in this Agreement or the Articles:

- (a) if it is reasonable to conclude that the Developer or any Associate of the Developer ~~asserts the existence of a Claim or issues~~ has a firm intention to issue proceedings in respect of any Claim against the Company/SPV:
- (i) the Directors appointed by the Material Shareholders other than the Developer (the **Independent Directors**) shall be entitled to defend such Claim in the name and at the expense of the Company/ SPV;
  - (ii) each of the Directors appointed by the Developer (**Developer Directors**) shall not be entitled to (and the Developer shall procure that the Developer Directors shall not) make (or participate in making) any decisions, attend or vote at meetings of the Board or otherwise take any action on behalf of the Company/SPV in respect of the defence by the Company/SPV of such Claim nor shall they be entitled to any ~~board~~Board papers or other papers or information in relation to such Claim; and
  - (iii) the quorum at any Board meeting of the Company /SPV convened to consider any such Claim shall be one Independent Director nominated by each Material Shareholder other than the Developer.
- (b) If a Material Shareholder (other than the Developer) asserts that the Company or SPV has any Claim against the Developer or an Associate of the Developer:
- (i) the Independent Directors shall be entitled to determine if and when to pursue such Claim in the name and at the expense of the Company/ SPV by the issue of proceedings by the Company/SPV against the Developer and/or Associate of the Developer;
  - (ii) each of the Developer Directors shall not be entitled to any Board papers or other papers or information in relation to such Claim nor shall they be entitled to (and the Developer shall procure that each of the Developer Directors shall not) make (or participate in making) any decisions, attend or vote at meetings of the Board or otherwise take any action on behalf of the

Company/ SPV in respect of ~~the pursuance of such Claim by the Company/ SPV; and;~~

(A) any decision pursuant to sub-clause (b)(i) to issue proceedings in respect of a Claim; and/or

(B) once proceedings have been issued in respect of a Claim, the pursuance of that Claim by the Company/ SPV; and

(iii) the quorum at any board meeting of the Company/ SPV convened in relation to any ~~such~~ consideration of making a Claim (sub-clause (b)(i)) and after the issue of proceedings in relation to the relevant Claim shall be one Independent Director appointee of each Material Shareholder (other than the Developer).

(c) For the purposes of this clause 6.5, **Claim** shall mean a claim of any nature, whether for breach of contract, in tort, breach of statutory duty or otherwise.

(d) <sup>14</sup>The provisions of sub-clauses (a) to (c) shall apply, if a simple majority of Directors (other than the Director appointed by HMTCo) so decide, with the necessary changes having been made:

(i) in the case of sub-clause (a), if it is reasonable to conclude that the [Authority] will issue proceedings in respect of a Claim against the Company/SPV as if references to the Developer are references to HMTCo; or

(ii) in the case of sub-clause (b), if a Claim against the [Authority] is asserted by a Material Shareholder and/or if proceedings are then issued by the Company/SPV against the [Authority] as if references to the Developer are references to HMTCo.<sup>15</sup>

and, in either case, the Observer shall be excluded from meetings and from receipt of Board papers or other information in the same manner as the Director(s) appointed by HMTCo.

## 7 Distributions

7.1 Subject to clause 6.2 (*Reserved Matters*) the parties shall procure (insofar as permitted by law) that, subject to any restrictions imposed pursuant to the Project Documents and subject to ♦ the working capital and other financial requirements of SPV (e.g. budgeted expenditure and maintenance reserves) as determined by the SPV Directors:

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<sup>14</sup> Clause 6.5 - Step-aside provisions. Sub-clause (d) recognises the commercial context of there being proceedings between the Company/SPV and the relevant authority in allowing for the initiation and then conduct of any such proceedings to be with the Shareholders (excluding HMTCo) even though there is no legal reason/conflict which would otherwise preclude HMTCo from participating.

<sup>15</sup> Clause 6.5 - Step-aside provisions. If SPV (or the Company) is party to a contract with an Associate of another Shareholder, analogous provisions would be inserted with respect to Claims relating to that contract.

- (a) SPV shall distribute all amounts which are lawfully available for distribution by the SPV to the Company by way of dividend on the Shares in SPV but only after payment of any interest and principal which is then due and payable, in order of priority, in relation to any Shareholder Debt by the SPV under the relevant ~~Shareholder Agreement~~ Note Instrument; and
- (b) the Company shall distribute all amounts which are lawfully available for distribution by the Company to the Shareholders by way of dividend on the Shares. The dividend payable per Share shall be calculated pro-rata to the total number of Shares.

## 8 Budgeting, Business Planning and financial matters

### *The Business Plan (including the Annual Budget)*

#### 8.1

- (a) The first Business Plan<sup>1416</sup> relating to the HoldCo Business and the SPV Business covering the period from the date specified in the Data Sheet through to the end of the first financial year of the Company has been approved by the Shareholders and comprises Schedule 3 (*Agreed Form Business Plan*) to this Agreement. The Business Plan shall be reviewed by the Board at least every six months and updated for each financial year in accordance with the provisions of sub-clause (b).
- (b) No earlier than three months and no later than one month before the end of each financial year of the Company, the Company will prepare and circulate to Shareholders a draft of the proposed Business Plan for the next financial year (**Draft Business Plan**). The Draft Business Plan (with such amendments as are agreed to it) will become the Business Plan in place of the then current Business Plan upon the later of:
  - (i) the relevant Reserved Matter approval being given under clause 6.2 (*Reserved Matters*) to it; and
  - (ii) the start of the financial year to which it relates.

- 8.2 The Annual Budget for each financial year shall form part of the Business Plan. The Annual Budget shall be reviewed by the Board at least every three months. From the end of the second financial year following the end of the Lock-in Period (as defined in clause 9.7(d)) the Annual Budget shall include relevant lifecycle costs.

### *Financial records*

#### 8.3

- (a) The Shareholders shall use reasonable endeavours to procure that each of the Company and SPV ~~shall (and each of the Company/ shall keep proper books of account and make true and complete entries of all its dealings and transactions of and in relation to its Business.~~

<sup>1416</sup>

**Clause 8 – Business Plan.** The Business Plan will be a key part of the overall proposals to be put forward by the Developer (and approved by HMT Co) in terms of the financials of the Company / SPV and the running costs etc.

(b) The Company shall (and shall procure that SPV shall) keep proper books of account and make true and complete entries of all its dealings and transactions of and in relation to ~~its Business~~.

~~(b) The Company shall procure that SPV shall keep proper books of account and make true and complete entries of all its dealings and transactions of and in relation to its Business~~their Businesses.

*Provision of information to Shareholders and designated third parties*

## 8.4

- (a)
- (i) The Company shall supply in respect of the Company, and shall procure that SPV shall supply in respect of the SPV, each of the Shareholders (and to HMTCo if HMTCo is not then a Shareholder) with the Transparency Information as detailed in Part A of Schedule 7 (*Transparency Information and Commercially Sensitive Information*) relating to the Company/SPV with the relevant period set out therein.
  - (ii) Each Shareholder shall provide to each other Shareholder (and to HMTCo if HMTCo is not then a Shareholder) the information as detailed in Part B of Schedule 7 (*Transparency Information and Commercially Sensitive Information*) within the relevant period set out therein.
  - (iii) Each of the Company, SPV and each Shareholder will use its reasonable endeavours to assist HMTCo in its preparation of any report required by a government department from time to time, which relates in whole or in part to the Project<sup>4217</sup>.
- (b) Notwithstanding the provisions of clause 13.1 (*Confidentiality and Freedom of Information*):
- (i) each Shareholder may (but only once the relevant Shareholder has made the intended recipient aware of that Shareholder's obligations of confidentiality under this Agreement (and in the case of the intended recipients in (D) and (E)) has obtained a written undertaking from that intended recipient agreeing with that Shareholder and for the benefit of all other Shareholders and the Company and the SPV, to comply with such obligations of confidentiality as though it were a party to this Agreement) disclose any information received from the Company, SPV or any Director, to:
    - (A) any shareholder in it;
    - (B) any director or other officer of, adviser to, trustee or manager of, or investor or prospective investor in its Shareholder's Group;

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<sup>4217</sup> **Clause 8.4(a)(iii) - Project information.** This sub-clause is analogous to clause 31.2.(h) (vi) of the Project Agreement.

- (C) the Shareholder's investment adviser and any of its other professional advisers;
  - (D) any member or prospective member of the Shareholder's Group;
  - (E) potential purchasers of any of that Shareholder's interest in the Company; and
  - (F) any person to whom it is required by law or a regulatory authority or body or by the Project Documents to be disclosed.
- (ii) HMTCo may disclose and use any Transparency Information in such manner and for such purposes as it may determine from time to time, including reports and reviews of the performance of PF2 projects generally or specifically in respect of the Project and in relation to any audit, accounting or other review or scrutiny by any government or public body where HMTCo considers it appropriate to make some or all of such information available; and
  - (iii) the Company shall permit (and shall procure that SPV shall permit) all records referred to in clause 8.3 (*Financial records*) and/or clause 8.4(a) (*Provision of information to Shareholders and designated third parties*) to be examined and copied from time to time by HMTCo or by any person to whom HMTCo notifies the Company that it wishes to have access to any such documents, records or information under sub-clause (b)(ii).
- (c) If HMTCo ceases to hold any Shares it shall still be entitled to (and the Company and the other parties shall provide) the Transparency Information.

*Tax matters*<sup>18</sup>

8.5

- (a)
  - (i) Each Shareholder shall use its reasonable endeavours to ensure that both the Company and SPV are treated by all relevant authorities as being resident for taxation and other purposes in the United Kingdom<sup>1319</sup>.
  - ~~(ii) If a Shareholder is not or ceases to be United Kingdom resident for tax purposes, it shall be treated no differently for the purposes of the making of distributions by SPV or the Company~~

<sup>18</sup> Clause 8.5 - tax matters. The parties may wish to insert bespoke drafting in this clause, to regulate matters of importance to the Company and the Shareholders. The drafting may cover matters such as VAT grouping, transfer pricing, group payment arrangements, worldwide debt cap issues etc and, generally, organisational arrangements for the Company and SPV tax compliance and administration. Bidders are required to summarise the bespoke arrangements they propose when submitting bids.

<sup>13</sup> ~~Generally~~<sup>19</sup> Clause 8.5 –tax matters. The taxation provisions have been drafted on the premise that HoldCo and SPV are tax resident in the United Kingdom ~~and the taxation provisions have been drafted on this premise.~~

~~or otherwise, and, in particular, shall not be entitled to any additional sums to compensate for any withholding required to be made by the payer of any sums to it pursuant to this Agreement.~~

~~(iii) To the extent that any Shareholder (**Affected Shareholder**) suffers any reduction in distributions or dividends from the Company as a direct result of another Shareholder (**non-UK Taxpayer**) ceasing to be resident in the United Kingdom for tax purposes, the non-UK Taxpayer shall indemnify the Affected Shareholder in respect of its demonstrable losses.~~

~~(b) To the extent that any tax losses arise, the Shareholders shall agree from time to time as the losses arise, how the losses shall be treated. The Shareholders agree, if so requested by a Shareholder, to discuss a mechanism for:~~

~~(i) the obtaining of relief for trading losses and other amounts eligible for relief from corporation tax by virtue of consortium-relief provisions by the Company or SPV or a Shareholder and compensation; or~~

~~(ii) for the making of an election to enable deductible payments to be paid by the Company or SPV to the Shareholders, each as under the relevant provisions of the Taxes Act. [other tax provisions to be agreed]~~

(b) To the extent that any tax losses arise, the Shareholders shall agree from time to time as the losses arise, how the losses shall be treated. The Shareholders agree, if so requested by a Shareholder, to discuss a mechanism for the obtaining of relief for a proportionate share of trading losses of each of the Shareholders and other amounts eligible for relief from corporation tax by virtue of consortium-relief provisions by the Company or SPV or a Shareholder and compensation. Each Shareholder agrees that no such mechanism shall be approved by the Company or SPV without the approval of the other Shareholders (acting reasonably and having regard to what is most likely to promote the success of the Company and SPV).<sup>14</sup>

## 9 Restrictions on share transfers

*Restrictions on transfers of Shares in the Company*

### 9.1

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<sup>14</sup> ~~Clause 8.5(b) – Tax / tax losses.~~ The parties ~~may wish to include specific provisions here from the outset on how tax losses are to be dealt with. Parties may seek guidance from HMTCo regarding the acceptability of proposed provisions to HM Treasury.~~

- (a) Except in relation to any transfer of Shares permitted by Article 12 (*Transfer – Permitted Transfers*), in the HoldCo Articles, all transfers of Shares shall be subject to the rights of first refusal<sup>1520</sup> set out in the HoldCo Articles.
- (b) Each party undertakes to transfer Shares only in accordance with this Agreement and the HoldCo Articles and to procure that only transfers made in accordance with this Agreement and the HoldCo Articles are registered.
- (c) Each Shareholder undertakes to comply with any restrictions on the transfer of Shares contained in the Project Documents.
- (d) No Shareholder shall sell or transfer any Shares to any person other than another Shareholder unless that person has first executed a Deed of Adherence in the form set out in Schedule 4 (*Deed of Adherence*). Each of the parties shall execute any such Deed of Adherence in respect of a transfer of Shares made in accordance with this Agreement and the HoldCo Articles. The Company shall not register any transfer in accordance with this Agreement and the HoldCo Articles unless the transferee (other than a Shareholder) has first executed a Deed of Adherence in the form set out in Schedule 4 (*Deed of Adherence*).
- (e) No Shareholder ~~(other than HMTCo in relation to sub-clause (e)(ii) where the restriction shall not apply to HMTCo)~~ shall, except with the prior written consent of all the Shareholders:
  - (i) grant any option over any Shares (or any interest, whatsoever, legal or beneficial, in any Shares); or
  - (ii) enter into any agreement in respect of the votes attached to any Shares (other than in any shareholders' agreement entered into between the shareholders of any company which is a Material Shareholder)~~;~~

provided that nothing in this sub-clause (e) shall restrict or prevent

(A) ~~provided that nothing in this sub-clause (e) shall restrict or prevent~~ the Company from granting a security interest over its shares in SPV to a funder of the SPV in relation to a project~~;~~ or

(B) ~~arrangements between HMTCo and the Authority from time to time.~~<sup>21</sup>

- (f) No Shareholder shall be entitled to give a Transfer Notice if it (or, if it is a company, any of its Associates excluding SPV) is at that time in material breach of this

<sup>1520</sup>

**Clause 9.1(a) – Permitted transfers.** The mechanism will be "first refusal" – i.e. a seller being able to sell to a third party at or above an "offer price" if the other shareholders have had the opportunity to buy at that price and have decided not to.

<sup>21</sup>

Clause 9.1(e) – voting of shares. As the Authority funds the HMTCo investment, HM Treasury will enter a Memorandum of Understanding with the Authority regarding the manner in which public sector equity will be funded and managed. In respect of voting, it is envisaged that decisions are taken by Treasury PF2 Equity Unit save in respect of: (a) proposed increased shareholder funding; (b) insolvency related matters; and (c) exercise of pre-emption rights.

~~Agreement or in material breach of any Project Document to which that Shareholder or any of its Associates is a party save with the written consent of all the Material Shareholders (where a Shareholder wishing to give a Transfer Notice shall be deemed to have provided such consent).~~ Nothing in this sub-clause (f) shall prevent the service of a Transfer Notice which a Shareholder is required to give in accordance with the HoldCo Articles or the giving of a Deemed Transfer Notice in accordance with the Articles.

- (g) Each of the Company and SPV shall procure that each share certificate issued by it will carry the following statement:

*"Any disposition, transfer, charge of or dealing in any other manner in the securities represented by this certificate is restricted by the Articles of Association of [Company] Limited and by a Shareholders' Agreement dated ~~201~~ and made between [Developer], [HMTCo], [Third Party Equity Provider], [Company] Limited and [SPV] Limited".*

- (h) ~~Subject to the provisions of this clause 9 (Restrictions on share transfers) including, without limitation clause 9.7 (Lock In Periods), a~~ Shareholder may not transfer any Share to ~~a Suitable~~an Unsuitable Third Party.

- (i) No Shareholder wishing to transfer Shares (**Transferring Shareholder**) may do so unless it transfers (or procures the transfer of) an equivalent proportion (relative to the number of Shares that the Transferring Shareholder owns) of any Shareholder Debt held by it or any member of the Shareholder's Group to the proposed transferee. The Transferring Shareholder must elect to include reference to both Shares and Shareholder Debt (where relevant) in a Transfer Notice.

#### *Events of Default and deemed transfers*

- 9.2 Notwithstanding the provisions of the HoldCo Articles, if an Event of Default occurs in relation to a Shareholder (**Defaulting Shareholder**) which, if capable of remedy, has not been remedied within twenty (20) Business Days of the Shareholder in default becoming aware of the Event of Default (or such longer period as the other Shareholders may notify in writing to the Defaulting Shareholder) (the **Remedy Period**) then the Defaulting Shareholder shall be deemed, at the end of the Remedy Period, to have given a Deemed Transfer Notice in respect of all the Shares held by it (**Default Shares**) in accordance with the provisions of the HoldCo Articles.

#### *Shareholder Debt*

### 9.3

- (a) Where a Deemed Transfer Notice is deemed given pursuant to clause 9.2 (*Event of Defaults and deemed transfers*), such Deemed Transfer Notice shall also be deemed to offer, by way of transfer, any Shareholder Debt outstanding to the Defaulting Shareholder in the Company (**Defaulting Shareholder Debt**). Any person acquiring some or all of the Default Shares pursuant to the provisions of this clause 9 (*Restrictions on share transfer*) and the HoldCo Articles shall be required to accept a transfer to it of an equal proportion of the Defaulting Shareholder Debt (and the Defaulting Shareholder shall transfer such Defaulting Shareholder Debt in accordance with the terms of the ~~Shareholder Loan Agreement~~Note Instrument



and this Agreement). Except where sub-clause (b) applies, the price for the Defaulting Shareholder Debt shall be the price agreed between the non defaulting Shareholders and the Defaulting Shareholder or, if a market valuation of the Default Shares is requested in accordance with the Articles, then the parties shall require and procure that such market valuation shall also value the Defaulting Shareholder Debt and the transfer of the Defaulting Shareholder Debt shall be at the ~~market value~~Market Value as so determined.

- (b) This sub-clause (b) applies where the Default Shares are offered for sale pursuant to the provisions of clause 9.4 (*Appointment of the Sale Agent in certain circumstances*) in which case the price to be paid for the Defaulting Shareholder Debt shall be as determined in accordance with clause 9.4 (*Appointment of the Sale Agent in certain circumstances*) and Schedule 5 (*The Sale Agent*).

*Appointment of the Sale Agent in certain circumstances*

- 9.4 If on the expiry of the Deemed Transfer Notice, the non-defaulting Shareholders have not purchased all of the Default Shares and accompanying Defaulting Shareholder Debt then a notice (an **Instruction to Sell Notice**) shall be deemed to have been served on the Defaulting Shareholder requiring the Defaulting Shareholder to sell such Default Shares and any such Defaulting Shareholder Debt and the Defaulting Shareholder and the other Shareholders shall jointly appoint a sale agent (**Sale Agent**) who shall be instructed in accordance with Schedule 5 (*The Sale Agent*) to find a purchaser for such Default Shares and any Defaulting Shareholder Debt (the Default Shares and any such Defaulting Shareholder Debt together being the **Investment**).
- 9.5 If no Qualifying Bid (as defined in Schedule 5 (~~the~~The *Sale Agent*)) is received from a Suitable Third Party within the sixty (60) Business Day period referred to in paragraph 6 of Schedule 5 (*The Sale Agent*) or the Investment has not been sold to a Suitable Third Party in accordance with and within the time periods set out in Schedule 5 (*The Sale Agent*), then the non defaulting Shareholders shall be entitled by notice in writing to the Defaulting Shareholder either:
- (a) subject to clause 9.6, to elect to purchase the Investment whereupon the Defaulting Shareholder shall forthwith transfer to the non defaulting Shareholders making the election pro rata to their holdings of Shares all (but not some only) of the Investment for an aggregate consideration (given that the market is deemed to have determined that the value of the Investment is nil) equal to the par value of the Default Shares only; or
- (b) to require that the Company be wound up in accordance with clause 12 (*Winding Up*) (in which case the Defaulting Shareholder undertakes to the other Shareholders to vote in favour of any resolution(s) to wind up the Company).
- 9.6 Notwithstanding clause 9.5(a), any non-defaulting Shareholder shall be entitled to purchase its entitlement to the Investment in its own name and/or by procuring that a Suitable Third Party purchases any part of that entitlement not purchased by that Shareholder provided that the identity of that Suitable Third Party is disclosed to the other non-defaulting Shareholders when it makes an election under clause 9.5(a)<sup>16</sup> and no non-defaulting Shareholder reasonably objects in writing within five (5) Business Days of being notified to the identity of the proposed Suitable Third Party on the grounds that the proposed

Suitable Third Party is a direct competitor to the non-defaulting Shareholder making the objection.<sup>22</sup>.

Lock In Periods

9.7

(a) **Shares in the Company.** ~~Each~~Subject always to clause 9.1(h), each Shareholder agrees that it shall not transfer or dispose of any interest in or over or right attaching to any of its Shares except by a transfer:

(i) to a transferee at any time after the expiry of the Lock In Period (as defined in sub-clause (d));

(ii) at any time to a transferee permitted in accordance with Article ~~12.1~~12.1, 12.2 or 12.3 of the HoldCo Articles; or

(iii) In the case of HMTCo, to a transferee at any time including during the Lock In Period (as defined in sub-clause (d)),<sup>4723</sup>1

but subject to sub-clauses (a)(i) to ~~(iii)~~(iii) above, otherwise in accordance with the provisions of the HoldCo Articles and this clause 9 (*Restrictions on share transfers*).

(b) **Shares in the Developer.** No transfer of any legal or beneficial interest in any share capital of [*identify superior holdings in the Developer*] (each an **Original Developer Shareholder**) in the Developer or change in the control over the exercise of voting rights conferred by shares held by the Original Developer Shareholders in the Developer shall be made or effected before the expiry of the Lock In Period;

(c) **Shares in the Third Party Equity Provider.** No transfer of any legal or beneficial interest in any share capital of [*identify superior holdings in the Third Party Equity Provider*] (each an **Original TPEP Shareholder**) in the Third Party Equity Provider or change in the control over the exercise of voting rights conferred by shares held by the Original TPEP Shareholders in the Third Party Equity Provider shall be made or effected before the expiry of the Lock In Period.

(d) For the purposes of this Agreement, **Lock In Period** means the period from and including the date of this Agreement up to and including the end of the SPV Lock In Period.

## 10 Warranties and undertakings

Warranties by HMTCo

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<sup>4622</sup> **Clause 9.6 – HMTCo purchase of the Investment.** HMTCo needs the flexibility to purchase a proportion of the shares only, with HMTCo procuring a Suitable Third Party purchaser for any remainder. (HMTCo expects to remain in a minority position).

<sup>4723</sup> **Clause 9.7 – Lock In Periods.** To facilitate new equity investors in PF2 projects, HMTCo may subscribe for a higher equity stake at financial close and sell down part of its shareholding thereafter during the lock in period. ~~This will be determined on a case by case basis~~ if HMTCo wishes to do this, bidders will be advised at the start of procurement and this provision would then be included.

10.1 HMTCo warrants and represents to each of the other parties at the date of this Agreement that:

- (a) it is duly incorporated under the laws of England and Wales;
- (b) it has the corporate power to enter into and to exercise its rights and perform its obligations under the Project Documents to which it is a party;
- (c) each Project Document to which it is a party constitutes, or will when executed constitute, legal, binding and enforceable obligations on it;
- (d) it has taken all necessary action to authorise the execution of and the performance of its obligations under the Project Documents to which it is a party (and in the case of a Project Document executed after the date of this Agreement will take all necessary action to authorise the execution of such Project Document);
- (e) no claim is being asserted and no litigation, arbitration or administrative proceeding is presently in progress, or, to the best of its knowledge pending or threatened against it or any of its assets which will or might have a material adverse effect on its ability to perform its obligations under those Project Documents to which it is a party;
- (f) it is not subject to any contractual obligation, compliance with which will be likely to have a material adverse effect on its ability to perform its obligations under the Project Documents to which it is a party; and
- (g) no proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge are threatened) for its winding-up or for its dissolution or for the appointment of a receiver, administrative receiver, liquidator, administrator or similar officer in relation to any of its assets or revenue.

*Warranties by the Developer, the Third Party Equity Provider, the Company and the SPV*

10.2 The Developer, the Third Party Equity Provider, the Company and the SPV each severally warrant and represent to each of the other parties at the date of execution of this Agreement that:

- (a) each of them is duly incorporated under the laws of England and Wales<sup>1824</sup> and has the corporate power to enter into and to exercise its rights and perform its obligations under the Project Documents to which it is a party;
- (b) each Project Document to which it is a party constitutes, or will when executed constitute legal, binding and enforceable obligations on each of them;
- (c) each of them has taken all necessary action to authorise the execution of and the performance of their obligations under the Project Documents to which they are respectively parties (and in the case of a Project Document executed after the date of this Agreement will take all necessary action to authorise the execution of that Project Document);
- (d) no claim is being asserted and no litigation, arbitration or administrative proceeding is presently in progress or, to the best of its knowledge pending or threatened against

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<sup>1824</sup> [Clause 10.2\(a\)](#). To be amended if any of the parties are not incorporated in England and Wales.

any of them or any of their assets which will or might have a material adverse effect on their ability to perform their obligations under the Project Documents;

- (e) none of them is subject to any contractual obligation, compliance with which will be likely to have a material adverse effect on their ability to perform their obligations under the Project Documents; ~~and~~
- (f) no proceedings or other steps have been taken and not discharged (nor, to the best of their knowledge, are threatened) for the winding-up of any of them or for their dissolution or for the appointment of a receiver, administrative receiver, liquidator, administrator or similar officer in relation to any of their assets or revenue-; ~~and~~
- (g) each of them has complied with and currently complies with the all relevant anti-bribery and corruption laws applicable to its business and operations including (without limitation) the provisions of the Bribery Act 2010.

*Warranties by the Developer, the Company and the SPV*

10.3 The Developer, the Company and the SPV each severally warrant and represent to each of the other Shareholders at the date of execution of this Agreement that each of the Company and SPV are newly incorporated companies and have not traded prior to the date of this Agreement.

**Tax compliance<sup>25</sup>**

**10.4 Each Shareholder represents and warrants that, as at the date of this Agreement, it has notified HMTCo in writing of any Occasions of Tax Non-Compliance or any litigation that it is involved in that is in connection with any Occasions of Tax Non-Compliance.**

**10.5 If at any time an Occasion of Tax Non-Compliance occurs in relation to a Shareholder, the Shareholder shall:**

**(a) notify HMTCo in writing of such fact within five (5) Business Days of its occurrence; and**

**(b) promptly provide to HMTCo:**

**(i) details of the steps which the Shareholder is taking to address the Occasion of Tax Non-Compliance and to prevent the same from recurring, together with any mitigating factors that it considers relevant; and**

**(ii) such other information in relation to the Occasion of Tax Non-Compliance as HMTCo may reasonably require.**

**10.6 If:**

**(a) the warranty given by a Shareholder pursuant to clause 10.4 is untrue; and/or**

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<sup>25</sup> Clause 10.4 - tax compliance. New clause added using the recommended drafting in the Cabinet Office Action Note 06/13 "Procurement Policy Note: Measures to Promote Tax Compliance".

- (b) the Shareholder commits a material breach of its obligation to notify HMTCo of any Occasion of Tax Non-Compliance as required by clause 10.5 or the [Authority] under the analogous provisions of the Authority Project Agreement;
- and, in either case, the Shareholder fails to provide details of proposed mitigating factors which, in the reasonable opinion of HMTCo, are acceptable, then HMTCo shall be entitled to give a notice to that Shareholder (a Provisional Transfer Notice) and the provisions of clause 10.7 shall then apply.

### Provisional Transfer Notices

#### 10.7 If a Shareholder receives a Provisional Transfer Notice:

- (a) it shall have ninety (90) days to effect the transfer of its Shares and Shareholder Debt to a Suitable Third Party; and
- (b) in relation to any such transfer:
- (i) the pre-emption and transfer provisions in this Agreement and the Articles shall apply;
- (ii) if the Shares and Shareholder Debt are transferred to a Suitable Third Party then the other Shareholders shall take (or procure) all steps reasonably requested of them by the transferring Shareholder to enable any such transfer to be effected and registered.
- (c) If the Shareholder has not effected the transfer of its Shares and Shareholder Debt to a Suitable Third Party within the ninety (90) day period referred to (or such longer period as may be agreed by HMTCo) then the same shall constitute an Event of Default in respect of that Shareholder.

## 11 Disputes

- 11.1 If there is a disagreement or dispute arising between two or more of the parties in connection with this Agreement (a **Dispute**), the parties shall use all reasonable endeavours to resolve the matter on an amicable basis. A matter or action requiring approval as a Reserved Matter not receiving the necessary approval shall not constitute a Dispute. If one party serves formal written notice on one or more of the others that a Dispute has arisen and the parties are unable to resolve the Dispute within a period of twenty (20) Business Days from the service of such notice, then the Dispute shall be referred to the respective Chief Executives, Managing Directors or, in the case of HMTCo, the Chief Executive of Infrastructure UK (as the case may be) of each of the parties who shall attempt to resolve the dispute within the following twenty (20) Business Days (the **Second Consideration Period**). No recourse to arbitration or litigation by any party against any other under this Agreement shall take place unless and until such procedure has been followed.
- 11.2 If the Chief Executives or Managing Directors (as the case may be) of the parties are unable to resolve a Dispute within the Second Consideration Period, then a **Deadlock** shall be deemed to have arisen following the expiry of the Second Consideration Period or such earlier date on which the parties agree that Deadlock has arisen (the **Deadlock Date**). Any Deadlock shall be dealt with in accordance with clause 11.3 (*Disputes*).

- 11.3 If a Deadlock has arisen, then any party shall be entitled to refer the Dispute to a third party expert (the **Expert**) who shall, unless otherwise agreed, be an independent expert with knowledge of and experience in matters relating to public private partnerships, [*project/ sector relevant subject matter – defence, health, waste, education etc*] and construction and development. The identity of the Expert shall be agreed between the parties within ten (10) Business Days of the Deadlock Date or, failing such agreement, shall be appointed by the President from time to time of the Institute of Chartered Accountants in England and Wales or any successor thereto and the fees and expenses of the Expert in making his determination shall be borne in such proportions as the Expert shall determine.
- 11.4 The parties shall co-operate with each other and with the Expert in an attempt to resolve the Dispute and Deadlock amicably. The decision of the Expert (appointed as set out above) shall not be binding unless the parties agree otherwise in advance of referring any Dispute to the Expert. Following the Expert's decision any party may, unless the Parties have agreed that the Expert's decision shall be binding, issue legal proceedings in relation to the subject matter of the Dispute. Where the parties agree that the Expert's decision shall be binding, the decision of the Expert (appointed as set out above) as to the Dispute or Deadlock shall (except in the case of manifest error) be final and binding on all the parties for all purposes and (subject only to their fiduciary duties as Directors) the parties and their respective appointees on the Board shall execute all such documents and do and take all such action as may be necessary or reasonably desirable to give effect to and/or implement the said decision as promptly as reasonably practicable after the date of the same being so determined. For the purposes of this clause 11 (*Disputes*), any consent required from any party to implement the decision of the Expert made in accordance with the above provisions shall be deemed to have been given.

## **12 Winding Up**

- 12.1 Without prejudice to clause 6.2, if the Shareholders pass a resolution pursuant to this Agreement or otherwise to wind up the Company by way of a members' voluntary winding-up they shall procure that the liquidator is a member of the Institute of Chartered Accountants in England and Wales acceptable to all the Shareholders and in default of agreement nominated at the request of any Shareholder by the President from time to time of such Institute.
- 12.2 Except to the extent each party has contractual obligations to the contrary, the Shareholders shall prove in the winding-up of the Company to the maximum extent permitted by law for all sums due or to fall due to them respectively from the Company and shall exercise all rights of set-off and generally do all such other acts and things as may be available to them in order to obtain the maximum receipts and recoveries.
- 12.3 To the extent that any or all of the Shareholders do not receive satisfaction in full in the winding-up of the Company of all sums due or to fall due to them the aggregate shortfall between all sums due or to fall due to the Shareholders and all amounts actually recovered by the Shareholders from the Company or its liquidator (whether by direct payment or the exercise of any right of set-off or otherwise) shall be calculated and apportioned between the Shareholders in the same proportions as the Shareholders hold Shares at the time of the determination. The Shareholders shall make such contributions to each other as are necessary to procure that the Shareholders bear the aggregate amount of such shortfall in such proportions.

## **13 Miscellaneous**

### *Confidentiality and Freedom of Information*

## 13.1

- (a) Subject to clause 8.4(b)(ii), during the term of this Agreement and after termination or expiry of the Agreement for any reason whatsoever, a party receiving information from another party shall:
- (i) keep Confidential Information (as defined in sub-clause (e)) confidential;
  - (ii) not disclose Confidential Information to any other person other than with the written consent of the party disclosing such information or in accordance with sub-clauses (b) to (d); and
  - (iii) not use Confidential Information for any purpose other than the performance of its obligations under this Agreement and the other Project Documents.
- (b) During the term of this Agreement, a party receiving information from another party may, subject to the provisions of clause 8.4 (*Provision of information to Shareholders and designated third parties*), disclose Confidential Information to its employees, contractors, sub-contractors, agents and advisers under conditions of confidentiality in each case to the extent that it is reasonably necessary for the purposes of this Agreement, or any other Project Document and may disclose Confidential Information to its funders, prospective funders, prospective shareholders of the Company or prospective purchasers of its assets under conditions of confidentiality. In each case the permitted recipient of such Confidential Information shall be known as a **Recipient**.
- (c) The party receiving information from another party shall so far as practicable procure that each Recipient is made aware of and complies with all that receiving party's obligations of confidentiality under this Agreement as if the Recipient were a party to this Agreement.
- (d) Without prejudice to sub-clause (b), the obligations contained in sub-clauses (a) to (c) shall not apply to:
- (i) any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under the Agreement for the performance of those obligations;
  - (ii) any matter which a party can demonstrate is already, or becomes, generally available and in the public domain otherwise than as a result of a breach of any of the provisions in sub-clauses (a) to (c);
  - (iii) any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or, if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
  - (iv) any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;

- (v) any provision of information to the parties' own professional advisers or insurance advisers or to lenders in respect of the Project or such lender's professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Company and/or SPV to enable it to carry out its obligations under this Agreement or may wish to acquire shares in the Company and/or SPV in accordance with the provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- (vi) any disclosure for the purposes of:
  - (A) the examination and certification of the Company's or the SPV's accounts;
  - (B) any examination pursuant to [Section 6(1) of the National Audit Act 1983]<sup>1926</sup> of the economy, efficiency and effectiveness with which the Authority has used its resources;
  - (C) complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies; or
  - (D) (without prejudice to the generality of sub-clause (d)(iii) above) compliance with the FOIA and/or the Environmental Information Regulations,

provided that, for the avoidance of doubt, neither sub-clause (d)(vi)(D) nor sub-clause (d)(iii) above shall permit disclosure of Confidential Information otherwise prohibited by sub-clauses (a) to (c) above where that information is exempt from disclosure under Section 41 of the FOIA.

- (e)
  - (i) Where disclosure is permitted under sub-clause (d), other than sub-clauses (d)(ii), (iii), and (vi), the party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.
  - (ii) For the purposes of the [National Audit Act 1983 the Comptroller and Auditor General] may examine such documents as he may reasonably require which are owned, held or otherwise within the control of the Company and/or SPV and may require the Company and/or SPV to produce such oral or written explanations as he considers necessary. For the avoidance of doubt it is hereby declared that the carrying out of an examination under [Section 6(3) (d) of the National Audit Act 1983] in relation to the Company and/or SPV is not a function exercisable under this Agreement.

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<sup>19</sup> <sup>26</sup> Clause 13.1(d)(vi). The National Audit Office are the auditors for central government.



- (iii) The parties acknowledge that the [National Audit Office] has the right to publish details of the Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament.
- (iv) The provisions of this clause 13.1 *Confidentiality and Freedom of Information*) are without prejudice to the application of the Official Secrets Act 1911 to 1989.
- (v) For the purposes of this clause 13.1 (*Confidentiality and Freedom of Information*), **Confidential Information** means:
  - (A) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, commercially sensitive intellectual property rights and know-how of any party and all personal data and sensitive personal data within the meaning of the Data Protection Act 1988; and
  - (B) Commercially Sensitive Information. <sup>2027</sup>

*Freedom of Information*

- (f) References in sub-clauses (f) to (m) to the Company shall apply also to SPV with the necessary changes. The parties acknowledge that HMTCo is subject to the requirements of the FOIA and the Environmental Information Regulations and the Company shall facilitate HMTCo's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in sub-clauses (f) to (m) (inclusive) below. For the purpose of sub-clauses (f) to (m) (inclusive) only **Information** has the meaning given under Section 84 of the FOIA.
- (g) Where HMTCo receives a Request for Information in relation to Information that the Company is holding on behalf of HMTCo, HMTCo shall transfer to the Company such Request for Information that it receives as soon as practicable and in any event within [five] Business Days of receiving a Request for Information and the Company shall:
  - (i) provide HMTCo with a copy of all such Information in the form that HMTCo requires as soon as reasonably practicable and in any event within [ten] Business Days (or such other period as HMTCo may acting reasonably specify) of HMTCo's request; and
  - (ii) provide all necessary assistance as reasonably requested by HMTCo in connection with any such Information, to enable HMTCo to respond to a Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.
- (h) Following notification under sub-clause (g) and up until such time as the Company has provided HMTCo with all the Information specified in sub-clause (g)(i), the

<sup>2027</sup>

**Clause 13.1(i) – Commercially Sensitive Information.** Any information or classes of information that the parties agree should be treated as Commercially Sensitive Information should be included in Schedule 7, Part C entitled Commercially Sensitive Material. The parties should be mindful of guidance on this issue when agreeing which information should be categorised as commercially sensitive. Broad blanket categorisations are not appropriate.

Company may make representations to HMTCo as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that HMTCo shall be responsible for determining at its absolute discretion:

- (i) whether the Information is exempt from disclosure under the FOIA and the Environmental Information Regulations;
- (ii) whether the Information is to be disclosed in response to a Request for Information,

and in no event shall the Company respond directly or allow its subcontractors to reply directly to a Request for Information unless expressly authorised to do so by HMTCo.

- (i) The Company shall ensure that all Information held on behalf of HMTCo is retained for disclosure for at least [six] years from the date it is acquired and shall permit HMTCo to inspect such Information as requested from time to time.
- (j) The Company shall transfer to HMTCo any Request for Information received by the Company as soon as practicable and in any event within two (2) Business Days of receiving it.
- (k) The Company acknowledges that any lists provided by it listing or outlining Confidential Information, are of indicative value only and that HMTCo may nevertheless be obliged to disclose Confidential Information in accordance with sub-clause (i) above.
- (l) If HMTCo makes a request to the Company pursuant to sub-clause (g)(ii) the Company shall, as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform HMTCo of the Company's estimated costs of complying with the request to the extent these would be recoverable if incurred by HMTCo under Section 12(1) of the FOIA and the Fees Regulations. Where such costs (either on their own or in conjunction with HMTCo's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in Section 12(1) of the FOIA and as set out in the Fees Regulations HMTCo shall inform the Company in writing whether or not it still requires the Company to comply with the request and where it does require the Company to comply with the request the ten (10) Business Days period for compliance shall be extended by such number of additional days for compliance as HMTCo is entitled to under Section 10 of the FOIA. In such case, HMTCo shall notify the Company of such additional days as soon as practicable after becoming aware of them and shall reimburse the Company for such costs as the Company incurs in complying with the request to the extent HMTCo is itself entitled to reimbursement of such costs in accordance with its own FOIA policy from time to time.
- (m) The Company acknowledges that (notwithstanding the provisions of clause 13.1 (*Confidentiality and Freedom of Information*)) HMTCo may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under Part I of the Freedom of Information Act 2000 (the Code), be obliged under the FOIA, or the Environmental Information Regulations to disclose Information concerning the Company:

- (i) in certain circumstances without consulting with the Company, or
- (ii) following consultation with the Company and having taken their views into account.

Provided always that where sub-clause (m)(i) applies, HMTCo shall, in accordance with the recommendations of the Code, draw this to the attention of the Company prior to any disclosure.

#### *Governing law and Jurisdiction*

### 13.2

- (a) This Agreement and any non-contractual obligations arising out of or in connection with it shall be considered as a contract made in England and Wales and shall be subject to the laws of England and Wales.
- (b) Subject to the provisions of clause 11 (*Disputes*), the parties agree that the courts of England and Wales shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of those courts.

#### *Further assurance*

### 13.3 Each party will:

- (a) execute any document and do any thing; and
- (b) use all reasonable endeavours to procure that any third party (where necessary) executes any deed or document and does any thing,

reasonably necessary to implement the terms of this Agreement.

#### *Costs*

### 13.4 Each party shall bear its own costs in relation to the drafting, negotiating and implementation of the Project Documents.

#### *Insurance*

### 13.5

- (a) The Company and the SPV shall each take out and maintain with reputable insurers all insurances required to be maintained by law and such other prudent insurances against such risks as are normally insured against by businesses carrying on activities similar to those of the Company/ SPV and (without prejudice to the generality of the foregoing) shall insure its assets of an insurable nature for their full replacement or reinstatement value. Each of the Company and the SPV shall comply with its obligations under the Project Documents in respect of insurance.
- (b) The Company and the SPV shall take out and maintain appropriate directors and officers liability insurance.

*Assignment*

13.6

- (a) This Agreement, shall be binding on, and shall enure to the benefit of, each of the parties and their respective successors. In the case of HMTCo its successors shall include any person to whom HM Treasury transfers the property, rights and obligations of HMTCo.
- (b) ~~No~~Save as permitted by sub-clause (a), no party shall assign, transfer, sub contract or otherwise dispose of any interest in this Agreement.

*Entire agreement*

13.7 Except where expressly provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject of this Agreement.

*Notices*

13.8

- (a) All notices under this Agreement shall be in writing and all certificates, notices or written instructions to be given under the terms of this Agreement shall be served by sending the same by first class post, email or by hand, leaving the same at:

<b><i>If to the Developer</i></b>	
For the attention of	
Address	
Email	
<b><i>If to HMTCo</i></b>	
For the attention of	
Address	
Email	
<b><i>If to the Third Party Equity Provider</i></b>	
For the attention of	
Address	
Email	
<b><i>If to the Company</i></b>	
For the attention of	
Address	
Email	
<b><i>If to the SPV</i></b>	
For the attention of	

Address	
Email	

- (b) Any party to this Agreement may change its nominated address or email address by prior notice to the other parties.
- (c) Notices given by post shall be effective upon the earlier of (i) actual receipt, and (ii) five (5) Business Days after mailing. Notices delivered by hand shall be effective upon delivery. Notices given by email shall be deemed to have been received (unless there is an error message returned to that email):
  - (i) within two (2) hours after sending, if sent on a Business Day between the hours of 9am and 4pm; or
  - (ii) by 11am on the next following Business Day, if sent after 4pm, on a Business Day but before 9am on that next following Business Day.

*Contracts (Rights of Third Parties) Act 1999*

13.9 It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provisions contained in this Agreement.

*Waiver – no waiver unless in writing*

13.10 Any relaxation, forbearance, indulgence or delay (together **indulgence**) of any party in exercising any right shall not unless made in writing, be construed as a waiver of the right and shall not affect the ability of that party subsequently to exercise that right or to pursue any remedy, nor shall any indulgence constitute a waiver of any other right (whether against that party or any other person).

*Severability*

13.11 If any provision of this Agreement shall be declared invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability or legality of the remaining provisions of this Agreement.

*No partnership or agency*

13.12

- (a) Nothing in this Agreement shall be construed as creating a partnership.
- (b) No party shall be deemed to be, an agent of any other party and no party shall hold itself out as having authority or power to bind any other party in any way.

*Amendments*

13.13 This Agreement may not be varied except by an agreement in writing executed as a deed by duly authorised representatives of the parties.

**Executed as a deed** by the parties or their duly authorised representatives on the date of this Agreement.

[Executed and delivered as a **DEED** by )  
[**DEVELOPER**] )  
acting by its duly authorised signatories: )

.....  
Director

.....  
Director/ Secretary\*]

OR

[Executed and delivered as a **DEED** by )  
[**DEVELOPER**] )  
acting by its duly authorised signatory: )

.....  
Director

In the presence of:

Witness Signature:

Name:

Address ]

[Executed and delivered as a **DEED** by )  
[**HM TREASURY COMPANY LIMITED**] )  
acting by its duly authorised signatories: )

.....  
Director

.....  
Director/ Secretary\*]

OR

Executed and delivered as a **DEED** by )  
**[HM TREASURY COMPANY LIMITED]** )  
acting by its duly authorised signatory: )

.....  
Director

In the presence of:

Witness Signature:

Name:

Address

[Executed and delivered as a **DEED** by )  
**[THIRD PARTY EQUITY PROVIDER]** )  
acting by its duly authorised signatories: )

.....  
Director

.....  
Director/ Secretary\*]

OR

[Executed and delivered as a **DEED** by )  
**[THIRD PARTY EQUITY PROVIDER]** )  
acting by its duly authorised signatory: )

.....  
Director

In the presence of:

Witness Signature:

Name:

Address

]



[Executed and delivered as a **DEED** by )  
[**COMPANY**] **LIMITED** )  
acting by its duly authorised signatories: )

.....  
Director

.....  
Director/ Secretary\*]

OR

[Executed and delivered as a **DEED** by )  
[**COMPANY**] **LIMITED** )  
acting by its duly authorised signatory: )

.....  
Director

In the presence of:

Witness Signature:

Name:

Address ]

[Executed and delivered as a **DEED** by )  
[**SPV**] **LIMITED** )  
acting by its duly authorised signatories: )

.....  
Director

.....  
Director/ Secretary\*]

OR

[Executed and delivered as a **DEED** by )  
[**SPV**] **LIMITED** )  
acting by its duly authorised signatory: )

.....  
Director

In the presence of:

Witness Signature:

Name:

Address ]

## Schedule 1)

### Definitions and Interpretation

#### 1 Definitions

1.1 In this Agreement, unless the context otherwise requires:

**Alternate** means an alternate director appointed by a Material Shareholder under clause 5.1(d) (*Composition of the Boards and the right to appoint Directors*);

**Annual Budget** means the annual budget forming part of the Business Plan;

**Appointing Shareholder** has the meaning given in clause 5.3(a) (*Removal of/ change to nominated Directors*);

**Articles** means the HoldCo Articles or the SPV Articles as the context requires;

**Associate**<sup>24</sup><sub>28</sub> means in relation to any company:

- (a) any company of which such company is a subsidiary;
- (b) any subsidiary of such company; or
- (c) any other subsidiary of such company's holding company

and **Associated** shall be construed accordingly;

**Auditors** means the auditors for the time being of the Company;

**Authority Project Agreement** means [add relevant definition of the project agreement];

**Boards** means the HoldCo Board and the SPV Board (as the context may require) and **Board** means either of them;

**Business Day** means a day other than a Saturday, Sunday or a bank holiday in England;

**Business Plan** means the plan referred to in clause 8.1(a) (*The Business Plan (including the Annual Budget)*) as the same may be varied or updated or replaced from time to time in accordance with the provisions of clause 8 (*Budgeting, Business Planning and financial matters*);

**Businesses** means the HoldCo Business and the SPV Business and **Business** means either of them as the context requires;

**Chairman** means such independent non-executive Director or other Director as may be appointed from time to time pursuant to clause 5.4 (*Chairman of the Board*);

**Claim** has the meaning given in clause 6.5(c) (*Step-aside provisions*);

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<sup>24</sup><sub>28</sub>

**Schedule 1 Definitions – Associate.** The definition of Developer Associate to be considered on a project specific basis on the relevant facts and in the context of the relevant Developer group structure to ensure the definition is appropriate/ wide enough. This definition will also be relevant to the funding competition regime in terms of Developer Associates not being permitted to compete for the Third Party Equity.

**Commencement Date** means the date on which this Agreement commences in accordance with clause 2.2 (*Conditions precedent*);

**Commercially Sensitive Information** means any information detailed in Part C of Schedule 7 (*Transparency Information and Commercially Sensitive Information*);

**Confidential Information** has the meaning given in sub-clause 13.1(e) (v) (*Confidentiality and Freedom of Information*);

**Connected Party** means, in relation to any Shareholder, any Associate, employee, director or authorised representative of that Shareholder;

**Consents** means all permissions, consents, approvals, planning permissions, certificates, permits, licences, statutory agreements and authorisations required by law, and all necessary consents and agreements from any third parties needed to carry out the Business in accordance with this Agreement;

**Data Sheet** means the document in the Agreed Form comprising Annexure 1 containing details about the Company and the SPV including, inter alia, subscriptions by the parties for Shares and details of any Shareholder Debt advanced to the Company, directors details and other administrative matters;

**Deadlock** has the meaning given in clause 11.2 (*Disputes*);

**Deadlock Date** has the meaning given in clause 11.2 (*Disputes*);

**Deed of Adherence** means a deed in substantially the same form as the draft set out at Schedule 4 (*Deed of Adherence*);

**Deemed Transfer Notice** has the meaning given in the HoldCo Articles;

**Default Shares** has the meaning given in clause 9.2 (*Events of Default and deemed transfers*);

**Defaulting Shareholder** has the meaning given in clause 9.2 (*Events of Default and deemed transfers*);

**Defaulting Shareholder Debt** has the meaning given in clause 9.3(a) (*Shareholder Debt*);

**Directors** means, as the context may require, the HoldCo Directors and/or the SPV Directors as nominated by the relevant parties from time to time and **Director** shall mean any of them;

**Dispute** has the meaning given in clause 11.1 (*Disputes*);

**[DOTAS means the Disclosure of Tax Avoidance Schemes rules which require a promoter of tax schemes to tell HM Revenue & Customs of any specified notifiable arrangements or proposals and to provide prescribed information on those arrangements or proposals within set time limits as contained in Part 7 of the Finance Act 2004 and in secondary legislation made under vires contained in Part 7 of the Finance Act 2004 and as extended to National Insurance Contributions by the National Insurance Contributions \(Application of Part 7 of the Finance Act 2004\) Regulations 2012, SI 2012/1868 made under s.132A Social Security Administration Act 1992;](#)**

**Draft Business Plan** has the meaning given in sub-clause 8.1(b) (*The Business Plan (including the Annual Budget)*);

**Environmental Information Regulations** means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such regulations;

**Event of Default** means

- (a) a petition being presented or a proceeding commenced (and such petition or proceeding not being discharged or dismissed) or an order being made or an effective resolution passed for the winding-up, insolvency, administration, re-organisation, re-construction, dissolution or bankruptcy of a Shareholder or for the appointment of a liquidator, receiver, administrative receiver, administrator, trustee or similar officer of a Shareholder or of all or any part of its business or assets PROVIDED THAT this paragraph shall not apply to any bona fide re-organisation or re-construction of a Shareholder whilst solvent (the structure of which has been previously approved by the other Shareholders in writing) in which a new company assumes (and is capable of assuming) all the obligations of the Shareholder;
- (b) a Shareholder stopping or suspending payments to its creditors generally or being unable to pay its debts as they fall due or seeking to enter into any composition or other arrangement with its creditors or being declared bankrupt or insolvent;
- (c) a creditor taking possession of all or any part of the business or assets of a Shareholder or any execution or other legal process being enforced against the business or any substantial asset of the Shareholder and not being discharged;
- (d) anything analogous or having an effect substantially similar to any of the events described in paragraphs (a) to (c);
- (e) a Shareholder:
  - ~~(i) disposing of all or a substantial part of its business or assets to an Unsuitable Third Party;~~ (ii) changing the nature or scope of its business such that it becomes an Unsuitable Third Party; or
  - ~~(iii) suffering the sequestration or expropriation of all or a substantial part of its business or assets by any public body or other governmental authority;~~
- (f) a Shareholder being in material breach of ~~its obligations under this Agreement including~~ any of the warranties given by it in clause ~~10 (Warranties);~~ 10.1 to clause 10.3 (Warranties) of its obligations under clause 4.1 (Initial subscriptions of Shares and Shareholder Debt) [within [ ] Business Days of the due date]<sup>29</sup>;
- (g) a Shareholder attempting to sell, transfer, charge or otherwise dispose of any of its Shares or Shareholder Debt or any interest in Shares or Shareholder Debt ~~or any of the assets of the Company~~ otherwise than in accordance with this Agreement (which in all cases shall be deemed not to be capable of remedy) or any secured party taking any steps to enforce any charge created over any Shares held by the Shareholder in the Company; or

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<sup>29</sup> To cover any payment default and with the benefit of the same grace period (if any) as permitted by Senior Funders.

(h) the circumstances where an Event of Default occurs as set out in clause 10.7(c); or

(i) a Shareholder failing to comply with its obligations under clause 8.4(ii) (Provision of information to Shareholders and designated third parties) and failing to remedy the same within thirty (30) days of receipt of notice to do so from another Shareholder or breaching that obligation three (3) times within a period of twenty four (24) months; or

(j) a Shareholder committing any material offence under any anti-bribery and corruption legislation in the UK from time to time or at common law in respect of fraudulent acts and provided always that if the offence is an offence under Section 7(1) of the Bribery Act 2010 no event of default shall arise unless HMTCo considers, acting reasonably, the offence to be material.

**Expert** has the meaning given in clause 11.3 (*Confidentiality and Freedom of Information*);

**Expiry Date** has the meaning given in the Project Agreement;

**Fees Regulations** means The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004;

**Financial Default** means the occurrence of an event of default under the Principal Funding Agreement;

**Financial Model** has the meaning given to it in the Principal Funding Agreement;

**Founder Shareholder** means a Shareholder who entered into this Agreement on the date on which it was signed;

**FOIA** means the Freedom of Information Act 2000 and any subordinate legislation (as defined in Section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such Act;

**Funding Agreements** means [*define by reference to relevant PF2 funding documents relating to the SPV*];

**General Anti-Abuse Rule means:**

(a) the legislation in Part 5 of the Finance Act 2013; and

(b) any future legislation introduced into parliament to counteract tax advantages arising from abusive arrangements to avoid national insurance contributions;

**Halifax Abuse Principle means the principle explained in the CJEU Case C-255/02 Halifax and others;**

**HMTCo Group** means:

(a) HMTCo, IUK, HM Treasury, UK government department or public body and any subsidiary, office or agency (from time to time) of HMTCo, IUK, HM Treasury or any UK government department or public body; and

(b) any holding company or parent undertaking or subsidiary undertaking of (a) above;  
~~and~~

~~(c) any fund, partnership or limited partnership managed by any of (a) to (b) above and/or in which any of them have an interest;~~

**HoldCo Articles** means the articles of association of the Company in the format set out in Schedule 6 (*The Articles of Association of the Company*) as amended from time to time;

**HoldCo Board** means the board of Directors from time to time of the Company as constituted in accordance with this Agreement and the HoldCo Articles;

**HoldCo Business** means the business of HoldCo as described in clause 3.1(a) (*The business of the Company and SPV and details of the Company and SPV*) and such other business as the Shareholders may from time to time agree should be carried on by HoldCo;

**HoldCo Director** means any director from time to time of HoldCo including where applicable any Alternate;

**Information** has the meaning given under Section 84 of the Freedom of Information Act 2000;

**Infrastructure UK** means the unit with that name in HM Treasury which works on the UK's long-term infrastructure priorities and, amongst other things, secures private sector investment in relation to infrastructure projects;

**Instruction to Sell Notice** has the meaning given in clause 9.4 (*Appointment of the Sale Agent in certain circumstances*);

**Investment** has the meaning given in clause 9.4 (*Appointment of the Sale Agent in certain circumstances*);

**Loan Note Instrument means the instrument creating unsecured loan notes dated on or about the date of this Agreement executed by SPV;**

**Lock In Period** has the meaning given in clause 9.7(d) (*Lock In Periods*);

**Management Services Agreement** means the agreement in the Agreed Form to be entered into between the Company, SPV and [service provider] on or around the date of this Agreement relating to the provision of management services to the Company and SPV by the service provider;

**Market Value** has the meaning given in the HoldCo Articles;

**Material Shareholder** has the meaning given in clause 5.1(b) (*Composition of the Boards and the right to appoint Directors*);

**New Shareholder** has the meaning given in sub-clause 2.1(b) (*Conditions precedent*);

**Observer** has the meaning given in clause 5.6(a) (*Observers at Board meetings*);

**Occasion of Tax Non-Compliance means:**

**(a) any tax return of the Shareholder submitted to a Relevant Tax Authority on or after 1 October 2012 is found to be incorrect as a result of;**

(i) a Relevant Tax Authority successfully challenging the Shareholder under the General Anti-Abuse Rule or the Halifax Abuse Principle or under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax Abuse Principle;

(ii) the failure of an avoidance scheme which the Shareholder was involved in, and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime; and/or

(b) the Shareholder's tax affairs give rise on or after 1 April 2013 to a criminal conviction in any jurisdiction for tax related offences which is not spent at the date of this Agreement or to a penalty for civil fraud or evasion;

**Offer to Allot** has the meaning given in sub-clause 4.3 (*Offers to Allot*);

**Original Meeting** has the meaning given in sub-clause 6.3(b) (*Manner of giving Shareholder Approval*);

**Other Directors** has the meaning given in sub-clause 6.3(b) (*Manner of giving Shareholder Approval*);

**Outgoing Director** has the meaning given in sub-clause 5.3(a) (*Removal of/ change to nominated Directors*);

**Outgoing Shareholder** has the meaning given in sub-clause 5.3(b) (*Removal of/ change to nominated Directors*);

**Principal Funding Agreement** means [*description of senior facility documents*];

**Project** has the meaning given in clause 3.1(b) (*The business of the Company and SPV and details of the Company and SPV*);

**Project Agreements** means [*description of relevant PF agreement and nature and extent of works and services*] and [*list other related project agreements – subcontracts etc*];

**Project Default** means the occurrence of an event of default under a Project Agreement;

**Project Documents** means this Agreement, the Funding Agreements, any Management Services Agreement and the Project Agreements;

**Provisional Transfer Notice has the meaning given in clause 10.6;**

**Public Sector Entity** means an entity which is classified, as at the relevant time, as being a public sector body or institution by the National Accounts Classification Committee;

**Recipient** has the meaning given in sub-clause 13.1(b) (*Confidentiality and Freedom of Information*);

**Relevant Shareholder has the meaning given in clause 5.5(g);**

**Relevant Tax Authority means HM Revenue & Customs, or, if applicable, a tax authority in the jurisdiction in which the Shareholder is established;**

**Remedy Period** has the meaning given in clause 9.2 (*Events of Default and deemed transfers*);

**Requests for Information** shall have the meaning set out in the FOIA or the Environmental Information Regulations as relevant;

**Reserved Matters** means those matters listed in Schedule 8 (*Reserved Matters*) and ticked in the second column ("Shareholder"), which shall not be carried out without prior written approval in accordance with clause 6.2(a) (*Reserved Matters*);

**Reserved Matter Board Approval** means those matters listed in Schedule 8 (*Reserved Matters*) and ticked in the third column ("Board"), which shall not be carried out without prior written approval in accordance with clause 6.2(b) (*Reserved Matters*);

**Sale Agent** has the meaning given in clause 9.4 (*Appointment of the Sale Agent in certain circumstances*);

**Second Consideration Period** has the meaning given in clause 11.1 (*Disputes*);

**Shares** means the Shares referred to in Schedule 2 (*Details of the Company and the SPV*) together with any further shares issued from time to time pursuant to clause 4 (*Funding of the Company and SPV and financial matters*);

**Shareholder Debt** means monies advanced or otherwise made available to the SPV by way of subordinated debt or loan stock subscription by a Shareholder or an Associate of a Shareholder (or, in relation to the SPV, by the Company);

~~**Shareholder Loan Agreement** means, where Shareholder Debt has been advanced or otherwise made available to the SPV (as the case may be), the agreement between the SPV and the relevant Shareholder(s) setting out the terms on which that Shareholder Debt has been advanced or otherwise made available to the SPV;~~

**Shareholders** means the parties to this Agreement (except for the Company and SPV) and such other persons who may become shareholders in the Company from time to time as permitted by this Agreement and the Articles and **Shareholder** means any one of them;

**Shareholder's Group** means:

- (a) in relation to a Shareholder which is a company, the Shareholder and each of its Associates; and
- (b) in the case of HMTCo each Associate of HMTCo and each member of HMTCo Group;

**SPV Articles** means the articles of association of SPV;

**SPV Board** means the board of Directors for the time being of SPV as constituted in accordance with this Agreement and the SPV Articles;

**SPV Business** means the business of SPV as described in clause 3.1(b) (*The business of the Company and SPV and details of the Company and SPV*) and such other business as the Shareholders may from time to time agree should be carried on by SPV;

**SPV Director** means any director for the time being of SPV including where applicable any Alternate;



**SPV Lock In Period** means the ~~date on~~ period during which shareholders in the SPV are not entitled to transfer shares in the SPV under clause [~~change in ownership clause in the PF2 Project Agreement~~]

**Suitable Third Party** means any person who is not an Unsuitable Third Party;

**Taxes Act** means the Income and Corporation Taxes Act 1988;

**Transfer Notice** has the meaning given in the Articles;

**Transparency Information** means the information described in Parts A and B of Schedule 7 (*Transparency Information and Commercially Sensitive Information*) and, for the avoidance of doubt, in no circumstances shall any Transparency Information constitute Commercially Sensitive Information whether or not listed in Part C of Schedule 7;

**Unsuitable Third Party**<sup>2230</sup> means:

- (a) [~~any person who has a material interest in the production, distribution or sale of tobacco products, alcoholic drinks and/or pornography;~~
- (b) any person whose activities are, in the reasonable opinion of HMTCo, incompatible with the provision of [*e.g. educational services*]; ~~and~~
- (c) any person whose activities, in the reasonable opinion of HMTCo, pose or could pose a threat to national security]; ~~or~~
- (d) any person whose tax returns submitted on or after 1 October 2012 have been found to be incorrect as a result of:
  - (i) HMRC successfully challenging it under the General Anti-Abuse Rule (GAAR) or the "Halifax" abuse principle; ~~and/or~~
  - (ii) a tax authority in a jurisdiction in which the supplier is established successfully challenging it under any tax rules or legislation that have an effect equivalent or similar to the GAAR or the 'Halifax' abuse principle; and/or
  - (iii) the failure of an avoidance scheme which the person was involved in and which was, or should have been, notified under the Disclosure of Tax Avoidance Scheme; or any equivalent or similar regime in a jurisdiction in which the person is established;

**Valuers** has the meaning given in the HoldCo Articles.

## 1.2 Interpretation

<sup>2230</sup>

**Schedule 1, Definitions - Unsuitable Third Party.** This definition will need to be adapted depending on the nature of the PF2 project. In relation to limbs (b) and (c), as a practical matter, parties will be able to informally seek guidance from Treasury PF2 Equity Unit as to whether a person is considered by HMTCo to be an Unsuitable Third Party at a point in time.

This Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning:

- (a) The headings and marginal notes and references to them in this Agreement shall be deemed not to be part of this Agreement and shall not be taken into consideration in the interpretation of this Agreement.
- (b) Except where the context expressly requires otherwise, references to clauses, sub-clauses, paragraphs, sub-paragraphs, parts and Schedules are references to clauses, sub-clauses, paragraphs, sub-paragraphs and parts of and Schedules to this Agreement and references to Sections, Appendices and Attachments (if any) are references to Sections, Appendices and Attachments to or contained in this Agreement.
- (c) The Schedules to this Agreement are an integral part of this Agreement and a reference to this Agreement includes a reference to the Schedules. In the event of any inconsistency between the provisions of the body of this Agreement and the Schedules, the body of this Agreement shall take precedence.
- (d) Words importing persons shall, where the context so requires or admits, include individuals, firms, partnerships, trusts, corporations, governments, governmental bodies, authorities, agencies, unincorporated bodies of persons or associations and any organisations having legal capacity.
- (e) Where the context so requires words importing the singular only also include the plural and vice versa and words importing the masculine shall be construed as including the feminine or the neuter or vice versa.
- (f) The language of this Agreement is English. All correspondence, notices, and information shall be in English.
- (g) References to any law are to be construed as references to that law as from time to time amended or to any law from time to time replacing, extending, consolidating or amending the same.
- (h) References to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the functions and responsibilities of such public organisation.
- (i) The words in this Agreement shall bear their natural meaning. The parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore, be construed contra proferentem.
- (j) Reference to **parties** means the parties to this Agreement and references to a **party** mean one of the parties to this Agreement.
- (k) In construing this Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word other or including or in particular shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.

- (l) Reference to a document being in **Agreed Form** is a reference to the form of the relevant document agreed between the parties and for the purpose of identification initialled by each of them or on their behalf.
- (m) Where this Agreement states that an obligation shall be performed **no later than** or **within** or **by** a stipulated date or event which is a prescribed number of Business Days after a stipulated date or event the latest time for performance shall be noon on the last Business Day for performance of the obligations concerned.
- (n) A reference to a **subsidiary** or **holding company** is to be construed in accordance with section 1159 of the Companies Act 2006.
- (o) If there is a conflict between the terms of this Agreement and the Articles, the terms of this Agreement shall prevail and, if there is such a conflict, the Shareholders shall procure at the request of any of the Shareholders any modification reasonably required to be made to the Articles as shall be necessary to remedy such conflict.
- (p) A person, being a company, shall be **controlled** by another person if that other person owns a majority of the voting equity of that person or controls the majority of the votes at meetings of the board of directors of that person.

## Schedule 2

### Details of the Company and the SPV

#### The Company

Name:	◆◆ Limited	
Registered Office:	◆◆	
Registered Number:	◆◆	
Shareholders:	<b>Shareholder</b>	<b>Shares</b>
	Developer	◆◆
	HMTCo	◆◆
	Third Party Equity Provider	◆◆
Initial Directors:	<b>Material Shareholder Appointor</b>	<b>Initial Director appointee</b>
	Developer	◆◆
	Developer	◆◆
	HMTCo	◆◆
	HMTCo	◆◆
	Third Party Equity Provider	◆◆
	Third Party Equity Provider	◆◆
Secretary:	◆◆	

#### The SPV

Name:	◆◆ Limited	
Registered Office:	◆◆	
Registered Number:	◆◆	
Shareholders:	<b>Shareholder</b>	<b>Shares</b>
	The Company	◆◆
Directors:	As for the Company (see above).	
Secretary:	◆◆	

**Schedule 3**

**Agreed Form Business Plan**

**(see clause 8 (Budgeting, Business Planning and financial matters))**

***[To be inserted]***

## Schedule 4

### Deed of Adherence

**THIS DEED OF ADHERENCE** is made the      day of                      201-~~◆◆~~

BY ~~◆◆~~ of ~~◆◆~~ (**Covenantor**) in favour of the persons whose names are set out in the Schedule to this Deed and is supplemental to the shareholders' agreement dated ~~◆◆~~ 201-~~◆◆~~ made by (1) [Developer], (2) [HMTCo], (3) [Third Party Equity Provider], (4) [Company] and (5) [SPV] (**Shareholders' Agreement**).

Terms defined in the Shareholders' Agreement shall bear the same meanings herein.

#### It is agreed

- 1      In consideration of the Covenantor being accepted as a party for the purposes of the Shareholders' Agreement by the parties thereto, as from [*insert date*] (**Adherence Date**) the Covenantor hereby confirms that it shall be a party to the Shareholders' Agreement as a Shareholder and agrees to be bound by all of the relevant provisions of the Shareholders' Agreement from the Adherence Date.
- 2      The Covenantor warrants and represents to each of the persons whose names are set out in the Schedule to this Deed, that the Covenantor is a Suitable Third Party.
- 3      The Covenantor makes all those warranties and representations, which are listed in full at clause 10.2 and clause 10.4 of the Shareholders' Agreement, to each of the persons whose names are set out in the Schedule to this Deed.
- 4      This Deed is governed by English law.

**In witness whereof** this Deed has been executed by the Covenantor and is intended to be and is hereby delivered on the date first above written

#### SCHEDULE

[Parties to Shareholders' Agreement including those who have executed earlier deeds of adherence].

## Schedule 5

### The Sale Agent

1 In this Schedule 5 (subject to paragraph 8):

**Investment** means the Default Shares and any Defaulting Shareholder Debt.

**Qualifying Bid** means a bid for the entire Investment which:

- (a) is accompanied by each of the following:
  - (i) an acknowledgement addressed to the Shareholders to the effect that the bidder has carried out its own due diligence and in offering to purchase the Investment has not relied on (and an undertaking that it will not rely on) any warranty, statement, undertaking or representation (whether negligent or innocent) made by or on behalf of any Shareholder;
  - (ii) a confirmation that if its bid is successful it will enter a Deed of Adherence and pay the Sale Agent's fees;
  - (iii) a confirmation of funding for the purchase of the Investment and its ability to complete the payment for and the transfer of the Investment within the time period specified in paragraph 6; and
- (b) is from a Suitable Third Party which is not Associated with the Defaulting Shareholder or any shareholder in the Defaulting Shareholder.

2 If the parties are unable to agree on the identity of the Sale Agent within twenty (20) Business Days of the issue of the Instruction to Sell Notice (as defined in clause 9.4 (*Appointment of the Sale Agent in certain circumstances*) of this Agreement), the Sale Agent shall thereafter be appointed on the application of any party by the President of the Institute of Chartered Accountants in England and Wales with the party making the application requesting that the appointment be made within twenty (20) Business Days of the date the party makes the application referred to.

3 The Defaulting Shareholder shall provide the Sale Agent with all such information as the Sale Agent may request in relation to the Investment and the Sale Agent shall invite tenders from Suitable Third Parties to purchase the Investment.

4 The Defaulting Shareholder and the Sale Agent shall comply with the Financial Services and Markets Act 2000 and all other legislation which may apply from time to time in relation to the offer for sale of the Investment.

5 The Defaulting Shareholder shall take all necessary action to ensure that the Investment has the widest possible market, and shall not do anything which might limit the number of potential bidders for the Investment and shall ensure that it has provided all necessary information to the Sale Agent to enable the Sale Agent to offer the Investment for sale within fifteen (15) Business Days of the appointment of the Sale Agent.

6 The Defaulting Shareholder shall accept the highest Qualifying Bid which is received by the Sale Agent (with the relevant Suitable Third Party being referred to as the **Purchaser**) by the end of sixty (60) Business Days from the Instruction to Sell Notice (the **Closing Date**) and

shall take all steps necessary to complete the transfer of its Shares and any Defaulting Shareholder Debt to the Purchaser within ten (10) Business Days of the Closing Date.

- 7 Should the Purchaser fail to complete the transfer of the Shares and any Defaulting Shareholder Debt to the Purchaser within ten (10) Business Days of the Closing Date then the Sale Agent shall remarket the Investment and the procedure referred to in paragraphs 3 to 7 shall be followed until either the Investment has been sold to a purchaser or no Qualifying Bid is received by the relevant Closing Date.
- 8 Notwithstanding the provisions of paragraphs 1 to 7, the Sale Agent shall also invite tenders (**Reserve Tenders**) from Suitable Third Parties for any Defaulting Shareholder Debt only<sup>2331</sup> and the provisions of paragraphs 1 to 7 shall apply with necessary changes having been made as if references to the "Investment" were in each case solely to the Defaulting Shareholder Debt and subject to the variations in this paragraph 8. If:
- (a) the aggregate consideration offered pursuant to a Qualifying Bid comprising a Reserve Tender (a **Reserve Bid**) is greater than under the highest Qualifying Bid which is not a Reserve Bid (or no Qualifying Bid is received which is not a Reserve Bid), then the Reserve Bid shall be accepted by the Defaulting Shareholder and the sale and transfer of the Defaulting Shareholder Debt shall be effected in accordance with the provisions of paragraphs 1 to 7.
  - (b) Where a Reserve Bid is accepted pursuant to sub-paragraph (a) in relation to the Defaulting Shareholder Debt then, in relation to the Defaulting Shareholder's Shares, the provisions of clause 9.5 shall apply in relation to the Default Shares and HMTCo shall be entitled to give written notice under clause 9.5.

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<sup>2331</sup>

**Schedule 5 – Sale Agent.** This mechanism in Schedule 5 (*The Sale Agent*) allows for offers for the Loan Notes only on the basis that this flexibility may add some liquidity and enhance the value received in a default transfer scenario.



**Schedule 6**

**The Articles of Association of the Company**

[To be inserted <sup>2432</sup><sub>32</sub>]

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<sup>2432</sup><sub>32</sub>

Schedule 6 – Articles. ~~Separate draft to be circulated~~ [See separate standard form document.](#)

## Schedule 7

### Transparency Information<sup>33</sup> and Commercially Sensitive Information

#### Part A: Information to be provided by the Company and SPV

Ref	Information	Last date for provision of information
A1	The audited accounts of the Company and SPV for each financial year.	The earlier of: (1) the end of 4 months after the end of that financial year; and (2) 30 days after its publication.
A2	Quarterly cashflow statements and cashflow forecasts for the Company and SPV including details of: (1) any payments received or made (a) by way liquidated damages and (b) in respect of changes and variations; and (2) payments <u>(excluding any reimbursement of expenses)</u> to directors.	The end of 3 weeks after the end of each quarter <u>during the construction period and ½ yearly thereafter.</u>
A3	The equity internal rate of return (for both an actual cumulative return to the date of preparation and of the expected forecast return up to the Expiry Date) for each shareholder to be prepared using the Financial Model and calculated on a cash basis to include all distributions and any other payments made to Shareholders in respect of fees.	31 March and 30 September.
A4	Debt service cover ratio (for the 12 month period to the date of preparation and for the next 12 month period as from the date of preparation) and the loan life cover ratio (for the period as from the date of preparation to the Expiry Date).	31 March and 30 September.
A5	The occurrence of any Financing Default or Project Default.	Within 7 days of becoming aware of that event.
A6	Distributions paid to Shareholders and payments in respect of Shareholder Debt.	Within 30 days of the date those payments are made.
A7	A copy of all information provided to the Authority under clause [9.2] of the Project Agreement (Lifecycle Fund).	Within 7 days of the date that information is delivered to the Authority.
A8	A copy of all information provided to the Authority under clause [31.2.2] in respect of deductions from the unitary charge and operating costs.	Within 7 days of the date that information is delivered to the Authority.

#### Part B: Information to be provided by the Shareholders

Ref	Information	Last date for provision of information
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<sup>33</sup> [Schedule 7 - Transparency Information. This schedule of the standard form is subject to amendment from time to time as other relevant consultation exercises are concluded, policy established and relevant legislation is enacted or amended \(for example, The Department of Business, Innovation and Skills consultation on disclosure of beneficial ownership\).](#)

Ref	Information	Last date for provision of information
B1	In respect of Shares and Shareholder Debt held by it, the identity of each person having a beneficial interest in those investments [insert carve out language for <del>publically</del> <u>Shareholders that are publicly</u> quoted companies <del>and</del> <u>or</u> funds]. <u>For the purposes of this item B1 the term "beneficial owner" shall have the meaning as set out in Regulation 6 of The Money Laundering Regulations 2007 (the 2007 Regulations) and the holder of the Shares and/or Shareholder Debt shall to the extent within its power to do so and to the extent reasonably practicable carry out due diligence measures regarding the beneficial ownership of the Shares and Shareholder Debt as set out in Part 2 of the 2007 Regulations and make available the findings of that due diligence as Transparency Information.</u>	The <del>effective and</del> <u>date</u> of this Agreement and within 7 days of any change of beneficial ownership.
B2	In respect of each person named pursuant to B1 above, the jurisdiction of incorporation and tax residence, or in the case of an individual, his nationality and tax domicile.	The <del>effective and</del> <u>date</u> of this Agreement and within 7 days of any change of beneficial ownership.
B3	The terms on which it <del>wishes</del> <u>has or is</u> to dispose of any Shares or Shareholder Debt (including the identity of the transferee and the price to be paid) .	<del>Prior to execution of</del> <u>Within two (2) Business Days of the date on which</u> legally binding documentation to dispose of that interest <u>is entered into</u> .

### Part C: Commercially Sensitive Information

Ref	Information	Applicable period
	[Note – to be added if/as required]	

**Schedule 8<sup>34</sup>**

**Reserved Matters**

Reference	Shareholder	Board	Reserved Matter
<b>A</b>			<b>Financial and Business Plan</b>
A1		<input checked="" type="checkbox"/>	<u>(1)</u> The approval of the Business Plan, budgets and maintenance plans and any material changes to those documents.  <u>(2) Any change to the Company's accounting policies or practices.</u>
A2	<input checked="" type="checkbox"/>		The approval of any change to the dividend policy set out in clause 7 ( <i>Distributions</i> ).
A3		<input checked="" type="checkbox"/>	The declaration and/or payment of any dividends by the Company save where such declaration and payment is made in accordance with the dividend policy set out in clause 7 ( <i>Distributions</i> ).
A4	<input checked="" type="checkbox"/>		An increase in any indebtedness save, in the case of SPV, where the same is permitted by, or has been approved in accordance with, the Project Agreement and the Financing Documents.
A5	<input checked="" type="checkbox"/>		The commencement by the Company of any new business not being ancillary to or in connection with the HoldCo Business or making any material change to the nature of the HoldCo Business.
A6	<input checked="" type="checkbox"/>		The Company participating in any activity which is detrimental to and/or incompatible with the provision of [ <i>describe the relevant services / sector</i> ].
A7	<input checked="" type="checkbox"/>		The making of any political donation.
A8		<input checked="" type="checkbox"/>	Bank mandates for Company bank accounts.
<u>A9</u>	<input checked="" type="checkbox"/>		<u>The formation of any subsidiary or acquisition or disposal of any shares in any company or participation/ ceasing participation in any joint venture (incorporated or not).</u>
<u>A10</u>	<input checked="" type="checkbox"/>		<u>The amalgamation or merging with any other company or business undertaking.</u>
<u>A11</u>	<input checked="" type="checkbox"/>		<u>The acquisition or disposal of any assets with an aggregate value of £♦ or more or of any freehold or leasehold properties.</u>
<u>A12</u>	<input checked="" type="checkbox"/>		<u>The Company giving any guarantee or indemnity involving a potential liability of £♦ or more.</u>

<sup>34</sup> Schedule 8 - Reserved matters. Three important general points: (1) the items in this table will need to be included in every Shareholders' Agreement for a PF2 Project; (2) a bidder/Developer may suggest different allocations of specific matters between the "Shareholder" and "Board" columns and/or additional items for consideration/evaluation during the bid process; (3) no separate Reserved Matter or Reserved Matter type issues Lists are to be included which operate to exclude a particular Shareholder from voting or which remove all Shareholder voting rights on specific matters.

Reference	Shareholder	Board	Reserved Matter
<b>B</b>			<b>Shares/ Shareholder Debt and constitutional</b>
B1	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>		Any amendment to the Memorandum or Articles of the Company.
B2	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>		Any issue of (and the terms of any issue of) new Shares and/or additional Shareholder Debt or any variation of any rights attaching to any Shares or of the terms of any <del>Shareholder Loan Agreement</del> <u>Note Instrument</u> .
B3	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>		The re-purchase or cancellation by the Company of any Shares, or the reduction of the amount (if any) standing to the credit of its share premium account or capital redemption reserve (if any) or any other reserve of the Company.
B4	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>		The re-purchase, repayment, redemption or cancellation of any Shareholder Debt (otherwise than in accordance with the terms of the relevant <del>Shareholder Loan Agreement</del> <u>Note Instrument</u> ).
B5		<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	The capitalisation of profits or reserves of the Company.
B6	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	A change of name of the Company.
B7	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>		A change in the status of the Company from a limited company to a public limited company or from a company limited by shares to any other form of legal entity.
B8	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>		A listing of the Company's share capital.
B9	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>		Any transfer or disposal by the Company of shares in the SPV which is not required under the Funding Agreements.
B10	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>		A transfer by the Developer or by the Third Party Equity Provider of any of its shares to a Public Sector Entity.
B11	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	A sale, lease, transfer or other disposition of the whole or a material part of a Shareholder's undertaking in the Company (where 'material' means having a value of more than <u>£100,000</u> ).
<u>B12</u>	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>		<u>Any material acquisition or disposal of any shares or assets by the Company (where 'material' means having a value of more than £100,000).</u>
<b>C</b>			<b>Management, control, directors and employees</b>
C1		<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	The devolution or transfer of management control of the Company to persons outside the Board and, if approved, the terms of such devolution or transfer.
C2		<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	The appointment or removal of any independent non-executive Chairman of the Company and/or of the [ <i>Contractor Representative</i> ] under any [PF2 Project Agreement] (as defined therein).
C3		<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	The making of loans or advances in excess of £ <del>100,000</del> <u>10,000</u> by the Company to any Connected Party other than in the ordinary course of business.


Reference	Shareholder	Board	Reserved Matter
C4		<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	(1) The engagement by the Company of (and terms of engagement of) any individual person as a consultant or employee whose annual remuneration (including benefits) exceeds £ <del>1</del> <u>1</u> .  (2) Any change to the terms of employment/ engagement and/or remuneration of a person or firm to whom (1) applies.
C5		<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	The engagement by the Company of (and terms of engagement of) its auditors and any professional advisers) and any change to those terms of engagement.
C6	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>		Moving the central management and control of the Company or the Company's tax residence outside the UK.
C7		<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	The approval of (and any change to) Company policies which <del>are material to</del> <u>affect</u> the potential statutory liability of directors (e.g. <u>anti-bribery and corruption</u> , health and safety <del>and</del> <u>,</u> non-discrimination).
C8		<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	Any payment of fees or remuneration to directors to the Company <u>save as expressly provided under the Project Agreements and Financing Agreements</u> .
<b>D</b>			<b>Management services and contracts with related parties</b>
D1		<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	[Except for the Management Services Agreement <sup>2535</sup> ] The entry into by the Company of any contract with a Shareholder or an Associate of a Shareholder (and/or any material amendment or variation to such a contract).
D2		<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>	[Any material change to, or extension or renewal of, the Management Services Agreement.] <sup>2636</sup>
<b>E</b>			<b>Insolvency and related proceedings</b>
E1	<input checked="" type="checkbox"/> <input checked="" type="checkbox"/>		The commencement of any winding up or dissolution or of the appointment of any liquidator, administrator or administrative receiver of the Company or any of its assets unless it shall have become insolvent (and no party shall present or cause to be presented or allow any act which would result in the winding up or the presentation of any petition for the winding up of the Company).
<b>F</b>			<b>General</b>
<del>F1</del>		<input checked="" type="checkbox"/>	<del>Approval of (and any amendment to) the Company's policies</del>

<sup>2535</sup>

**Schedule 8, Reserved Matter (D1) – Management Services Contract.** If there is an initial Management Services Contract between the Company/SPV and the Developer or an Associate of the Developer then the terms of that contract will be approved by the Shareholders at or prior to financial close. After that, any material change or renewal etc will be a Reserved Matter.

<sup>2636</sup>

**Schedule 8, Reserved Matter (D2) – Management Services Contract.** To be included if there is such a contract.

Reference	Shareholder	Board	Reserved Matter
			<del>on health and safety, non-discrimination and any other policies which could impact/ are potentially material relevant to the statutory liability of its directors.</del>
F21			Putting in place (and the terms of/ any changes to) appropriate insurances for the Company (including D&O cover).
<b>G</b>			<b>SPV related Reserved Matters</b>
G1	<i>Approval level as per the relevant item</i>		In relation to SPV each of the above Reserved Matters in this table shall also be a Reserved Matter in relation to SPV (as if references to the Company were references to SPV and to the HoldCo Business were references to the SPV Business).

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Description	#3783667v11<LIVE> - PF2 - SHA - SF Sep 13
Rendering set	Addleshaw Goddard On Screen Version

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