

THE PUBLIC-PRIVATE
PARTNERSHIP
LAW REVIEW

SIXTH EDITION

Editors

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

THE LAWREVIEWS

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Editors

André Luiz Freire, Thiago Luís Santos Sombra
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PREFACE

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

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

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

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

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

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

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

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

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

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São Paulo

March 2020

LEBANON

*Hadi Melki*¹

I OVERVIEW

Lebanon suffered from war between 1975 and 1990. Its major infrastructure was destroyed or seriously affected, and public services were interrupted. 17 years after the end of the war, Lebanon has not yet completely reinstated the infrastructure and public services that existed before 1975, nor has it developed the existing infrastructure and public services to cater to the growing population and economy. Basic utilities such as power, water and sewage are not being provided on a national level or on a sustainable basis. Social infrastructure and services such as public hospitals, schools and housing are either poorly provided or not provided at all. Land public transport is not organised, and rail transport services do not exist.

Because of the limited government resources to fund the required infrastructure and public services, public-private partnerships (PPPs) constitute an important means of funding the development of the required infrastructure and public services. The absence of a holistic approach from the government towards PPP has not prevented certain ministries and other government agencies from resorting to PPP in their respective sectors. The Ministry of Telecommunications procured the implementation of the mobile telecommunications networks and provision of mobile services (currently owned by the government) through build–operate–transfer (BOT) contracts with private investors. The Ministry of Interior and Municipalities (MOIM) awarded to private investors vehicles inspection stations and services on a BOT basis. The procurement and implementation of isolated PPP projects is not generally prevented by the absence of a programme approach or a PPP legislative and institutional framework. But positioning a country as a PPP jurisdiction and reaping the benefits of PPP on a national level and across sectors and industries would require a clear political commitment to PPP, as well as a legislative and institutional framework providing political and regulatory visibility and certainty to investors and lenders.

On 6 April 2018, the Government of France convened a conference called ‘Conférence Économique pour le Développement par les Réformes avec les Entreprises’ (CEDRE) during which the Government of Lebanon outlined its vision for the stabilisation and development in Lebanon including a long-term Capital Investment Program (CIP) for which it seeks financing from lenders and donors for new projects, including non-traditional lenders and donors in order to enhance private sector participation in infrastructure investment. The Government’s vision includes an increase of public investment through the implementation

¹ Hadi Melki is a partner at EKP Legal Counsel in association with HFW. EKP would like to thank Lea Hani for her contribution to the chapter.

of projects for which foreign loans have been committed and the launch of a programme of new projects requiring investment in infrastructure through private sector participation. We have noticed a recent increase of interest in PPP, and set out details of such initiatives below.

The government has announced that the CIP will focus on the following sectors: water, waste water, solid waste, transport, electricity, telecoms and infrastructure for tourism and industry. The total cost of the CIP during the first two phases of the programme (from 2018 to 2021 and 2022 to 2025) is estimated at US\$17.253 billion, including the estimated cost of land acquisition for US\$1.7 billion. The government envisages that all new generation capacity in the electricity sector, except for one replacement plant, will be provided through power purchase agreements to be entered into with the private sector including solar and wind sources. It also envisages the construction of facilities for the supply of liquified natural gas (LNG) through the private sector. About 30 per cent to 40 per cent of the financing needed is expected to be provided by private investors of which approximately US\$3 billion is estimated for Phase I. PPP projects are estimated at around US\$7 billion and private investments are estimated at US\$5 billion for Phases I and II of the CIP.

II THE YEAR IN REVIEW

Following almost a decade of debates and discussions at the Council of Ministers (CoM) and parliament commissions, draft PPP Law No. 42 of 14/9/2017 was finally issued and published in the Official Gazette on 14 September 2017 (the PPP Law). The authority of the Higher Council for Privatisation, which was initially tasked with privatisation projects, has been expanded to include PPP, and its name was accordingly modified to the Higher Council for Privatisation and Partnerships (HCPP). The HCPP has become the PPP unit of Lebanon. Most recently, a new Secretary General for the HCPP was appointed. Lebanon has adopted a legislative and institutional framework governing PPP projects, which is a major step towards introducing PPP into a country's legal regime. Since the issuance of the said Law, several PPP projects have been identified:

- a* the waste-to-energy (WTE) project;
- b* 180MW photovoltaic solar farms and the procurement of liquefied natural gas import terminals on a PPP basis;
- c* the expansion of the Beirut Rafic Hariri International Airport, a US\$500 million construction of Terminal 2. The International Finance Corporation (IFC) is serving as lead advisor on the project;
- d* the implementation of a US\$3 billion toll road from the southern edge of Beirut all the way through to the Nahr Ibrahim area;
- e* 227MW wind farms. The first Independent Power Producer (IPP) in Lebanon, was set for financial close in September 2019, with international financing institutions and Bank Audi as lenders;²
- f* in August 2019, the HCPP had expressed its interest in obtaining the support of the European Bank for Reconstruction and Development (EBRD) for the preparation and financing of the pre-feasibility study for the rehabilitation and expansion of the Kleiaat Rene Mouawad Airport, terminal and airside facilities under a PPP structure; and

2 Electricity Sector Reform Notes. (27 June 2019). Retrieved from https://pwstg02.blob.core.windows.net/pwfiles/Library/Assets/Gallery/Lebanon/PDF/Electricity_Reform_Plan_June27-2019.pdf.

g the HCPP is also preparing for the National Data Center Project; estimated at about US\$100 million. This project will certainly shape the knowledge of the county as pertains to the digital economy infrastructure. Further to an interview with the former Secretary General of the HCPP, the Data Center is expected to be implemented earlier than the Beirut Rafic Hariri International Airport expansion and the Beirut Toll Road construction as the HCPP was hoping to tender it at the beginning of this year.³

III GENERAL FRAMEWORK

i Types of public-private partnership

As previously indicated, PPP was not regulated and institutionalised in Lebanon prior to the issuance of the PPP Law. The foregoing did not prevent certain PPP projects from being implemented by some ministries or other government agencies. The main PPP projects include the roll-out of the first mobile telecommunications network procured by the MOT in 1994 and awarded to LibanCell and FTML on a BOT basis. The MOT received back the network infrastructure in 2004 and procured their management to Alfa and MTC. Another notable example is the mandatory vehicles inspection stations and services project procured by the MOIM in 2002 on a BOT basis. The private investor designed, financed, built, operated and handed over to the MOIM, at the term of the nine-year contract, four vehicles inspection stations. Due to the delay in procuring the expansion of further vehicles inspection stations, a management contract was entered into with the private investor in 2013 in relation to the four existing stations until a new tender for the expansion of the existing station is launched. This tender was actually launched in 2016 but the administrative decision awarding the project was annulled by the Shura Council (administrative court) for the violation of the law. To date, the BOT model was the main model used by ministries and other procuring entities. With the issuance of the PPP Law and the development of infrastructure requiring operations and management (e.g., mobile telecommunications network and vehicles inspection stations), further models are expected to be used. As previously indicated, several initiatives are being considered by several ministries and government agencies, and we expect further PPP opportunities to arise in 2019.

ii The authorities

The HCPP plays a pivotal role in the inception, procurement and implementation of PPP projects. The HCPP is chaired by the president of the CoM and comprises the competent minister (depending on the project being procured), the Minister of Justice, the Minister of Finance, the Minister of Economy and Trade and the Minister of Labour. The HCPP has a secretary general who heads its Secretariat General (SG) and handles the daily business of the HCPP.

PPP projects are proposed by the chairman of the HCPP or by any competent minister. Municipal projects are proposed by the chairman of the municipal council. A preliminary study is required to be submitted to the HCPP. It will be considered by the SG, which will prepare a report concerning the feasibility of the proposed project and submit it along with

3 Schellen, T. (8 November 2018). Interview with Ziad Hayek, Secretary General of the High Council of Privatisation and PPP. Retrieved from <https://www.executive-magazine.com/economics-policy/interview-with-ziad-hayek-secretary-general-of-the-high-council-of-privatization-and-ppp>.

its recommendation to the HCPP. The HCPP will then decide whether to proceed with the proposed project or not. If the HCPP decides to proceed with the proposed project, it will form a committee (the PPP Committee) chaired by the Secretary General and comprised of representatives of the competent minister, the Ministry of Finance, the chairman of the relevant regulatory authority and the chairman of the municipal council for municipal projects. The PPP Committee will be assisted by a work team including consultants appointed thereby, a representative of the public entity who will benefit from the project, experts from ministries and regulatory authorities and a representative of the SG whose role is to coordinate the efforts of the work team. The PPP Committee, assisted by the work team, will prepare a complete study of the project covering technical, economic, legal and financial aspects, including the project award criteria and the level of interest of potential investors and lenders and will prepare a report and raise it along with its recommendation to the HCPP. Once the HCPP approves to proceed with the procurement of the project, it will transfer it to the CoM for its approval. Following the approval of the CoM, the PPP Committee launches the procurement process for the award of the project.

According to the PPP law, any ministry or other public entity or municipality may engage in PPP projects. As previously indicated, PPP projects may be proposed either by the chairman of the HCPP or by the competent minister, that is, the minister overseeing the public entity intending to engage in PPP projects.

iii General requirements for PPP contracts

Any project of public interest initiated by the government, public entities or other government bodies (with the exception of municipalities, which have the option of whether or not to subject such projects to the PPP Law) in which the private sector contributes through financing and management and at least one of the following activities – design, building, development, refurbishment, equipment, maintenance and operations – is subject to the PPP Law, including telecommunications, power and civil aviation projects.

The PPP Law provides that the PPP contract should address the following matters:

- a* the rights and obligations of the parties;
- b* the basis for the financing of the project;
- c* the term of the PPP contract, provided that it does not exceed 35 years from the signature date of the PPP contract;
- d* the revenue that the project company will generate from the public entity or that the public entity will generate from the project company, depending on the nature of the project, in consideration of the project company carrying out the required activities pursuant to the PPP contract and the terms of payment;
- e* fees or taxes relating to the PPP project that the government or municipal council allows the project company to collect in the name and on behalf of the concerned public entity;
- f* the key performance indicators applicable to the project;
- g* reports relating to the implementation of the project that the project company has to prepare and raise to the public entity and the HCPP;
- h* the risk allocation between the public entity and the project company and the measures to be adopted for the mitigation of such risks;
- i* the limitations applicable to the modification of the initial terms of the contract;
- j* the guarantees, undertakings and representations that may be granted by the project company, the private investor or the public entity for the implementation of the project;

- k* the assets and property owned by the public entity put at the disposal of the project company throughout the term of the project for the fulfilment of its obligations, as well as the rights and obligations of the project company in relation to such assets and property;
- l* the transfer of the project to the public entity upon expiry of its term;
- m* project and services continuity upon expiry or termination of the PPP contract or upon breach by the project company of its contractual obligations thereunder;
- n* remedies and penalties applicable to contractual parties in case of breach of their contractual obligations and detailed procedures for the implementation of such penalties; and
- o* dispute resolution procedures including mediation, and national and international arbitration.

Although the PPP Law does not specifically require the HCPP to conduct a value-for-money exercise prior to approving the procurement of a project on a PPP basis, the PPP Law requires the PPP Committee to carry out a complete study of the project covering technical, economic, legal and financial aspects, including the project award criteria and the level of interest of potential investors and lenders and to raise recommendations in this respect to the HCPP, which transfers the file to the CoM for the final approval on the procurement of the project on a PPP basis. The PPP Law provides that implementation decrees may be issued by the CoM following the proposition of the president of the CoM. Such decrees were not issued yet and further requirements may be set out in such instruments if and when issued by the CoM.

As previously indicated, the study of the PPP project covering technical, economic, legal and financial aspects should be approved by the HCPP and the CoM for the project to be procured by the PPP Committee in accordance with the procedure set out in the PPP Law.

IV BIDDING AND AWARD PROCEDURE

i Expressions of interest

Once the approval of the CoM is granted for the procurement of the project on a PPP basis, based on the studies conducted by the SG and the PPP Committee and approved by the HCPP and the CoM, the PPP Committee starts the procurement process. The process starts with the advertisement of a public invitation for interested parties, including the prequalification criteria, which should be set out in accordance with the nature and scale of the project. The invitation should be published in local and international newspapers, specialised publications and the website of the HCPP one month prior to the deadline for the submission of expressions of interest. The PPP Committee examines the prequalification requests, with the assistance of the working team, assesses such requests based on the published prequalification criteria and raises a report to the HCPP, including a recommendation of prequalified and non-prequalified participants for the issuance of the final decision. Once the HCPP takes a decision in relation to the prequalified and non-prequalified participants, the result of the prequalification process is announced, provided that at least three participants are prequalified; otherwise, the process should be repeated.

ii Requests for proposals and unsolicited proposals

The PPP Law is silent with regard to unsolicited proposals.

Once the prequalification phase is completed, the PPP Committee, with the assistance of the working team, will prepare the request for proposals (RFP), which should include the following:

- a* the PPP project's evaluation criteria, which should be objective, measurable, subject to evidence or testing, and set out in accordance with the scale and nature of the project; and
- b* instructions to bidders, as well as all financial, technical and administrative components of the project, enquiry and objection procedures, and procedures to make determinations in relation to objections.

iii Evaluation and grant

The PPP Committee will share the draft PPP contract with the prequalified bidders and conduct, with the assistance of the working team, consultations with the prequalified bidders and lenders in an objective and transparent manner to reach a comprehensive understanding of the technical and financial requirements of the project. The PPP Committee will amend, if necessary, the draft RFP in accordance with the result of such consultations. The PPP Committee will then raise the final draft of the RFP to the HCPP for approval. Once such draft is approved, the chairman of the HCPP will raise it to the CoM for final approval thereon. The draft RFP for municipal projects is raised by the chairman of the HCPP to the chairman of the municipal council following the HCPP's approval thereon. Once the RFP is approved in accordance with the foregoing process, the PPP Committee notifies it to all prequalified participants, who are then required to submit their technical and financial proposals to the PPP Committee in accordance with the instructions set out in the RFP. In the event that fewer than three proposals are submitted, the project should be retendered. If only two proposals are submitted in response to the retendering procedure, then the procurement process may be resumed, subject to the approval of the HCPP. The PPP Committee will open the technical proposals in the presence of the participants to assess their compliance with the requirements of the RFP. The PPP Committee may address enquiries to the participants or request that they provide missing requirements and confirm certain undertakings within time frames it may determine in this respect. Technical proposals that are not compliant with the RFP requirements should be rejected and the related financial proposals should be returned to the rejected participant without opening them. The rejected participants will be notified of the decision and the causes thereof. The PPP Committee will assess, with the assistance of the working team, the remaining technical proposals in accordance with the project evaluation criteria set out in the RFP, and the PPP Committee will determine the technical proposals that have been found to be compliant with the evaluation criteria. In the event that at least two technical proposals have not been found compliant, the project should be retendered for the sake of securing competition in bidding. The PPP Committee will then open the financial proposals submitted by the participants whose technical proposals have been accepted in the presence of such participants and raise to the HCPP a report classifying the proposals in light of the technical and financial evaluation. The PPP Committee will also raise with this report its recommendation as to the best offer based on the project evaluation criteria set out in the RFP. The PPP Committee may, by delegation from the HCPP, conduct negotiations with the participant who has submitted the best proposal, in order to enhance its proposal from a technical perspective. The project will be awarded to the participant who has submitted the

best proposal based on the evaluation of the PPP Committee in accordance with the project evaluation criteria set out in the RFP with the approval of the HCPP. The PPP Committee will announce the result of the procurement process and notify the unsuccessful participants of the causes of the rejection of their proposals.

V THE CONTRACT

i Payment

The PPP Law provides for the possibility of payment from the public entity to the project company or from the latter to the former. No further details are set out in the said law. It is to be noted that the PPP Law provides that implementing decrees may be issued by the CoM and such decrees may provide further details and requirements in relation to the payment mechanism (e.g., payment frequency, levels, key performance indicators). Until then, the foregoing aspects may be freely agreed between the parties to the PPP contract by virtue of the general principle of freedom of contract under Lebanese law. The suspension of payment in the event of the interruption or non-availability of the services required to be provided pursuant to the PPP contract may be freely agreed between the parties.

ii State guarantees

The PPP Law is silent with regard to state guarantees that may be provided for PPP projects. It only stipulates that the PPP contract should include provisions relating to security granted, *inter alia*, by the public entity. The constitution provides that any government undertakings resulting in financial obligations on the government require the passage of a law. State guarantees may be granted in favour of the project company or its sponsors, provided it is allowed by virtue of a law. Such law would typically provide the terms and conditions of the guarantee on a case-by-case basis, depending on the particulars of each project.

iii Distribution of risk

The PPP Law is largely silent on the subject of risk allocation in PPP projects. It only stipulates that risk allocation should be agreed between the parties by virtue of the PPP contract. Subject to any requirements relating to risk allocation that may be issued by virtue of CoM implementation decrees, risks are expected to be identified as part of the study to be conducted by the SG and the PPP Committee and allocated to the parties by virtue of the PPP contract. Because of the absence of a Lebanese PPP model *per se*, there is no clear or standardised position on risk allocation. The uncertainty is expected to be resolved as PPP projects increase in number.

iv Adjustment and revision

The PPP Law is silent with regard to mechanisms of adjustment and revision of contract terms, including changes to the levels of payment, in PPP projects. Subject to any requirements relating to the foregoing mechanisms that may be issued with CoM implementation decrees, such mechanisms are expected to be freely agreed upon by virtue of the PPP contract. The PPP Law stipulates that the PPP contract should address, *inter alia*, the limitations applicable to the modification of the initial terms of the contract.

v Ownership of underlying assets

The PPP Law provides that the public entity that enters into a contract with the project company may put at the disposal of the latter, and throughout the duration of the project, land owned by the state for the purpose of the project. It further provides that the PPP contract should include the assets and property put by the public entity at the disposal of the project company and the rights and obligations of the latter in relation to such assets and property. The PPP Law is silent as to the possibility of security laid upon assets and property owned by the state and put at the disposal of the project company. But the general legal framework prohibits laying security over state-owned assets and property. The sponsors should seek alternative security for the bankability of the PPP project, such as pledge of the project company's shares, assignment of the project's proceeds or assignment of insurance proceeds.

vi Early termination

With regard to early termination of the PPP contract and procedures applicable in the occurrence of events of defaults, the PPP Law only stipulates that the PPP contract should address project and service continuity in case of early termination or breach by the project company of its contractual obligations. Based on the foregoing and based on the general principle of freedom of contract under Lebanese law, we may conclude that the public entity and the project company may agree and enter into direct agreements with lenders to grant them step-in rights to carry on with the project in the event of a project company event of default. This interpretation is confirmed by provisions in the PPP Law providing that the PPP contract should, inter alia, address project and services continuity upon termination of the PPP contract or breach by the project company of its contractual obligations thereunder.

VI FINANCE

Although the banking sector is one of the key sectors driving the Lebanese economy, project finance is not yet well developed in Lebanon. One of the main reasons could be the interesting yield generated by Lebanese sovereign bonds in which banks have largely been invested, thus the historical lack of appetite for long-term project financing. Lebanese banks have expressed their willingness to play an active role in developing PPP projects in Lebanon and engaging in long-term project finance. These actions should be encouraged and closely observed. The current economic situation in Lebanon which has negatively affected bank investments in sovereign bonds may well incentivise them to turn to long term project financing of infrastructure projects.

VII RECENT DECISIONS

The PPP Law is silent on the subject of dispute resolution relating to the procurement and implementation of PPP projects. To date, disputes relating to public procurement are governed by the general legal framework applicable to public procurement. The Shura Council (administrative court) is the competent court to examine and settle disputes relating to public procurement in general and procurement of PPP projects. The most recent cases are the challenges filed by bidders submitting for the management of the existing vehicles

inspection stations and the expansion thereof, which was being procured by the Tenders Department (and not the HCPP). The challenges resulted in a decision annulling the administrative decision awarding the project to one of the bidders for violations of the law.

VIII OUTLOOK

Turning PPP into an enabler for the development of a country's economy requires more than passing a law and a programme (CEDRE and CIP). Practice plays a key role in attracting investors and lenders and positioning a jurisdiction on the regional or global PPP map. Education in this respect is key and should be spread across all PPP stakeholders to raise awareness about PPP, its rationale, requirements and ultimate purpose. Government officers and local lenders should play a key role in the development of PPP in Lebanon. Government officers should get acquainted with the rationale of PPP projects and PPP teams should be formed at the HCPP and different ministries that are likely to be involved in PPP to deal with the various stakeholders, namely, the HCPP, the bidders and their lenders. Once the PPP project is awarded, they should be in a position to administer the PPP contract and deal with the project company and its lenders. Local banks should develop project finance, non- or limited recourse and long-term financing capabilities. The economic issues that Lebanon recently faced and that have negatively affected historical banks investments in sovereign bonds should incentivise banks to take policy decisions to start diversifying their investment portfolio by moving away from government bonds to other sources of revenue, such as those generated from PPP projects, which would contribute to the development of the economy. Once a local PPP model and practice becomes established, international investors and lenders will be more keen to consider investing in PPP projects in Lebanon.

ABOUT THE AUTHORS

HADI MELKI

EKP Legal Counsel

Hadi Melki is a partner at EKP. He has more than 20 years of experience across the Middle East region. He specialises in projects, information and communication technology (ICT), public sector and regulatory matters.

Hadi regularly advises governments and private sector investors in connection with various PPP infrastructure projects. Hadi has also advised several GCC ministries and other government agencies on the design of institutional and governance frameworks for the implementation of megacities and projects, designing and implementing transformation projects and sectorial reforms. One of the major PPP projects he has handled in Lebanon is the development and operations of a design–build–finance–operate–transfer (DBFOT) PPP project for a countrywide mandatory vehicles inspection stations and services project including negotiation of the transfer of the DBFOT project to the government at its term and negotiation of a management contract for the operations of the stations. He is also advises a major local authority on the procurement of a US\$300 million waste-to-energy project based on a PPP model.

Hadi has an LLM in private law from the Lebanese University (Beirut, Lebanon), an LLM in banking and finance law from the University Paris I Pantheon – Sorbonne (Paris, France), and an LLB from St. Joseph’s University (Beirut, Lebanon). He is a member of the Beirut Bar Association and is fluent in Arabic, English and French.

EKP LEGAL COUNSEL

1st Floor, Badaro Circles Tower

Sami Solh Avenue

PO Box 116-2083

Beirut

Lebanon

Tel: +961 1 387 778

Fax: +961 1 387 776

hadi.melki@ekplegal.com

www.ekplegal.com

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