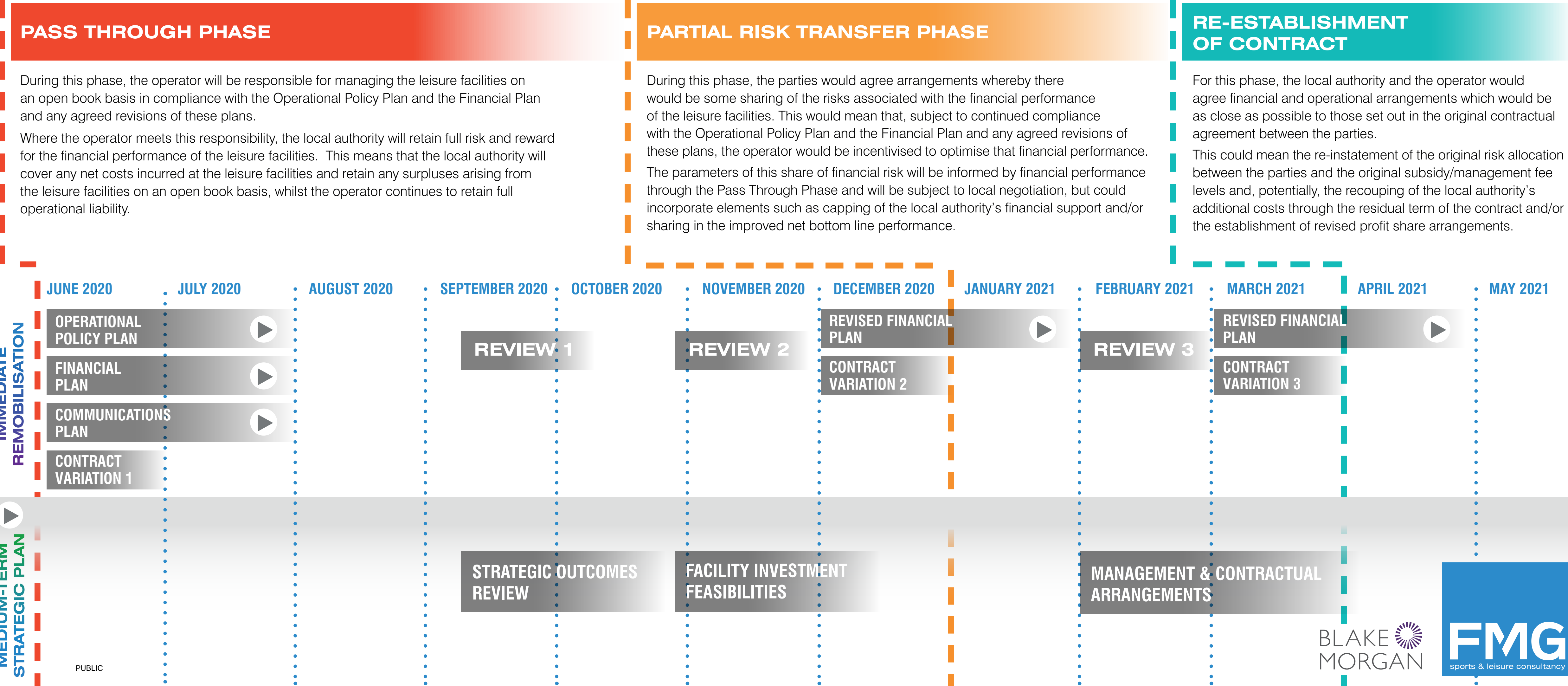


POST-LOCKDOWN ROADMAP TO BUSINESS RECOVERY

The Coronavirus pandemic and the associated enforced closure of leisure facilities across the UK has created significant challenges for local authorities, leisure operators and other stakeholders. We recognise that each contract and partnership is unique, but this Roadmap is intended to be used as an ‘aide memoire’ to stimulate thinking, establish broad timescales and bring structure to discussions and process. We have indicated a timeline starting in June 2020 to reflect the urgency of the challenge. Whilst this timescale is not definitive in all situations, time is of the essence.

GUIDING PRINCIPLES

- Flexibility
- Health & Wellbeing
- Focus
- Mutual Support
- Open Book
- Determination
- Active Listening
- Value for Money
- Commitment
- Ownership





OPERATIONAL POLICY PLAN

The Operational Plan will set out the key features of the intended approach to operating the sites through the business recovery phases. This will include:

- the phased re-opening of facilities and re-commencement of related services on a site-by-site basis;
- the phased re-instatement of opening hours and activity programmes, including any assumptions about reconfiguration and/or changed use of facilities;
- the phased re-instatement and un-furloughing of staff on a designation-by-designation basis;
- pricing policies, including membership and concessionary price schemes;
- staffing policies, including supervision levels, re-training and any potential redundancies;
- health and safety management, including access control, PPE, cleanliness and management of customer journeys and social distancing;
- asset management policies, including re-instatement and ongoing maintenance of plant;
- bookings and administration, including on-line processes, use of cash etc.
- policies and operational processes to optimise accessibility and inclusivity.



This document will be primarily created and updated by the operator, but needs to be guided by local circumstances, local political sensitivities and affordability. The local authority will need to carefully consider the proposals submitted by the operator and ultimately sign up to the implementation of those proposals through the business recovery phases.

It is anticipated that, as circumstances change through the business recovery phases, the operational approach will need to evolve. This document will need to establish how the local authority and operator will discuss and agree ongoing changes to the operational policy plan. It will be important for the parties to establish appropriate levels of local authority scrutiny without imposing on the operator's flexibility to respond promptly to changing needs.

POST-LOCKDOWN ROADMAP TO BUSINESS RECOVERY



The Financial Plan will describe the projected financial performance of the leisure facilities through the initial business recovery phases (i.e. from July 2020 to June 2021). This will include:

- detailed projections of income and expenditure, on a month-by-month, centre-by-centre, activity-by-activity basis;
- details of the key assumptions underpinning the projections and as reflected in the Operational Policy Plan;
- consideration of the key sensitivities of the financial projections, including estimates for the impact of alternative operational policies as and where relevant.
- assumptions regarding funding and other support potentially available to the operator from central government and/or other sources.



This document will be primarily created and updated by the operator, but again the local authority will need to carefully consider the assumptions and implications of the projections.

The document will also need to establish the mechanics by which financial performance will be monitored and managed between the parties through the business recovery phases. This will include assumed timescales for the submission of performance figures and supporting information and assumed timescales for payments between the parties.

Specifically, the Financial Plan will be subject to formal review and revision at one or more agreed points during the Pass Through Phase and the Partial Risk Transfer Phase. The purpose of these formal reviews will be to assess financial performance to date and, in that context, consider revised financial projections for the next 6-12 months.

Any such review will be guided by information provided by the operator, but will be a joint process undertaken by the parties with an open book approach.

POST-LOCKDOWN ROADMAP TO BUSINESS RECOVERY





The Communications Plan will set out the planned joint approach of the operator and local authority to ensure that there is an appropriately robust and coordinated approach to communications with staff, customers, non-users, members and other stakeholders throughout the business recovery phases. This will include:

- identification of the main audiences;
- confirmation of the key messages and proposed media for each of the audiences;
- a detailed plan of intended communications through the business recovery phases.



This document will be jointly created and updated by the operator and the local authority and the document will also need to establish ongoing working arrangements between the parties to ensure that messaging is agreed and coordinated at all times.

POST-LOCKDOWN ROADMAP TO BUSINESS RECOVERY



The parties will need to consider the potential longer-term impact of the coronavirus pandemic. Following the principles of the Sport England Strategic Outcomes Planning Guidance (SOPG), depending on the local circumstances, this document may need to incorporate:

- a re-assertion of the strategic outcomes that the local authority and its partners are seeking to achieve through the leisure facilities;
- updated insight of the local impact of the pandemic on the behaviour of local people and their needs in respect of sport and physical activity;
- reviews, where necessary, of the local authority's key strategic documents, including the Built Facilities Strategy and the Playing Pitch/Outdoor Spaces Strategies;
- potential renewed consultation with relevant local stakeholders;
- progression of feasibility work for relevant interventions, including infrastructure investments and targeted public health initiatives;
- consideration of alternative leisure operating contract terms;
- consideration of alternative management models.



The document will be primarily created and updated by the local authority, although it is important that the operator is consulted throughout and has a clear understanding of the local authority's strategic priorities.



The Health Protection (Coronavirus, Restrictions) (England) Regulation 2020 (Regulations), provided that indoor fitness studios, gyms, swimming pools or other indoor leisure centres “must cease to carry on that business” from 2pm on 21 March 2020. The Regulations currently expire at 1pm on the 26th September 2020.

The Cabinet Office has published two Procurement Policy Notes (PPN) of particular relevance here, the latest being PPN 04/20: Recovery and Transition from COVID-19. Effective from 1st July 2020 to October 2020, it seeks to provide information and guidance for public bodies on payment of their suppliers to ensure service continuity during the current COVID-19 outbreak.

The note updates and builds on the provisions contained in PPN 02/20, which had encouraged authorities to maximise commercial flexibilities within their contracts, to include waiving or delaying a council's rights and remedies such as service credits or termination rights, and vary contracts, taking account of their own contract, contractor performance, and the procurement regulations that permit variations and state aid rules. However, what the guidance didn't do – but is outlined by the Local Government Association's detailed 'Options for councils in supporting leisure providers through COVID-19' advice note – is recognise the unique nature of leisure operator contracts, which is more relevant to this market.

PPN 04/20 continues to encourage transparent support of suppliers of critical services, whilst also looking forward at whether supported contracts are still sustainable. The focus is more on developing transition plans to exit from relief as soon as possible and consider contract variations if operational requirements have changed significantly. It is important for such arrangements to continue to deliver value for money over the medium to long term.

Contracting authorities are encouraged, in line with PPN 02/20, to still proactively consider relief to maintain service continuity, but of particular interest here, income generating contracts and concessions are specifically mentioned. In such cases, if payment relief is not available within existing budgets, **contracting authorities should work with their suppliers to identify commercial solutions that are specific and appropriate to the contract.** Again, reference to the specific contract is required.

Importantly, PPN 04/20 requires authorities to work with their suppliers in partnership to plan an eventual exit from such relief and transition to “a new, sustainable, operating model taking into account strategic and re-prioritisation needs” such as:

- **a planned exit date for supplier relief whilst flexing if local restrictions are reintroduced;**
- **a process for reconciling payments against costs (the model interim payment terms accompanying PPN 02/20);**
- **an assessment of any costs in implementing Public Health England guidance specifically on contract delivery;**
- **an assessment as to whether, as a result of COVID-19, the contract is still operationally relevant and viable and, if not, proposals for variation or termination.**

Parties must check the basic commercial assumptions that underpinned the viability of the original contract, and consider contract variations, to get the contract back onto an appropriate commercial footing, or termination pursuant to the contract's terms if the contract is no longer relevant or viable. The PPN 04/20 acknowledges that this will mean risks are being taken, and authorities should continue to work with suppliers on an open book basis and retain comprehensive records of all decisions, reasoning behind key decisions and actions taken, to support transparency and future scrutiny of value for money.

It is certainly not in the interests of the parties for the operator to go into administration and it is important for the parties to work together in partnership to find a solution.

Many contracts, including the standard Sport England contract, do not have “pandemic” included as a Force Majeure Event, unless COVID-19 is viewed as a biological contamination, which may be difficult to establish. For many, an alternative contractual basis of relief needs to be found, such as a claim for a Relief Event or a ‘Qualifying Change in Law’ (QCIL). Not all contracts will permit such claims, so a review of the documentation is required. We understand Sport England had not intended for pandemics to be captured by QCIL, and this needs to be borne in mind.

The standard contract does not specify how long relief would last until. However clearly the Regulations are time limited (6 months) and thereafter there would need to be a new basis for claim if services are still impacted. In terms of the relief given, it will be a negotiation between the parties as to what places the operator in a neutral position, and this is likely to have a series of phases: (i) immediate impact; (ii) phased reopening; (iii) back to new-normal.

It is important for both parties that the operator can get back on its feet and return to its contracted financial model – that needs to be in the context of the market as a whole, to ensure no betterment of the operator. There may need to be an element of benchmarking and risk/reward sharing to get there, but this is feasible as benchmarking and surplus share have been long used processes in leisure contracting.

PPN 04/20 is clear that “suppliers should not expect to make profits on elements of a contract that are undelivered during this period and all suppliers are expected to operate with integrity” and in such cases, a right of clawback is likely to be required to recover payments made.

Where a contract variation is required, the variations are likely to fit within certain grounds specified in the Public Contracts Regulations (PCR), but a Council would need to keep a record of the exact ground(s) they would use, for audit purposes. In some cases, a Council would also have to post a modification notice on OJEU.

If a contract variation is required, it is advisable to secure legal support from leisure specialists in documenting how the contract is changing and ensuring the benchmarking and risk/reward sharing processes are effectively used. It is important to ensure that the relief does not continue for the whole of the contract's remaining term, and the operator is encouraged to find its new market normal without being supported over and above other market participants.

PPN 04/20 places a focus on working towards transition planning, and for such plans to be implemented as soon as possible and before the end of October 2020 (albeit the Regulations expire in September). In addition, loans or relief in the immediate impact phase could be recovered in later ‘good’ years if there are surplus profits made. This should be considered carefully and documented by the parties.

Parties also need to consider State Aid. Where the Covid-19 Temporary Framework will not be appropriate due to the operator breaching the E800,000 threshold for aid, the Market Economy Operator Principle may be more appropriate. A check and audit trail is needed for this.