

PPP in France - 2006

Following a series of recent legal reforms to establish a modern framework for PPP in France, the first projects have now reached fruition, paving the way for a stream of similar structures in different sectors over the coming years.

Simon Ratledge and Paul Lignières of our Paris PPP team take stock of some of the defining features of this developing market and evaluate how PPP in France shapes up in comparison to common practice elsewhere in Europe.

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Overview

History and background to PPP in France

Public-Private Partnerships ("PPPs") are no revolutionary concept in France but unlike elsewhere in Europe domestic law has not, until very recently, provided sufficient flexibility to encourage proper development.

Since the end of World War II, the cult of the State has been strongly upheld in France with the public sector in charge of virtually all infrastructure projects. Concessions were more often than not awarded to separate public entities rather than to privately held companies looking for public partners.

One episode, in particular, which has had a significant delaying impact on the growth of the PPP market relates to the now infamous METP (*marchés d'entreprises de travaux publics*). The METP, which were employed principally for school building projects during the 1980s-1990s were long term contracts covering both construction (or renovation) and on-going maintenance aspects against which the contractor was remunerated over time by the public authority. The METP technique was heavily criticised, not only in its implementation - procurement mechanics were seen as an opaque way of avoiding the protections of the public procurement code (*code des marchés publics*), but also in its philosophy since, although producing infrastructure at no initial capital cost to the public sector, it led indirectly to local authorities paying for expensive private sector financings. The METP

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were often linked to political funding scandals and were ultimately banned, leaving for many (such as small businesses who felt themselves excluded from this market), an enduring stigma. Along with their prohibition came a number of additional restrictions to the public procurement code referred to in greater detail below (please the section entitled "Legal framework for PPPs" below).

One important distinction to be drawn between today's PPP and the METP is that unlike today's PPPs the METP did not benefit from any defined legal framework.

What factors brought about the development of PPP?

However, the State control model has clearly been evolving over recent years to keep pace with changing infrastructure requirements. Toll road and bridge concessions are now awarded through public tender to private companies (as with the recently opened Viaduc de Millau) some of which have successfully raised private finance on a limited recourse basis (as was the case with the recently opened A28 toll road in Normandy and the recently financed A41 project near Annecy). Railroad concessions (such as the international high speed link between Perpignan and Figueras) have also been opened up to private operators.

Added to this **cultural** change, **economic** factors have come in to play - [slowdown has been a distinct feature in France (as elsewhere in Europe) over the last few years.] As an indicator, the French budget deficit for 2004 reached 3.6% of GDP, is well outside the EU's Stability and Growth Pact's minimum targets for members of the Euro zone (3%). When combined with an urgent need for infrastructure investment in key public service sectors such as healthcare and custodial, PPP clearly represented an attractive way of raising financing for vital public sector infrastructure in key sectors such as defence, police, prisons and the judiciary as well as education and health.

As a further factor paving the way for the development of the PPP market in France was a **political** change - the election success in 2002 of the conservatives (UMP) over the outgoing socialist party.

For some too, the desire for the State to achieve off-balance sheet treatment was also at the forefront of the initial strategy to adopt PPP in France. Whilst it is beyond the scope of this work to consider this point (and related criteria such as degree of risk transfer and ownership of assets) in any detail, we would note that the specific funding structures currently envisaged for certain projects (please the paragraph entitled "Assignments of receivables" and the section on "Funding" below) indicate that one of the primary objectives of the public sector for PPPs in France would appear to be to ensure that projects are effected so as to minimise initial financing costs rather than perhaps to maximise the degree of risk transfer.

How advanced is the current programme?

When analysing the state of the PPP market in France, what becomes immediately clear is that whilst the overall objectives (as described above) are common to all sectors, the legal basis and commercial maturity differs significantly from one sector to another.

We will examine the legal background across the sectors in detail in "Legal Framework for PPPs" below but the basic message to note in terms of status of the legal framework is that a full range of primary and secondary legislation now exists to provide the tools necessary to implement projects as diverse as pilot training centres to prisons, hospitals, sports stadia and waste projects.

In terms of maturity of the individual sectors, we will examine this in detail in "Completed projects", "Review by sector" and "Project pipeline" below but the basic picture is that PPP in France is currently in its early stages in comparison with developed markets such as the UK PFI Healthcare and prisons projects currently lead the field in France, but a number of new sectors are beginning to produce their first PPP projects.

What are the prospects for the successful development of a PPP market in the future?

Given some fairly conspicuous difficulties in procuring infrastructure projects in France in the past - from economic issues (such as Orlyval and Eurotunnel) to issues surrounding the validity of the concession award (such as the Stade de France and the Lyon ringroad) - it would take a confirmed optimist to imagine that the PPP market in France will develop free from any such complications in the future.

What is clear, however, is that the national business case is compelling - political, legal and economic factors have converged to focus on PPP as a key tool in implementing much needed public infrastructure projects. More than a social or economic experiment, this is the result of widespread and lengthy consultation by the public sector in France, both with neighbouring countries such as the UK as well as with key interested parties locally - industry representatives, local government, bankers and lawyers.

Political situation

Summary of governing party's policy towards PPP

When the UMP (*Union pour un Mouvement Populaire*) came to power in June 2002, its agenda included the reform and modernisation of the State and its administrations. In addition to the recent high profile privatisations of the state gas company (GDF), the state electricity company (EDF), motorway concessionaires ASF, APRR and Sanef and the announced privatisation of *Aéroports de Paris* (ADP), an important part of the modernisation process has been to redynamise public investment to address the problems caused by two decades of declining spending. In the words of Vincent Le Taillandier¹ with reference to healthcare policy "investment has once again become a strategic lever".

As noted above, the government is now emerging from a lengthy preparatory period during which a robust framework for PPPs has been created, equally well from a legal perspective (new laws having been enacted and ratified) from a budgetary perspective (with the recent modification of the LOLF²) and from an accounting perspective (with the recent Eurostat guidance). With only a few successfully completed projects under its belt at the time of writing, the French government now appears to be keen to press forward with the execution phase of its PPP programme.

Perhaps the most concise summary of current government PPP policy was made by Thierry Breton (Minister for the Economy, Finance and Industry) in a communication to the council of ministers on 2 August 2005 in which he confirmed his intention is to use the "partnership contract"³, an innovative new tool ("inspired by foreign initiatives") to "acquire the good working practices of the private sector and to achieve financial gains linked to the sharing of risks with the private sector" as well as to take advantage of benefits to the public sector "(reduced public investments) and to the user (acceleration of public investments...)". At the inauguration of a dedicated taskforce in May 2005, Thierry Breton again emphasised the importance of the partnership contract as an "accelerator for economic growth and the modernisation of public administrations".

Is there a central PPP unit within government?

The Ministry for the Economy is also supported in its PPP objectives by a taskforce (*Mission d'appui à la réalisation des contrats de partenariat*

¹ Head of the MAINH (please see the paragraph entitled "Is there a central PPP unit within Government?")

² *Loi organique relative aux lois de finances*

³ See the section on "Legal framework of PPPs" below

publics privés”, “**MAPPP**”). The primary purpose of the MAPPP is to provide assistance in the preparation and negotiation of “partnership contracts” and also to provide its expert opinion on the overall economics of a transaction or to assist the relevant public authority (both at central and local government levels) in its initial feasibility study. This taskforce has already issued an initial practical guide (“*Les Contrats de Partenariat- principes et méthodes*”), but does not currently intend to follow the UK Treasury’s precedent of issuing standardised documentation. The taskforce comprises a core team of half a dozen civil servants who consult regularly with a 37-strong committee (*comité d’orientation*) made up of interested institutional and professional bodies. At the inauguration of the MAPPP in August 2005, Thierry Breton encouraged the taskforce to take a wide view of its role and expressed his wish that it act as a “catalyst for future projects”.

The Ministry for Health (*Direction de l’hospitalisation et de l’organisation des soins*) is supported in the implementation of the “*Hôpital 2007*” Programme by the *Mission nationale d’appui à l’investissement hospitalier* (known as the “**MAINH**”), which acts as a coordinator of the Programme at the national level, and the *Agences régionales d’hospitalisation* (“**ARH**”) which follow the projects at the regional level. The ARH are represented in each of the country’s 26 regions, including the 4 overseas regions). The stated objective of the MAINH is to “facilitate the successful renovation of public and private healthcare facilities and the innovation and sharing of new investment tools” which it aims to do in particular by providing technical supervision and support at the local level to the ARHs and healthcare establishments (*établissement publics de santé*, “**EPS**”) from inception of individual schemes onwards. The MAINH is responsible for the development of legal and financial framework and has recently drawn up a first set of practical guidelines (aimed principally at hospital directors) on the comparison between traditional public procurement and PPP techniques, the application of the competitive dialogue and on certain “key clauses” in order to facilitate the use of these new legal tools.

Not a taskforce as such, but noteworthy all the same, is the use by the Ministry of Justice, of its public works agency (*Agence de maîtrise d’ouvrage des travaux du ministère de la justice*, “**AMOTMJ**”) as competent authority for all aspects of the PPP prisons tender process leading up to award of the contract.

An expert committee (“*organisme expert*”) has also been created within the Ministry of Defence aimed at evaluating individual defence projects prior to the launching of any call to tender as a partnership contract⁴.

⁴ Decree 2004-1551 of 30 December 2004

How are responsibilities split between central and local government for PPPs?

Responsibilities for PPP projects reside both at the national level and at the local level depending on the specific sector. The responsibility for prisons for instance fall within the jurisdiction of central government (Ministry of Justice) as do military procurement projects (Ministry of Defence) whereas projects serving more local needs are managed at that level, such as healthcare projects (through the EPSs).

Clearly decentralisation represents an opportunity to closely tailor service provision to local needs and thereby improve efficiency of public services. In this light the government is currently in the process of decentralising important sectors such as airports and roads.

Please note also that the main thrust of Thierry Breton's statement of 2 August 2005 was to ensure that local authorities (*collectivités locales*) systematically consider the "*contrat de partenariat*" option in any major procurement project - the legislative framework for these contracts was specifically designed to apply both at central and local government levels. The reflex, at local government level, of turning to these contracts is likely to be pivotal to their overall success.

Legal framework for PPPs

Comparison with the traditional procurement techniques

Although we do not intend to cover traditional concession techniques (as used since the end of 19th century in France to the present day) in any detail in this chapter, a brief understanding of these techniques is nonetheless necessary to properly grasp how they fit together with the recently devised PPP techniques described below. Indeed, in using the term “PPP”, we reflect popular usage in France at the time of writing by referring primarily to those instruments developed collectively since 2002 in response to the political initiatives referred to above.

Contrary to the generally more flexible use of the term in the Anglo-Saxon context, the concept of the concession falls within the strict parameters of the body of administrative law relating to the concepts of *service public* and *délégation de service public* (“**DSP**”): a concession is only possible if it involves the undertaking of a given public service taken as a whole, rather than simply the provision of a specific building or piece of equipment together with individual maintenance or other services, as these are considered to be simply the means by which the relevant public service can be provided.

The concept of the concession implies that the concessionaire is not to be paid by the conceding public entity but must instead obtain its revenues to a significant extent from the end users of the public service conceded. Accordingly, only financially free-standing projects (such as car parks or toll roads) can be set up through concessions, not projects based on “services sold to the public sector” (such as prisons or government building projects).

Leaving aside the possibility of setting up public-private joint-ventures (*sociétés d'économie mixte*), the only real alternative to the concession as a way of putting in place PPPs in France has, until now, been by public procurement under the public procurement code. Public procurement, however, is ill-fitted to the needs of private financing of public works due to the prohibition on deferred payment mechanics (related to the METP scandal referred to above) as well as the obligation to conduct separate tenders for construction works and operation/maintenance⁵. Collectively these restrictions have acted as an impediment to effective investment in infrastructure by preventing the French State from taking advantage of the extensive risk transfer underpinning global tenders, and have created

⁵ See Article 94 of the *Code des Marchés Publics* (on deferred payment), Articles 10 and 94 of the *Code des Marchés Publics* (on separate tenders and deferred payment) and Art. 10 of the law of 12 July 1985 on *maîtrise d'ouvrage public* which provides for distinct roles between the general contractor (*maître d'ouvrage*) and sub-contractor.

additional administrative burden which has impacted negatively on the timetable for effecting investments.

To address these issues, a series of laws have been enacted over the last few years, both on a sector-specific basis (essentially under lease-based DBFM schemes at central and local government levels) and on a more generic basis under the so-called “partnership contract” model where the structure is in principle more open.

In each case the basic purpose of each of the new instruments is to bridge the gap between the traditional concession regime (by allowing payments from the State) and the *marché public* regime (by permitting deferred payment and global tenders of works and services).

Prisons, courts, police stations

The first ministries to adopt the French PPP initiative were the Ministry for Home Affairs and the Ministry for Justice with strategic laws in August 2002 on domestic security⁶ and in September 2002 relating to the judiciary⁷, known as “**LOPSI**” and “**LOPJ**” respectively. These schemes introduced a new legal framework aimed at promoting new projects for the construction and management of prisons and facilities to be used by the judiciary, police and gendarmerie.

The schemes are based on lease-type structures (known as “**AOT/LOA**”⁸) allowing public real estate to be temporarily held by the private sector (otherwise contrary to the public law concept of inalienability of the public domain) subject to a right of return/purchase in favour of the State.

Healthcare

In July 2003, Parliament adopted a general enabling law⁹ (the “**Enabling Law**”) allowing the Government to enact by way of government order (*ordonnance*) a general framework for future PPPs by creating “new forms of contracts”.

This Enabling Law was first used for a government order of urgency for the hospital sector adopted in September 2003¹⁰ (the “**Hospital Order**”) and ratified and completed by a law recently passed by Parliament (the “**August 2004 Law**”)¹¹. This government order modifies the Public Health Code.

The Hospital Order provides for both traditional procurement and PPP models. Under the traditional procurement model, the overall responsibility

⁶ *Loi d'orientation et de programmation pour la sécurité intérieure* of 29 August 2002 - “LOPSI”

⁷ *Loi d'orientation et de programmation pour la justice* of 9 September 2002 - “LOPJ”

⁸ *Autorisation d'occupation temporaire* - “AOT” / *Location avec option d'achat* - “LOA”

⁹ Law 2003-591 of 2 July 2003 *habilitant le Gouvernement à simplifier le droit*

¹⁰ *Ordonnance n°2003-850* of 4 September 2003 *portant simplification de l'organisation et du fonctionnement du système de santé*

¹¹ Law n°2004-806 of 9 August 2004 *relative à la politique de santé publique*.

for the works (*maîtrise d'ouvrage*)¹² and the financing of them remain with the public sector. Under the PPP model, the *maîtrise d'ouvrage* is entrusted from the outset to a private participant who also bears responsibility for the financing in return for receiving deferred payments from the hospital.

The basic contractual structure for hospital PPP projects under the *Hôpital 2007* programme (described further in the "Review by sector" section below) is that of the long term administrative lease known as the *bail emphytéotique hospitalier* ("BEH") akin to the AOT/LOA, but at local government level. In this scenario, the EPS grants a BEH (at a "peppercorn" rent) to the private partner who thereby benefits from the right to occupy the public land subject to its obligation to build and, as the case may be, maintain specified facilities. The BEH is to be concluded for a long period (between 18 and 99 years) and effectively allows the lessee to temporarily own buildings on the public domain subject to the obligation to return such assets to the EPS at the end of the BEH free of charge.

The BEH is accompanied by an indissociable contract (*convention non détachable* or "CND") which specifies the conditions under which the facilities and any related equipment are to be made available to the EPS and sets out the basis on which the private partner is to be remunerated for providing the serviced facilities (so as to cover both amortisation of capital costs and pass-through of service costs). The CND also sets out the circumstances under which the payment stream(s) to the private partner are to be reduced to reflect poor performance.

Defence laws

A specific decree relating to defence procurement was passed on 7 January 2004¹³ (the "Defence Decree"). The Defence Decree derogates from the Public Procurement Code with respect to the procurement of supplies and services relating to weaponry, ammunition and military equipment and procurement of services directly linked to military strategy or the employment of armed force.

The rules for procurement under the Defence Decree are designed to be particularly flexible, in line with the general trend towards simplification of process which began in January 2004¹⁴ with a significant reform of the Public Procurement Code. The new rules allow the Ministry to define its requirements and the means to meet them throughout the selection procedure.

¹² Pursuant to article 2 of law n°85-704 of 12 July 1985 "a party providing the *maîtrise d'ouvrage*, bears overall responsibility for the works, ensuring the feasibility of the scheme, defining the parameters, ensuring the financing, choosing the technical solution and entering into contracts with the contractors of its choice".

¹³ Decree n° 2004-16 "in application of article 4 of the Public Procurement Code and relating to certain procurements for defence needs".

¹⁴ Decree n°2004-15 of 7 January 2004.

In addition to the Defence Decree, a law¹⁵ applicable to real estate, effectively extends the AOT/LOA regime described above to land held by the Ministry of Defence. The impact of this particular legislative reform is, however, unlikely to be significant since the current policy of the Ministry of Defence is more towards the divestment of real estate assets no longer used (such as barracks) rather than investment in new-build schemes.

Partnership contracts

The general Enabling Law referred to above gave rise on 17 June 2004 to the landmark Government Order (the “**Order**”) which in turn introduced the concept of “partnership contracts” (*contrats de partenariat*), completing the panorama of procurements techniques (both traditional and sector-specific PPP instruments) since this new form of contract was specifically conceived to apply generally to projects (rather than on a sector-specific basis).

Partnership contracts under the Order are also conceived as flexible instruments pursuant to which a variety of schemes may be implemented including design, build, finance and operate (“**DBFO**”) structures as well as renovation and outsourcing transactions. The Order is specifically aimed at making the partnership contract available to local as well as central government level.

Although the legal framework and methodological infrastructure for the *contrats de partenariats* have only just been put in place, a number of key areas are emerging where they might offer procurement possibilities not otherwise available. Amongst the projects recently tendered or under examination by the MAPPP feature cultural establishments (museums/zoos), educational projects (schools, institutes) incinerators, IT projects as well as transport projects (particularly road and rail with a new law having been adopted recently to make partnership contracts possible within the railway sector¹⁶).

We consider some of the specific characteristics of the partnership contract in the next section.

Rail

For rail, yet further legislative changes have been necessary to make *contrats de partenariats* (as well as *délégations de service public*) possible in this sector, notably the recent law of 5 January 2006 which modifies the constitutive law for the public sector company RFF (*Réseau ferré de France*, the French rail infrastructure provider) was required in order to derogate from RFF’s monopoly rights as general contractor (*maître d’ouvrage*) with respect to national rail infrastructure and to allow the participation of private parties in

¹⁵ Law 2003-73 of 27 January 2003 on 2003-2008 military programming.

¹⁶ Law n°2006-10 of 5 January 2006 *relative à la sécurité et au développement des transports*.

the construction, maintenance and operation of that infrastructure. Traffic control and operation and maintenance of security equipment, however, are still to remain within the mandatory responsibility of the SNCF as operator of rolling stock.

The law of 5 January 2006 also anticipates a specific derogation to the texts relating to the organisation of passenger transport in the Paris region , to permit the establishment of an express rail link between the Roissy Charles de Gaulle airport and central Paris (*Gare de L'Est*). In common with the derogation with respect to RFF referred to above, this derogation anticipates that detailed implementation mechanics are to be set out in a decree of the *Conseil d'Etat*, which decrees have not, at the time of writing, yet been published.

Characteristics of French PPP model

General

In common with many other civil law jurisdictions in Europe, PPP contracts in their various forms are classified as administrative law contracts since they relate to the focal concept of the *service public*. Essentially administrative law is concerned with enabling competent authorities to properly serve the public. It is largely based on case law developed over the years in particular around key principles such as continuity, adaptability, equality (of users) and neutrality, and in certain circumstances gives rise to certain enhanced rights for the benefit of the contracting authority, whether or not contractualised. We do not propose to go into any detail on administrative law in this chapter but seek only to stress the importance of this as defining factor in concluding and negotiating contracts with the relevant public body. Also important to note is that any dispute relating to an administrative contract falls, in principle, within the exclusive jurisdiction of the administrative courts although the possibility of arbitration proceedings has recently been opened up for *contrats de partenariats*, as referred to in the paragraph on "Partnership contracts" below.

Accommodation-type PPPs in France (hospitals, prisons etc.) broadly resemble their UK PFI equivalents with payment streams comprising availability and service deduction mechanisms, although not always strictly on a unitary basis as under the PFI. The scope of services remain narrow in comparison to UK counterparts, however, basic "hard" FM services are often supplemented with an obligation to control utilities consumption in line with pre-established guidelines (as has been the case in some recent UK hospital deals), but "soft" FM services are generally not extensive. Hospital projects do not encompass clinical services, unlike the current Spanish model.

Prisons

In contrast to similar schemes elsewhere in Europe (such as the UK PFI), management or custodial services cannot be outsourced as part of any of the AOT/LOA schemes described above since such services fall within the mandatory jurisdiction of the State. Clearly this has a bearing on the level of risk that can be transferred by the State to the private sector and will be likely to influence the appetite for these schemes by certain service providers.

Partnership contracts

Since their introduction, there has been some considerable debate in legal circles around the fact that partnership contracts represent a new procurement category. This is seen by many as potentially increasing the possibility of challenge for improper categorisation a risk which adds to that already existing as between the *délégations de service public* (such as the concession) and *marchés publics*.

In our view, this legal risk is mitigated to a large extent by the requirement under the Order for the public authority to conduct a formal evaluation (in many respects akin to the celebrated “public-sector comparator” under the UK PFI) on the rationale for having recourse to the new contract. As part of this evaluation (to be conducted prior to launching a call to tender as a partnership contract), the authority is to show that (i) the project in question is either “urgent” in nature or, more likely (ii) due to its complexity, the authority is not able to establish on its own in advance precisely how the project should be implemented. In addition, the authority is required to set out (albeit briefly in circumstances of urgency) the economic, financial or legal reasons for choosing, after comparison with other options, tender as a partnership contract. Although seemingly onerous, since this evaluation is required prior to tender, it is generally viewed as justified since it effectively acts as an important safeguard against subsequent legal challenge that tender as a partnership contract was unnecessary or inappropriate.

Another important characteristic of the partnership contract is that the Order introduces the possibility of providing recourse to arbitration for the settlement of disputes, French (administrative) law, of course, governing the contract. This development represents a clear departure from the general rule that the administrative courts have mandatory jurisdiction over administrative contracts and should provide significant flexibility and comfort to sponsors and financiers alike. It is one of the major innovations of the partnership contract model, bringing them in line with practice elsewhere in Europe.

Assignments of receivables

One of the most hotly debated issues to arise in the development of PPP in France has been the question of whether and how to incorporate receivables assignments (*cession de créances*) in their various guises.

In many respects this debate goes to the core of the viability of PPP as a procurement solution in France since it touches on the key issues of the cost of implementing a private financing, which is inevitably higher than under a traditional public procurement or public financing. Over the recent development of PPP in France, this factor is one that has weighed most heavily against the primary arguments in favour of PPP such as the benefits of an accelerated investment calendar and the optimisation of risk allocation.

The receivables assignment mechanic as it is applied in French PPPs essentially involves a transfer by the borrower to the financing institution funding capital investment costs of its right to receive certain specified cash flows in such a way that they become isolated from performance risk following satisfaction of predefined conditions (invariably completion of the works). Once isolated from performance risk in this way, the assigned cash flows invite a credit analysis and risk-weighting approaching that of the underlying debtor (being the granting authority) and hence attract greatly reduced margins as against the construction phase. In this respect, the appeal of a financing based on a receivables assignment in some ways resembles that driving the UK PFI's credit guarantee programme - both techniques seek to harness the public sector's capacity to raise cheap financing.

Commentators on the assignment of receivables technique broadly fall into two camps - firstly, those that support the effort to drive down financing costs (mindful of public budgetary constraints and the sometimes marginal business case for PPP where investment costs are high) and, secondly, those who are more critical and favour a broader risk transfer in the spirit of the UK PFI's unitary payment. Clearly both camps have well-founded bases for their respective positions, but the discussion should perhaps be viewed in the light that, for the time being at least, the scope of services under the French PPP model is in any case greatly reduced in comparison to its UK counterpart - this factor effectively shifts the balance away from performance deductions towards performance bonds in respect of asset condition on hand-back or buy-back as more effective controls. No doubt also an influential factor in this context is Eurostat's recent decision¹⁷ on the accounting treatment for public sector obligations which leaves much room for interpretation in terms of the level of transfer of availability risk required in order to achieve off-balance sheet treatment.

In terms of mechanics for effecting such a receivables assignment, the original approach (the so-called "*cession Dailly acceptée*", named after the Senator who promoted it), is contained in article L.313-29 of the *code monétaire et financier* and involves a formal acknowledgement by the underlying obligor of the assignment to the financial institution. The Order also introduces an alternative mechanic, with reduced formal requirements, to apply specifically to receivables with respect to "part" of the investment cost for partnership contracts, which now appears as article L.313-29-1 of the *code monétaire et financier*. This mechanism has since been extended to apply to healthcare projects under the Hospital Order.

The guidance on partnership contracts recognises the impact of isolating payments from performance risk can have on risk transfer and accounting treatment in the light of Eurostat criteria and stipulates the extent to which such an assignment of receivables should be made. Likewise, the MAINH's "Guide BEH" recommends assignments ranging between 50 to 80 per cent.

of the investment cost (as a function of the EPS' appetite for risk transfer and other relevant factors) in order to strike the balance between optimising risk transfer and minimising financing costs.

Risk transfer

Apart from the impact of receivables assignment mechanics described above, two key features of French PPP setting it apart from the UK PFI model in terms of risk allocation are, firstly, the impact of administrative law and, secondly, a relative lack of established market standard.

On the first point, one factor which partly accounts for the considerable difference in length between a project agreement under the UK PFI and its French PPP equivalent is that risk allocation is not only a function of commercial negotiations, it is also the result of a number of general principles, many of which developed in the context of jurisprudence in relation to concession agreements. By way of illustration, the concepts of *fait du prince*, *imprévision* and *force majeure* merit a brief explanation.

Under the doctrine of *fait du prince*, the contractor may claim compensation for increased costs resulting from the exercise by the grantor of its regulatory power that is specific to the contract or discriminatory in nature. The grantor may be obliged to grant compensation but only if the financial equilibrium of the contract is affected. The measure of compensation is that required to restore the financial equilibrium of the concession.

Under the doctrine of *imprévision* where as a result of unforeseeable circumstances which are beyond the parties' control there is an upheaval of the financial equilibrium of the contract ("*bouleversement de l'équilibre financier*"), the contractor may obtain a contribution from the grantor so as to permit the continuation of the public service to which the contract is related. Under this doctrine, however, the compensation which the grantor can be requested to make is never full compensation and such remedy is intended to be of limited duration.

Force majeure is strictly interpreted. It encompasses events unforeseen and unavoidable which are irresistible and entirely outside the control of the parties and which render performance of the contract impossible. Clearly there is a certain amount of common ground here between principles of change in law and delay, relief and compensation events under the PFI, but the approach is more conceptual in French PPP rather than reliant on detailed definitions and contractual provisions. It should also be noted that whilst general principles such as these are frequently contractualised, supplemented and modified, this approach is not universally adopted, as witnessed in the recent trend in certain PPP contracts of referring simply to relevant principles of administrative law, including in circumstances where the underlying principles are not sufficiently developed to support such an

¹⁷ 11 February 2004

approach (e.g. in relation to the level of compensation payable on termination for *Force Majeure*).

On the question of market standards, it is currently far too early in the development of PPP in France for any cohesive template to have emerged on key risk allocation provisions such as termination on compensation and it is unfortunately beyond the scope of this chapter to describe the different approaches adopted to date. A number of the early transactions to reach the market have been favourable to sponsors and bankers alike, but the current movement, on the whole, is to extract value from the PPP structure by ensuring maximal transfer to the private sector of those risks which it is able to manage. In some recent transactions, indeed, the public sector in France, has gone significantly beyond UK PFI practice in cementing risk transfer. By way of example, some recent projects rely not only on the commercial imperative of starting revenue generation as soon as possible to transfer construction risk, but combine this dynamic with liquidated damages for delay, evergreen construction phase performance bonds and flat rate penalties on termination.

Please note also that the guides produced by the Ministry of Finance and by the MAINH referred to above contain useful sections on risk transfer, including basic risk matrices.

Procurement policy

Principal steps in the procurement process

Public authorities may tender PPP contracts in one of two options - ordinarily by way of competitive dialogue (inspired by EU directive N° 2004/18/CE) or, for partnership contracts, in limited circumstances of particular urgency, under the restricted procedure.

For the sake of brevity, this section will be limited to the competitive dialogue procedure relative to healthcare PPPs and partnership contracts. The competitive dialogue procedure applies to “particularly complex” projects within sense of the EU directive, that is, projects where the granting authority is objectively not able to identify the best means to satisfy its needs nor to evaluate which technical, legal or financial solutions are best suited. The object of the dialogue is, therefore, to define the technical methodology and legal/financial structure to best address the tendering authority’s needs and will generally involve fine-tuning the risk matrix and the discussion of legal, financial and technical clauses, establishing draft contracts and the elimination of candidates.

In broad terms, the procurement procedure would typically involve the following stages:

1. preparatory stage including scoping, public sector comparator, preparation of tender pack, issue of tender notice (*avis d'appel public à la concurrence* or “**AAPC**”) and prequalification of candidates;
2. the competitive dialogue including distribution of bidding pack (comprising tender rules and draft contracts), dialogue and conclusion of dialogue;
3. the final stages including distribution of final offer pack, invitation to submit final offers, examination/clarification of final offers, choice of contractor, finalisation of contracts, approvals, signature, *contrôle de légalité*).

Any aspect of the project may be discussed in order to allow the tendering authority to finalise its requirements and for the candidate to finalise its offer, provided the characteristics of the project as initially presented in the tender announcement remain unchanged. The award will ultimately be made to the “most economically advantageous” offer with respect to the criteria set out in the tender process, described in more detail below.

For hospital projects, the competitive dialogue procedure is generally subdivided into 3 separate, essentially reiterative, stages known respectively as the *Principe Partenarial et Organisationnel* (PPO), *Proposition Prévisionnelle Sommaire* (PPS) and the *Proposition Prévisionnelle Détaillée*

(PPD). Although this approach inevitably results in a lengthy process, the approach was deliberately conceived to ensure that key technical and financial issues are properly addressed ahead of the award of preferred bidder.

Procurement timetable

The procurement timetable clearly varies from project to project and there is no overall limit on the duration of the competitive dialogue phase.

Looking again at the three basic stages set out above an indicative timetable for any given project might be as follows, according to the size and complexity of the underlying deals:

1. Preparatory stage
 - From AAPC to pre-qualification submissions: 1.5 months.
 - Confirmation of pre-qualified consortia: 1-2 months.
2. Competitive dialogue
 - From confirmation of pre-qualified consortia to commencement of competitive dialogue procedure: 1-3 months.
 - Competitive dialogue: 4-12 months.
3. Final stages
 - From conclusion of the competitive dialogue to submission of final offers: 2-4 months.
 - Consideration/clarification of final offers to execution/entry into effect of project contracts: 2-6 months.

How transparent is procurement?

Strict conditions of equality apply to each candidate. The tendering authority may not give to some candidates information that is likely to place them at an advantage as against others and may not reveal to other candidates solutions or confidential information proffered.

The contract is to be awarded to the candidate with the “most economically advantageous” offer with respect to the criteria set out in the tender process-price being one only of the criteria, alongside performance, architectural aspects or the portion of the contract to be entrusted to small/medium sized companies. The weighting to be attributed to each category is to be set out, failing which a hierarchy between the various elements is to be established.

In common with other European jurisdictions, bidders, financiers and advisers are often critical of the competitive dialogue procedure in practice. Other than the length and cost of the process, the most frequently expressed criticisms tend to be that the sharing of information with consortia poorly placed at the technical level can lead to a convergence of bids with no clear

winners and can also enable the granting authority to “pilot” the award in any given direction.

How are bid costs treated?

One distinctive feature of French PPPs (in contrast to the UK PFI, infamous for its so-called “bid fatigue”) is that a portion of bid costs are often reimbursed to unsuccessful bidders, depending on the extent to which they participate in the competitive dialogue procedure and the detail of their offer.

Although the practical guide to partnership contracts notes that there is no obligation either at national or EU level requiring unsuccessful bidders to be compensated, the guide suggests such payments would be justified if they would effectively extend access and competition to the process, reinforce the chances of securing the best quality offer or reduce the risks of challenge relating to the tender procedure.

According to the MAINH, for hospital projects, the level of reimbursement can reach 40% of design cost for the PPS phase and 70% for PPD phase.

Competition and access to market

The procurement process is, of course, subject to European principles relating to public contracts such as freedom of access, transparency and equality of treatment of candidates.

Although there have been some important examples of penetration by foreign sponsors in French infrastructure projects recently such as the award to the consortium led by the Spaniard Urbaser (a subsidiary of ACS) of the large waste treatment plant in Marseille (by way of *délégation de service public*), such in-roads remain the exception rather than the rule so far.

In terms of service providers including financial advisory and lending, the market is generally open and has been quick to take advantage of experience gained in more developed PPP markets abroad.

What are the barriers to foreign participation in the local PPP market?

A number of factors could be seen as discouraging to potential foreign sponsors. Firstly, and perhaps most obviously, is the fierce competition already existing at the local level. France has no shortage of “national champions” - its powerful construction companies rank amongst the largest and most successful in Europe, notwithstanding that the local market is characterised by notoriously low margins.

On the facilities management side, the same large groups can also boast the ability to provide global solutions covering design, construction and maintenance in-house so as to potentially improve efficiency, reduce interface risks and keep overall costs down.

In addition to the general points referred to above, a number of specific factors also potentially come into play, such as the following:

- the complexity of legal background and contractual structure (including lease/lease-back arrangements such as the AOT/LOA or BEH/CND);
- administrative process (such as permitting/authorisations) can be seen as relatively opaque and risky;
- obligation to entrust a portion of the works to small to medium-sized companies can lead to complications as to pricing and risk allocation;
- many of the early projects to reach the market have fallen below the €50 million mark. “Bundling” of projects to produce economies of scale (as seen in the UK schools) has not been widely adopted, other than for prisons;
- the services sector is seen by some as somewhat underdeveloped in comparison to industry with significant returns being difficult to achieve;

- as noted above, the scope of services on projects is invariably low, either as a factor of legal constraints or culturally/politically due to the importance of the public sector and the protection afforded to its employees.

What is the degree of protection offered to domestic operators- are there any sectors where foreign investment is discouraged?

Although there is no formal policy in this regard in relation to PPPs, the questionable treatment of certain foreign consortia bidding for French motorway concessionaires APRR and Sanef can leave no doubt as to how sensitive the question of foreign ownership can be in relation to public services in France. A recent decree drawn up by the Ministry of Economy and Finance aimed at protecting companies in certain key sectors from foreign takeover also perhaps gives some indication of where State sensitivities lie. The ten key sectors cited were casinos, security, biotechnology, production of antidotes, equipment for the interception of communications, security of computer systems, military/civil technology, cryptology, armaments and secret defence markets. If the same sensitivities were to apply to PPP projects, we would obviously be unlikely to see foreign controlling interests in any projects comparable to Skynet 5 in France.

Funding

In line with the brief description above in relation to local sponsors, France has no shortage of national champions in the banking and finance sectors, particularly after the recent trend of consolidation. The French PPP market has also attracted interest from many City of London-based financing houses seeking to extend their PPP activities across Europe, particularly since the French market now seems widely expected to produce a good volume of PPP transactions.

We have already mentioned (please see the paragraph on "Assignments of receivables" above) the current popularity for the *cession de créances* mechanism which is a distinguishing feature of the French market, producing essentially low risk, low margin tranches of financing.

Although the market is currently in its early stages a number of financing institutions have already begun to target the third party equity market, many targeting significant minority holdings (20-40%) and some even targeting majority holdings. Clearly this product has found favour with sponsors wishing to avoid consolidating project debt on their balance sheets. Some financial institutions have also established funds within which to hold these equity interests as part of a wider European strategy. Mezzanine financing has been employed successfully in certain projects in the past but remains a relatively rare instrument in the French PPP market.

Despite the high level of development of the capital markets, these remain largely untapped for PPPs, apart from €460 million wrapped, index-linked bonds providing part of the financing requirement for the recent A28 toll road project. This is due both to the low cost of the *cession de créances* funding technique and also the relatively small size of the transactions to have reached the market so far.

In terms of tenor of the debt, the majority of PPPs have a revenue generation period of 25-30 years which is therefore compatible with classic project financing techniques incorporating a reasonable "tail". Toll road projects, by contrast, frequently have longer concession lives (around 60 years) - a range of financing solutions have been considered for such projects including the "mini-perm" employed effectively elsewhere in Europe and recently used to finance the A41 toll road/tunnel.

Project financing, however, does not lend itself to all projects coming to the market particularly small scale projects (in the absence of "bundling") which find difficulty in justifying recourse to such complex contractual and security arrangements.

Amongst alternatives, other than balance sheet financings and assimilation to classic local authority lending, the Hospital Order anticipates the possibility of financing by way of *crédit bail* (leasing mechanism) involving

the participation of a credit institution which would directly hold certain rights under the BEH. In practice, this type of arrangement is often accompanied by a tripartite or "direct " agreement between EPS, lessee and credit institution governing the various rights and responsibilities of the parties upon early termination of the BEH.

Completed projects

Although the French PPP market is now considered to be in full swing, the number of deals completed as PPP remains relatively modest at present since many transactions remain in the latter stages of the procurement process.

Amongst the highlights of deals completed in the last 12 months are the Douai Logipôle project and the Quinze-Vingts research institute, the first two PPP projects to be completed under recent legislative reforms. Douai involved the design, build, finance and maintenance of a logistical support platform (*Logipôle*) at the Douai Hospital in the North of France. This project was sponsored by members of the Bouygues Group together with ABN AMRO and marks the first PPP project to be effected under the French healthcare investment programme "*Hôpital 2007*". In kind with the Quinze-Vingts, Douai is structured around a long term administrative lease (or "BEH") as described above. The Quinze-Vingts project involves the design, financing and creation of a clinical and biomedical research institute on the site of the *Centre Hospitalier National d'Ophtalmologie (CHNO) des Quinze-Vingts* (Central Eye Hospital) in Paris. It the first important healthcare sector PPP outside the "*Hôpital 2007*" Programme to be awarded and was sponsored by the *Caisse des dépôts*, the *Caisse d'Epargne* and Icade.

The first batch of prisons has also recently reached financial close with sponsor Eiffage guaranteeing the financing arranged by Calyon and Natexis.

One of the most important completed projects based on the Defence Decree was in relation with the provision and maintenance of two long range transport airports (project dubbed "**TLRA**").

Amongst the projects recently completed as traditional concessions rather than pursuant to recent legislative reforms, two key projects to note were the Perpignan-Figueras high speed international rail link and the A41 tollroad near Annecy which includes a three-kilometre tunnel through Mont Sion.

Review by sector

We have commented above on the legal and political backdrop to PPPs in France and take a closer look below at the key characteristics of the market from a commercial/economic perspective.

Healthcare

The first sector to take advantage of recent wave of liberalising legislation referred to above, the healthcare sector has now produced its first completed PPPs and continues to produce new deals as part of the French Government's ambitious investment programme, "*Hôpital 2007*".

The *Hôpital 2007* programme was launched by the Ministry for Health in 2002 to provide a much needed boost to investment aimed at improving service provision and optimising economic performance by modernising and reorganising healthcare facilities. The aggregate capital value of this scheme is estimated at approximately 6 billion euros of which around 1,4 billion euros in total relate to some 35 PPP-based projects, some of which comfortably exceed the €100 million mark.

In terms of underlying funding source, each EPS (*établissement public de santé*), into which category the various *centres hospitaliers* or "CH" referred to below fall, is essentially reliant indirectly on social security contributions, with a global annual budget being determined for each EPS at the regional level by the head of the *agence régionale d'hospitalisation* ("ARH"). In practice, five-year investment programmes are established by the ARHs in conjunction with the various EPSs within their region.

Other than the completed deals referred to in the previous section, the procurement process for the following transactions (representing the vast majority of the *Hôpital 2007* programme) is currently underway:

Centre Hospitalier Sud Francilien de Corbeil-Essonnes	New Hospital
Projet de la Cité Sanitaire de Saint Nazaire	New Hospital
Bougoin- Jallieu	600 bed complex regrouping 3 existing institutions
Centre Hospitalier Universitaire de Caen	Haematology and mother/child clinic
Etablissement Public de Santé Alsace Nord de Brumath	2 psychiatric units
Centre Hospitalier Henri Ey de	2 treatment centres (alcohol,

Bonneval	medical/psychological)
Centre Hospitalier de Douai	Retirement home
Hôpitaux du Léman	Retirement home
Hôpital Intercommunal du Haut Limousin de Bellac	Logistical support platform
Centre Hospitalier Universitaire de Dijon	Logistical support platform
Centre Hospitalier de Bigorre	Logistical support platform
Centre Hospitalier de Charleville Mézières	Dry cleaning facility
Centre Hospitalier Universitaire de Clermont Ferrand	Dry cleaning facility
Centre Hospitalier de Sainte Ménéhould	Additional medical facilities
Centre Hospitalier de Rodez	Nurse training institute
Centre Hospitalier Universitaire de Limoges	Documentary and administrative building
Centre Hospitalier Universitaire de Rennes	Medical/technical building and haematology unit
Centre de soins des Tilleroyes-Ambroise Paré de Besançon	Building for 120 beds and rehabilitation centre
Centre Hospitalier d'Arras	Building for 220 beds
Centre Hospitalier de Laval	Retirement home
Centre Hospitalier de Saint Valéry sur Somme	Specialised accommodation
Centre Hospitalier de Carcassonne	Logistical support platform
Centre Hospitalier Intercommunal des Portes de l'Oise	Renovation of a psychiatric unit
Centre Hospitalier de Pontoise	Medical/technical block
Centre Hospitalier de Gonesse	Dry cleaning facility
Centre Hospitalier de Romain Blondet à Saint Joseph	45 bed treatment and rehabilitation unit

Prisons

Heralded as the largest new build prison programme in Europe, the French Ministry of Justice launched its ambitious 18 prison, 11,000 place initiative at the end of 2004. The estimated capital cost of the programme is around €1.4

billion and the initiative is set to increase the national number of prison places by approximately 18%.

The PPP prisons are being tendered in batches, the first batch of 4 prisons (Béziers, Corbas, Maxeville and Roanne) has recently been awarded to an Eiffage-led consortium whereas the second batch of 3 prisons (Le Mans, Le Havre and Poitiers) is in the initial stages of the competitive dialogue procedure.

Waste

Waste treatment plants are currently being tendered both under old and new legal regimes. Amongst the projects currently being tendered as traditional DSPs is the 20 year DBFO contract for a plant having an annual treatment capacity of 45,000 tonnes at Macon in Burgundy. Amongst the projects currently being tendered as partnership contracts is the incinerator at Antibes having an annual capacity of 156,000 tonnes.

Transport

Although not strictly speaking PPPs in the sense described above, a number of significant toll road projects are currently being procured (as classic concessions) such as the A65 between Pau and Langon and the A88 in Normandy.

In terms of light rail projects, the classic concession model likewise underpins the tram planned for Reims.

In terms of heavy rail, the public sector has (with the exception of international links such as Eurotunnel and Perpignan-Figueras) always retained overall responsibility for the procurement of these projects. Feasibility studies are, however, now underway to examine the possibility of implementing certain schemes, such as the possible LGV between Tours and Bordeaux and the other projects as described in the next section.

Education

Although yet to get underway, the education sector should in principle be a likely candidate to benefit from the recent legislative reforms on partnership contracts given the important need for capital investment in the sector, but again individual deal sizes are likely to be modest.

The fitness for purpose of the partnership contract in the context of a project to renovate teaching facilities at the Mirail University in Toulouse was, significantly, confirmed in a feasibility study conducted by the *Caisse des dépôts et consignations* as adviser to the French Government. A number of Paris-based universities are also currently contemplating PPP solutions to implement rehabilitation and enlargement works on their premises.

IT

PPPs (particularly Partnerships Contracts) are also being seen as a potentially effective way to implement IT and telecom projects (e.g. broadband internet access in rural areas). Some half a dozen such projects are currently under consideration.

Project pipeline

Having looked at the highlights of the market in terms of what has already been launched, we now take a look at the key deals that are expected to be tendered in the near future.

After much anticipation, in mid-October 2005, an inter-ministerial commission (dubbed the "CIACT"¹⁸) finally released a list of forthcoming potential infrastructure projects to be launched either as partnership contracts or as *délégations de service public*. Of the 35 projects to be launched as partnership contracts, 8 fall within the transport sector and the remaining 27 cover a wide variety of sectors and project types from renovations/extensions to IT and utilities projects across 8 different ministries.

Amongst the highlights in the transport sector are:

- the "LGV Aquitaine", a multi-billion euro high speed rail link between Tours and Bordeaux in the South-West of France;
- the Nîmes/Montpellier rail by-pass project;
- the Charles de Gaulle Express, Paris' answer to the Gatwick Express linking the Gare de l'Est with the Roissy airport north of Paris;
- a series of roads projects, such as the A4-A86 in the east of Paris, the east-west link at Avignon (A9 to A7), the RN88 at Albi and the A75.

Amongst the remaining candidates for partnership contracts are the following, most of which are in the process of being formally assessed by the MAPPP:

- an outsourcing project for electronic ID cards for the Ministry for the Interior (dubbed "INES");
- the helicopter pilot training centre at Dax involving the provision and maintenance of 50 helicopters together with teaching facilities/services (Ministry of Defence);
- the outsourcing of the Ministry of Defence's telecommunications network (dubbed "RDIP");
- the implementation of the Electronic Medical Record (*Dossier médical personnel*);
- various accommodation projects, including the renovation and the management of several facilities for the Ministry for Youth and Sports (dubbed "INSEP"¹⁹) and restructuring of the university buildings at Paris-Dauphine and Strasbourg I;

¹⁸ Comité Interministériel d'Aménagement et de Compétitivité des Territoires

¹⁹ Institution Nationale du Sport et de l'Éducation Physique

- a project to deploy a GSM network in the rail sector

Apart from the above initiatives, the prisons programme is set to continue with the remaining prisons to be tendered in further batches (for the third batch, by the way of partnership contract rather than under the original AOT/LOA scheme) alongside the refurbishment of the La Santé prison in Paris (also as a partnership contract) and one hospital remains to be tendered under the Hôpital 2007 scheme (*Centre Hospitalier d'Annemasse*). Other local government projects currently under evaluation include the City of Rouen public lighting and traffic management project and the middle schools IT equipment project for the Département of Eure and Loir.

Simon Ratledge / Paul Lignières

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Simon is a partner in Linklaters' Projects department in Paris where he concentrates on European Infrastructure projects as well as international mining, infrastructure and petrochemical projects in North and francophone Central Africa.

Before joining the Paris office five years ago, Simon was based in Linklaters' Global Projects group in London where he was involved in numerous landmark projects in the early years of the UK PFI, such as the first hospital project (Dartford & Gravesham), the first wastewater treatment project in Northern Ireland (Kinnegar) and GCHQ's accommodation project in Cheltenham.

Simon's PPP experience in France includes the Douai Logipôle and the "Quinze Vingts" ophthalmological research centre in Paris (the first two PPPs to close in France) as well as acting for third party equity provider and mezzanine finance provider on the recently opened A28 toll road in Normandy, the first toll-road to be project financed in France.

Paul Lignières

Paul is a partner in Linklaters and head of Public Law in Paris. Paul has extensive experience in a wide variety of projects in Government-related areas (airports, railways, motorways, defence, energy, telecommunications). He is also experienced in advising on privatisations (such as GDF, the motorways companies), the restructuring of public sector companies, the liberalisation of regulated sectors and on M&A transactions having a significant public law component. He benefits from two years spent at The World Bank, is Lecturer in Public Law at the *Ecole Nationale des Ponts et Chaussées* and is a member of the Board of Editors of *Droit administratif*. Paul is widely credited as having had a central role in developing the French PPP structure and is author of *Partenariats public-privé* (Lexis-Nexis, Litec, 2005). He is currently advising on a number of pathfinder PPP projects in the healthcare, prisons, waste, defence, transport, telecoms and energy sectors.

Bertrand Andriani

Bertrand is head of the Paris Projects department and has extensive civil law projects and banking/structured finance experience. He has been involved in major projects such as the Eurotunnel project (from the outset to the present day, involving a syndicate of 214 banks), the Koniambo nickel mine in New Caledonia and the financing of a transnational oil pipeline across Chad and Cameroon. Bertrand has headed up the team on numerous PPP deals in France particularly in the health, defence and prisons sectors.