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# France

## PPP Units and Related Institutional Framework



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May 2012

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## Context of this Publication

This report is part of EPEC's work on PPP units and their related institutional framework. EPEC is grateful for the assistance provided by our EPEC member in France – the *Mission d'appui aux partenariats public-privé* – in the compilation of this report. This report is largely based on evidence gathered in October and November 2011. The findings presented here are inevitably subject to change.

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## Acronyms used in this report

ANAP	<i>Agence Nationale d'Appui à la Performance des Établissements de Santé et Médico-sociaux</i>
AOT	<i>Autorisation d'occupation temporaire du domaine public</i>
APIJ	<i>Agence Publique pour l'Immobilier de la Justice</i>
BEA	<i>Bail emphytéotique administratif</i>
BEH	<i>Bail emphytéotique hospitalier</i>
CP	<i>Contrat de partenariat</i>
CPE	<i>Contrat de partenariat and equivalents</i>
DSP	<i>Délégation de service public</i>
EP	<i>Évaluation préalable</i>
EU	European Union
IGD	<i>Institut de la Gestion Déléguée</i>
LOA	<i>Contrat de bail avec clause de rachat anticipé</i>
MAINH	<i>Mission Nationale d'Appui à l'Investissement Hospitalier</i>
MAPPP	<i>Mission d'appui aux partenariats public-privé</i>
MEFI	Ministry of Economy, Finance and Industry
MESR	Ministry of Higher Education and Research
MoD	Ministry of Defence
RFF	<i>Réseau Ferré de France</i>
PFI	Private Finance Initiative
PPP	Public-private partnership

## 1. Introduction

France has a long tradition of concession arrangements (or “user-pay PPPs”). Their use grew significantly over the second half of the 20<sup>th</sup> century. More recently, France has become one of the most buoyant markets in the world for “government-pay PPPs”.<sup>1</sup>

As shown in Figure 1 below, government-pay PPPs gradually made their way in France in the late 1980s and the 1990s but their use significantly increased with new legislation passed in 2004 which introduced the *contrat de partenariat* (partnership contract) and set the basis for a central PPP unit (the *Mission d'appui aux partenariats public-privé* or “MAPPP”). Since then, over 200 government-pay PPP transactions have reached financial close with an aggregate investment value in excess of EUR 12 billion.

**Figure 1 – Key PPP developments in France**

1988	Introduction of the first form of government-pay PPP contract ( <i>bail emphytéotique administratif</i> )
1994	Introduction of another form of government-pay PPP contract (the <i>Autorisation d'occupation temporaire du domaine public</i> )
2002-2004	Sectoral measures to favour the use of PPP arrangements
2003	Launch of the <i>plan hôpital 2007</i> which foresees significant PPP use
2004	Legislation introducing the <i>contrat de partenariat</i> and decision to create a central PPP unit (MAPPP)
2005	MAPPP is set up and starts operating
2008	New law facilitating the use of the <i>contrat de partenariat</i> and of the <i>bail emphytéotique administratif</i>
2011	Financial close of one of the largest PPP projects in Europe (Tours-Bordeaux High Speed Rail)
2011	France becomes the largest PPP market in Europe in value terms

<sup>1</sup> By opposition to user-pay PPPs, government-pay PPPs are arrangements under which the public sector (rather than the project users) pays the private partner for the provision of the service.

PPPs in France are procured at many government level, whether central (e.g. line ministries, companies with a public mission, health trusts, universities) or sub-national (e.g. regions, municipalities). They are used across almost all economic sectors (e.g. transport, health, justice, education, urban equipment, environment, energy efficiency, telecommunication, culture).

PPPs are supported by a well-established institutional framework, in particular the role of MAPPP. MAPPP started to operate in 2005. It was created as an “expertise body” in charge of the preliminary evaluation of PPP projects and was placed under the direct authority of the minister of economy and finance. In 2011, MAPPP became a “service with national competence” and was placed at the Treasury department of the Ministry of Economy, Finance and Industry. MAPPP has three main functions:

- it acts as PPP project gate-keeper (in prescribed cases) through the validation of the preliminary project evaluations prepared by procuring authorities before launching a tender;
- it provides support to public sector entities in the preparation, negotiation and monitoring of *contrats de partenariat*. This entails the preparation of analytical tools, guidance and standard contractual clauses; and
- it informs on and promotes the use of *contrats de partenariat*.

A key feature of the French PPP market (and possibly a factor partly explaining its success) is the structure of the domestic contracting industry. France has three of the twelve largest contractors worldwide (Vinci, Eiffage and Bouygues). Besides their renowned technical and project management abilities, the three “majors” have built up significant experience on concession or government-pay PPP arrangements across the world and have developed substantial operating/facilities management capabilities. The majors have been awarded most of the PPP contracts tendered in France, including the smaller ones through their subsidiaries. This market concentration attracts frequent criticism in and outside the country.

Although the modern French PPP initiative is still relatively young, PPP projects appear to have largely delivered according to expectations. A recent study suggests that over 80% of government-pay PPP projects reach construction completion within the expected time frame. In over 90% of cases, the budget overrun for the public authority is below 3%.

The principal aim of this report is to provide an overview of the PPP institutional set-up in France. The report has the following structure:

- Section 2 sets out the main PPP contracts used in France;
- Section 3 provides an overview of the French PPP market;
- Section 4 describes the governance structure and operational framework of MAPPP;
- Section 5 presents the role of other key public sector entities in PPPs;
- Section 6 briefly describes the legal framework for PPPs; and
- Section 7 outlines the typical PPP project cycle. This serves as a process mapping of how French PPPs are developed, the participants involved and their roles and responsibilities.



## 2. PPP Contracts in France

France has a long tradition of concession arrangements. Their origins date back to the Roman Empire. Canals and bridges were built using concession arrangements in the 16<sup>th</sup> and 17<sup>th</sup> century. Railway, metro, water and power infrastructures followed in the 19<sup>th</sup> century. The *affermage*<sup>2</sup> took its legal form in the early 19<sup>th</sup> century while, in the second half of the 20<sup>th</sup> century, concession arrangements spread to motorways, urban transport, waste management and district heating.

Aside from concessions (user-pay PPPs), government-pay PPPs went through a gestation period in the late 1980s and the 1990s and developed considerably through the 2000s.

Today, PPP contracts in France are often categorised as:

- partnership contracts (*contrat de partenariat*) and equivalent contracts; and
- concession arrangements (the so-called *délégations de service public*).

Table 1 below compares both categories of PPP contracts with traditional public works contracts.

**Table 1 – PPP contracts and traditional public works contracts**

	<b>Public works contracts</b>	<b>Partnership contracts and equivalents</b>	<b>Concessions</b>
<b>Scope</b>	Design, construction	Design, construction, maintenance, operation	Design, construction, maintenance, commercial exploitation
<b>Term</b>	Short	Long	Long
<b>Payment</b>	Public	Public or mixed	Users (with possibility of subsidies)
<b>Risk transfer</b>	Limited to construction	Yes	Yes

<sup>2</sup> A service concession under which the private operator is not required to make significant capital investments.

## 2.1. The *contrat de partenariat* and equivalent contracts (CPE)

The *contrat de partenariat* and equivalents (“CPE”) category comprises all forms of government-pay PPP arrangements. They include the *contrat de partenariat* (“CP”), the *bail emphytéotique administratif* (“BEA”), the *bail emphytéotique hospitalier* (“BEH”), the *autorisations d’occupation temporaire du domaine public* (“AOT”) and the AOT with a lease arrangement (*bail avec clause de rachat anticipé* or “LOA”).

Table 2 below sets out the main characteristics of the various forms of CPE (see Annex 1 for more details).

**Table 2 – Main characteristics of CPE contracts**

	CP	BEA / BEH	AOT / LOA
<b>Scope of the contract</b>	Global contract for the design, construction, operation, finance and maintenance of an asset	The object is mostly linked to the building; non building services are limited	The object is linked to a mission of general interest and contains an obligation for the private partner to build and an option for the authority to buy the asset
<b>Sectors</b>	All	Justice, police, health, social housing, fire and rescue services	Police, justice, defence
<b>Procuring authority</b>	All public entities	Local authorities and health trusts	The State and local authorities
<b>Ownership of the project assets</b>	Public ownership	<i>De facto</i> transfer to the private partner for the duration of the contract	<i>De facto</i> transfer to the private partner for the duration of the contract
<b>Remuneration of the private partner</b>	Public payments (with a possibility of some user revenues)	Public payments	Public payments
<b>Project design</b>	Design can be carried out by the public authority or by the private partner (in part or in total)	Design is carried out by the private partner	Design is carried out by the private partner
<b>Contract duration</b>	Linked to the life of the asset (maximum of 99 years)	Between 18 and 99 years	Maximum 70 years

### 2.1.1 The *contrat de partenariat* (CP)

The CP was introduced by a law passed in 2004 which in practice launched modern PPPs in France. The CP, which is a UK PFI-style contract, is behind the success of the current PPP initiative in France. It is the most used PPP contract in the CPE category.

The CP is an agreement which entitles a public procuring authority to grant to a private partner a global mission to design (fully or partly), build, maintain, operate and finance public assets and public services over the long-term against a payment made by the public sector and spread through time. The rationale for introducing the CP was to optimise the performance of both the public and private sectors in order to implement projects within the best timescale and cost envelope.

CPs are therefore characterised by:

- a global approach. At least three elements need to be brought together to justify the use of a CP: (i) the construction or refurbishment/transformation of an asset, (ii) the maintenance, exploitation or operation of the asset and (iii) all or part of the financing of the asset;
- a long-term arrangement;
- the integration of the financing;
- a risk transfer to the private partner, including construction and service performance; and
- an ongoing public payment (possibly complemented by other sources) over the long-term.

CPs can be used at every level of government and beyond. Indeed, any public entity (e.g. the State, the various layers of local government, the *établissements publics*,<sup>3</sup> public bodies of private law) can enter into a CP.

CPs are regulated by law, mostly through the 2004 PPP *ordonnance* as amended and complemented in 2008 and 2009 (together, the “PPP Laws”). In particular, a procuring authority can only opt for a CP if at least one of the three following fundamental conditions is met:

- the project is complex. Complexity arises in particular where the public procuring authority is not able to define *ex ante* an efficient financial or legal structure for the project;
- the project is urgent; or
- the CP arrangement provides value for money (the so-called *efficience économique* criteria).

### 2.1.2 The *bail emphytéotique administratif* (BEA) and *bail emphytéotique hospitalier* (BEH)

The BEA and BEH predate the CP. The BEA was introduced in 1988 and its first sectoral versions were introduced in 2002. The BEH (in substance a BEA for the health sector) was introduced in 2003.

In practice, BEAs/BEHs were the first UK PFI-style contracts used for central government projects. The BEH was introduced to ensure the fast delivery of the “hospital programme 2007” adopted by the government in 2002 (see Section 5.2).

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<sup>3</sup> The *établissements publics* are companies governed by public law and which have a mission of public service.

Compared to CPs, BEAs and BEHs:

- are tools which permit the transfer of building rights to a private partner on a publicly-owned land;
- have a strong building focus, the operation being mostly limited to maintenance and facilities management;
- offer less flexibility for ancillary revenues (i.e. user revenues) and innovative financing; and
- originally, had a less comprehensive framework for contract award (although this has been significantly remedied as BEAs/BEHs now follow the same procurement rules and contractual provisions as CPs).

Due to their strong building focus, BEAs are mostly used in the police, justice, defence and health sectors (in the latter case, BEHs).<sup>4</sup>

Although, BEAs/BEHs have proved relatively successful (see Section 3), it is expected that the more modern/flexible CP will become the norm for government-pay PPP contracts.

### 2.1.3 *The autorisation d'occupation temporaire du domaine public (AOT) and the contrat de bail avec clause de rachat anticipé (LOA)*

The AOT was introduced in 1994. AOTs essentially entitle a private entity to construct and own a building on a public land. The building is then leased to the public entity. Ownership of the building is transferred to the public entity upon expiry of the AOT contract.

The LOA is in substance similar to an AOT except that the public entity has an option to buy the building before the expiry of the contract. Sectoral legislation has made LOAs possible mainly in the defence and domestic security/police areas.

## 2.2. The délégation de service public (DSP)

The *délégation de service public* ("DSP") is a user-pay arrangement. The most common forms of DSP are the *concession* (for works and services), the *affermage* (for services) and the *régie intéressée*.<sup>5</sup> DSPs entitle a private partner to manage and commercially exploit a public service. The service is provided by the private partner at its own risk. The private partner's remuneration arises from the commercial exploitation of the service. Contrary to CPEs, the private partner bears the risk of service consumption by the users.

<sup>4</sup> Interestingly, some regions use BEA/BEHs more than others. For instance, the *Région Aquitaine* carried out half of its PPPs through BEAs.

<sup>5</sup> Under a *régie intéressée* the public authority grants operational responsibilities of an asset to a private partner but retains the commercial/revenue risks associated with the operation of the asset.

### 3. The French PPP Market

This section provides an overview of the evolution, current status and prospects of the French PPP market, the main players involved and the key issues the market currently faces.

#### 3.1. PPP data and the PPP observatory

In 2006, the *Mission d'appui aux partenariats publics-privé* ("MAPPP") and the *Institut de la Gestion Déléguée* ("IGD") created an observatory for PPPs (the *Centre d'expertise français pour l'observatoire des partenariats public-privé*).<sup>6</sup> Its purpose is to promote the sound use of CPEs, through gathering market intelligence, drawing lessons learned from past experience and carrying out analytical work on legal and economic aspects of PPPs. The observatory is managed by the IGD and is the primary body in charge of monitoring the evolution of the French PPP market as far as CPEs are concerned.

In France, gathering data for CPs is relatively straightforward given that procuring authorities have significant information obligations towards MAPPP once a transaction is closed. Data collection is less straightforward for BEAs/BEHs and AOTs/LOAs as reporting obligations are looser (in particular for BEAs carried out at the local level). As far as DSPs are concerned, data collection is challenging as there is no central body overlooking the use of concessions in France.<sup>7</sup>

#### 3.2. Signed PPP transactions

PPPs have become of significant relevance in France. The IGD estimates that the yearly revenues derived from CPEs and DSPs represent about 5% of GDP.

The French PPP market has recorded many financial closings since the early 2000s. Table 3 below lists some of the most noteworthy transactions closed.

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<sup>6</sup> See <http://www.cefoppp.org/>

<sup>7</sup> The IGD has recently engaged in a process aimed at improving the quality of data gathering for DSPs.

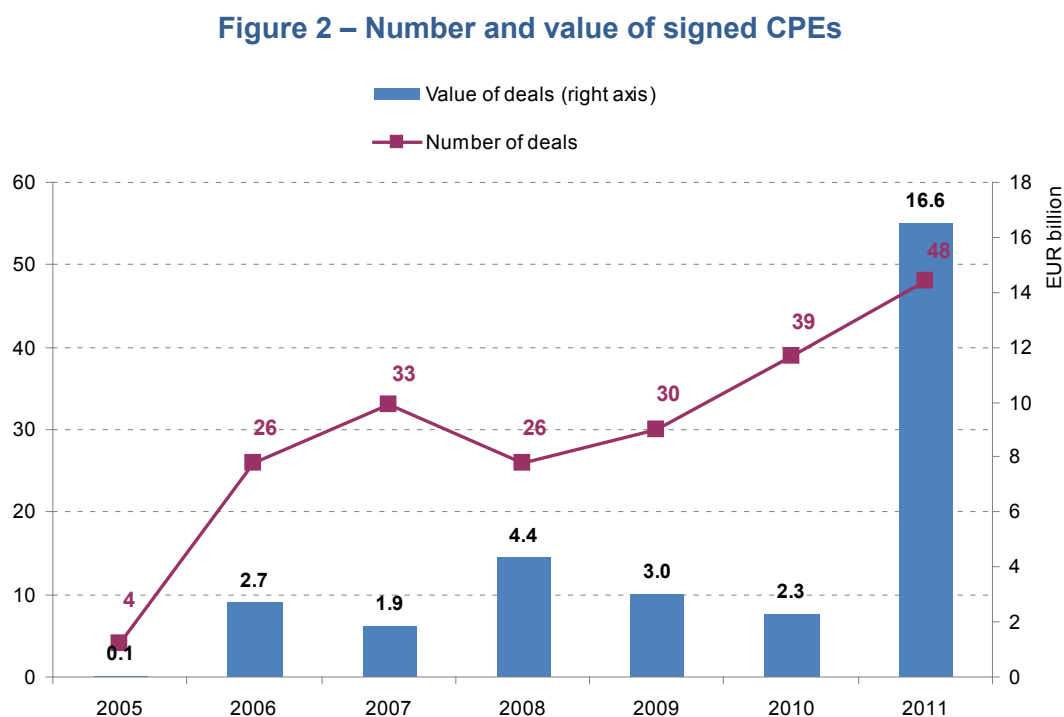
**Table 3 – Noteworthy PPPs which reached financial close**

<b>Project name</b>	<b>Closing date</b>	<b>Capital value</b>	<b>Type of contract</b>
Auvers-sur-Oise Street-lighting	2005	EUR 4 m	Local CP
Sud-Francilien Hospital Centre	2006	EUR 340 m	BEH
Caen Hospital	2006	EUR 101 m	BEH
Prisons – First & Second Lots	2006-2007	EUR 400 m	AOT
Région Auvergne Broadband Internet	2007	EUR 22 m	Local CP
Dax-Army Helicopter School	2008	EUR 72 m	State CP
Diderot University	2009	EUR 87 m	CP
Lille Stadium	2010	EUR 282 m	Local CP
Nice Stadium	2010	EUR 205 m	Local CP
GSM-R Communication	2010	EUR 650 m	State CP
Vincennes Zoo	2010	EUR 160 m	State CP
Marseille Stadium	2010	EUR 250 m	Local CP
Ministry of Defence Balard	2011	EUR 992 m	State CP
Bordeaux Stadium	2011	EUR 190 m	Local CP
Tours - Bordeaux High Speed Rail	2011	EUR 7.8 bn	Concession
Bretagne - Pays de Loire High Speed Rail	2011	EUR 3.4 bn	State CP
EcoTaxe (charging system for lorries)	2011	EUR 1 bn	State CP

### 3.2.1 CPEs – transaction numbers and values

206 CPE transactions have reached financial close since 2005, of which about 130 CPs, 35 BEHs and 12 AOTs/LOAs.<sup>8</sup>

Figure 2 below shows the evolution of the number of signed CPEs and their aggregate contract value since 2005:



Source: IGD data

The number of CPEs has grown considerably since their introduction. 38 CPE transactions closed in 2010 compared to four in 2005. 2011 showed a reduction in the number of transactions but a significant increase in the aggregate contract value (i.e. the arithmetical sum of public payments over the contract life) and in the aggregate capital value (i.e. the value of the projects' capital investment).

As far as the capital value of CPEs is concerned, contracts signed between 2005 and the end of 2011 represented a cumulative capital investment of approximately EUR 12 billion. This compares to public investments in the order of EUR 90 billion per year.

The IGD estimates that the aggregate contract value of CPEs in existence at end December 2011 amounted to EUR 31 billion.

As far as CPs are concerned:

- over 60% of the CPs signed have a capital value below EUR 30 million;
- the average contract value of a local government CP is EUR 28 million. The average contract value of a State CP is about EUR 315 million;
- out of the 130 contracts signed since 2005, 103 were granted by local government entities (e.g. *régions*, *départements*, *communes*) and 27 by the

<sup>8</sup> The data for BEAs is incomplete. 41 BEAs have been centrally reported but it is estimated that over 300 BEAs have closed since their introduction, in particular at the local government level.

State or State entities. In terms of capital value, State CPs are much more significant than local government CPs (State CPs represent 80% of the aggregate capital value of CPs by the end of 2011); and

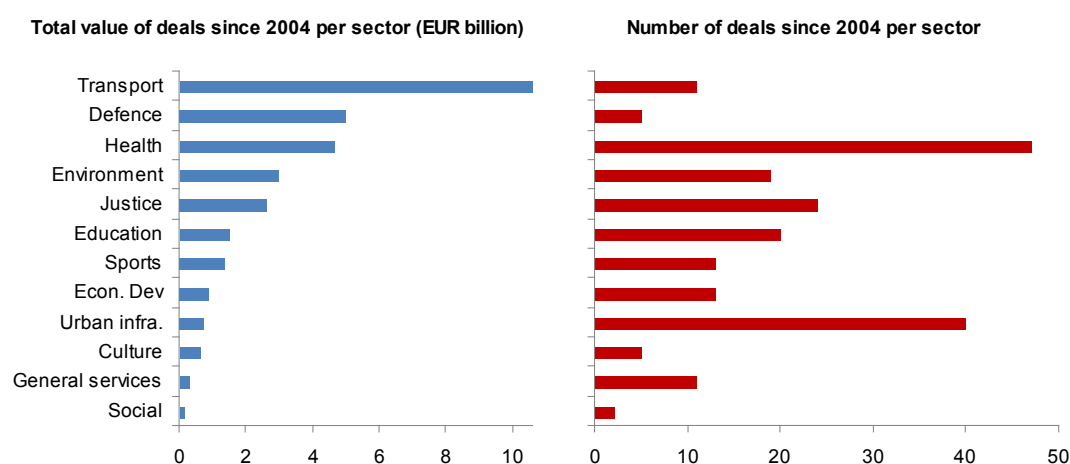
- at the start of the current PPP initiative, most CPs were granted by local authorities. The recent trend points towards larger transactions and State CPs. The bulk of the State CPs were signed in the period 2009-2011.

### 3.2.2 CPEs – sectoral breakdown

As Figure 3 below shows, CPEs are mostly used in the health, urban infrastructure (e.g. street-lighting), justice and environment sectors. In the early days of the current PPP initiative, CPEs (in particular BEAs and BEHs) were mainly used by local government entities and health trusts.

Concerning CPs in particular, local government CPs are mostly found in street-lighting, broadband communication, information technology, waste to energy and sport/culture facilities. State CPs are predominantly found in health and, to a lesser extent, education. Transport CPs tend to be limited in number but significant in size.

**Figure 3 – Value and number of signed CPEs per sector (2004 to 30 June 2011)**



Source: IGD data

### 3.2.3 DSPs

As noted above, the quality of the dataset for DSPs is weak. The IGD estimates that there are between 12,000 to 15,000 DSP contracts (including service-only *affermage* contracts) currently in force in the country.

DSPs are mostly found in sectors such as water, wastewater, district heating, waste, energy and car parking.



### 3.3. PPP market players

#### 3.3.1 Contractors

France has a very unique contracting industry. It hosts three of the twelve largest contractors worldwide (Vinci, Eiffage and Bouygues).<sup>9</sup> The three “majors” have won most of the PPP contracts procured in France to date, including the smaller contracts through their subsidiaries. In the prison/justice sector for instance, all the PPP contracts were awarded to only two contractors. Very few contracts are awarded to independent contractors. Foreign sponsors have shown little interest in the French PPP market so far.<sup>10</sup>

The majors’ dominance is such that it has fuelled competition concerns and complaints from independent small and medium size contractors and architects. Some procuring authorities, in particular at the State level, are trying to address these criticisms through reducing the size of individual contracts.

#### 3.3.2 Financial institutions and equity investors

The main funding instruments used for financing French PPPs are as follows:

- Traditional “project finance” debt – France enjoys a relatively deep and sophisticated banking market. Many French and foreign commercial banks are active on the French PPP market. They provide a full suite of financing products (e.g. structuring, provision of senior and junior debt, hedging instruments, equity, leasing products) and advisory services to public procuring authorities and private sponsors. Domestic public institutions such as the *Caisse des dépôts* are involved in PPPs both as provider of equity and as long-term funder. The EIB is an important financier of large PPP transactions, in particular in the transport sector.
- Bank financing for the “*Dailly* tranche” – CPs often feature the *cession de créances Dailly* mechanism. Under this mechanism, a public authority granting a CP (and hence liable for a stream of payments to the private partner over the operational life of the contract) accepts to guarantee a portion of those payments to the lenders provided that project completion has occurred. The authority undertakes to pay the amounts due whatever happens under the underlying contract. As a result, lenders consider the loans backed by the *cession de créances Dailly* as public sector risk rather than project finance risk.<sup>11</sup>
- Corporate financing – These are structures under which a creditworthy industrial company (usually a contractor) owns a significant share of the PPP project company’s capital and either finances the project from its own resources or provides corporate guarantees to the banks lending to the project company. Corporate financings are mostly used in small transactions.
- Equity – The investor base for equity participation in PPP projects is relatively well developed. A number of dedicated infrastructure funds, both French and foreign, are active on the French PPP market. Given their financial strength, the major contractors also have a significant ability to invest equity in PPP

<sup>9</sup> According to Engineering News-Record, see <http://enr.construction.com/toplists/GlobalContractors/001-100.asp>

<sup>10</sup> A notable exception is the recently closed EcoTaxe project for which one of the main sponsors is Autostrade of Italy.

<sup>11</sup> For more information on the *cession de créances Dailly*, see <http://www.eib.org/epcc/resources/epcc-state-guarantees-in-ppps-public.pdf>, page 16.

projects. Equally, until the onset of the financial crisis, banks proved willing to invest equity in PPP projects.

- Leasing (*crédit-bail immobilier*) – The *crédit-bail immobilier* has been used for small-size CPEs with a strong building focus (in particular BEAs and BEHs) and in which the risk transfer is limited.

It is worth noting that the French authorities have promoted two initiatives in support of the financing of PPP projects:

- In early 2009, the French government established a guarantee scheme for priority PPP projects in particular as a response to the financial crisis.<sup>12</sup> This was prompted by the high number of very large PPPs in the pipeline, which risked not proceeding without government support. The French government authorised a EUR 10 billion guarantee facility to be utilised on projects approved by an inter-ministerial committee and which were scheduled to reach financial close by the end of 2010. The scheme was managed by MAPPP. Four projects worth over EUR 13 billion were authorised although only one project (the Tours-Bordeaux High Speed Rail) eventually used the guarantee (for a guaranteed amount of EUR 1,460 million).
- The French authorities are developing the *Fonds Commun de Titrisation PPP* instrument. The aim of the initiative is to set up a fund which would issue long-term bonds to finance PPP projects. The bonds would be issued on a project-by-project basis and their proceeds used to refinance the banks financing the construction of PPP projects once the projects reach satisfactory completion.

### 3.4. Mortality of projects during procurement and lead times

#### 3.4.1 Number of projects reaching the procurement stage

According to the IGD, from 2004 to the end of 2010, 627 projects contemplating the use of a CPE were put to tender. Out of these, 205 projects reached the preferred bidder stage in the period.

BEAs and CPs currently represent the vast majority of CPEs in procurement. For CPs more specifically, 500 projects have given rise to a feasibility study to date and about 220 of these have proceeded to the tender phase.

#### 3.4.2 Abandoned transactions

The mortality rate of PPP projects during the procurement phase is relatively low in France. According to the IGD, since 2004, 22 CPE projects which reached the preferred bidder stage have subsequently been abandoned. MAPPP estimates that about 40 CP projects were abandoned during the tender process since 2004.

#### 3.4.3 Timing to financial close

Based on a sample of 65 projects, the IGD estimates that CPs procured through a competitive dialogue require on average 15 months from the start of the procurement process to contract award.

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<sup>12</sup> For more detail, see the annex of the EPEC paper on “State Guarantees in PPPs” available at <http://www.eib.org/epec/resources/epec-state-guarantees-in-ppps-public.pdf>

MAPPP estimates that the time period required for a CP to reach financial close (from the start of project preparation as a PPP) is 12 months at the minimum and 21 months on average. On large projects (whether State or local government), such period typically exceeds 24 months.

State projects tend to be more complex and require more time to prepare (e.g. public consultation process) and to procure. For instance, the EUR 992 million Balard Defence Headquarters project started PPP proceedings in the fall of 2008 and reached financial close in May 2011.

Local government projects reach financial close more rapidly, in particular in the street-lighting sector as documentation and processes are by and large standardised.

### 3.5. Project pipeline and challenges for the future

The stock of CPE projects in procurement (i.e. projects which have yet to reach financial close) stands at 684, of which 122 are CPs. In addition to these, about 262 CP projects are currently being studied (i.e. projects which have yet to reach the procurement phase).

According to MAPPP, more State PPPs are to be expected in the future, in particular for prisons, court houses, universities and in the defence sector. Large infrastructure projects will be constrained by budgetary limitations, although the very large Canal Seine Nord project could reach financial close at some stage in 2012.

The French PPP market has performed well to date despite the financial crisis. Future performance will largely be dictated by its ability to meet a number of key challenges. By far the most significant challenge is that of the financing of projects. The effect of the current crisis on the liquidity of the banking sector and on the pricing and maturity of financings endangers the value for money of PPP projects. The liquidity and sovereign crisis has also had a significant impact on the cost of the *cession de créances Dailly* mechanism which is used in many CPs (see Section 3.2). The French government is trying to address this in part through the setting up of the *Fonds Commun de Titrisation PPP* instrument mentioned above.

The development of PPPs in France has raised a certain amount of criticism, in particular from independent architects and small/medium size contractors and companies. This criticism is largely fuelled by the *de facto* dominance of the major contractors. The difficulties encountered on a couple of PPP projects (e.g. the Sud-Francilien Hospital Centre, see Section 5.2.2) have exacerbated these criticisms.

The French PPP market has also witnessed so far a number (albeit limited) of legal challenges, mostly upon contract award. This often leads to protracted negotiations between the procuring authorities and the private partners in particular regarding the assumption of the risk of contract cancellation.

Although the modern PPP initiative is still relatively young, PPP projects appear to have largely delivered according to expectations. A recent study of French PPPs carried out by pwc<sup>13</sup> suggests that over 80% of government-pay PPP projects reach construction completion within the expected time frame. In over 90% of cases, the budget overrun for the public authority is below 3%.

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<sup>13</sup> The study is available at <http://www.pwc.fr/etude-sur-la-performance-des-contrats-de-partenariat.html>

## 4. The Central PPP Unit: the *Mission d'appui aux partenariats public-privé*

### 4.1. History

The *Mission d'appui aux partenariats public-privé* ("MAPPP") was created by a decree of October 2004 in application of the PPP Law of June 2004. MAPPP was formally set up in May 2005.

MAPPP was created as an "expertise body" in charge of the preliminary evaluation of PPP projects. It was placed under the direct authority of the minister of economy and finance.

In 2010, the chairman of MAPPP was asked to carry out a review/audit of the unit which confirmed its relevance but made recommendations to improve its governance and sustainability. This led to the transformation of the status of MAPPP into a *service à compétence nationale* (service with national competence) placed within the *Direction Générale du Trésor* (Treasury) of the Ministry of Economy, Finance and Industry ("MEFI").

### 4.2. Tasks

MAPPP's activities are largely focused on CPs. MAPPP's involvement in other CPEs and in DSPs is relatively marginal.

MAPPP has three main functions:

- validating preliminary project evaluations prepared by procuring authorities;
- providing support to public sector entities in the preparation, negotiation and monitoring of CPs; and
- informing on and promoting CPs.

MAPPP's resources are allocated to these three functions in roughly equal parts.

It is important to stress that MAPPP does not act as a procuring authority for projects (the management of the PPP projects during the project cycle is the responsibility of the teams at the line ministries, the *établissements publics*, the local government entities, etc.) and is not involved in the procurement or negotiations of specific PPP contracts. The French authorities have considered it important to separate execution responsibilities from the analysis of value for money / affordability and the support to procuring authorities.

#### 4.2.1 Validation of the *évaluations préalables*

MAPPP is required to produce an opinion (an *avis*) on all the preliminary evaluations (*évaluations préalables* or “EPs”, see Box 1 below) submitted to it by public procuring authorities contemplating the use of a CP.

##### **Box 1 - The *évaluation préalable***

An EP is an analysis carried out by a procurement authority which compares alternative procurement and contractual solutions such as traditional public work contracts (*maîtrise d'ouvrage publique*), DSPs, BEAs, AOTs, LOAs and CPs. The EP's analysis looks at the global cost of a project, performance aspects and risk sharing matters. An EP is not meant to address the socio-economic usefulness of a project (this has to be analysed before the EP process). Equally, an EP does not tackle issues related to the affordability of a project for the public sector.

An EP therefore sets out the relevance of using a CP for a specific project. For instance, an EP addresses the following issues:

- whether the criteria imposed by the PPP Laws for using a CP are met;
- whether the need for the project is a global one (i.e. covering the design, construction, operation and financing activities) and whether this need can be met through a long-term contractual arrangement;
- whether the investment can be repaid (at least in part) from user charges;
- whether the project need can be easily expressed in terms of output;
- whether the public staff in charge of the service can be reallocated to the private partner; and
- whether the CP is likely to attract private sector interest.

EPs follow a standard approach and format which have been developed by MAPPP.<sup>14</sup>

#### The role of MAPPP regarding the *évaluations préalables*

State procuring authorities (e.g. line ministries, *établissements publics*) are obliged to submit their EPs to MAPPP for its *validation*. Local government procuring authorities have the option (but no obligation) to submit their EPs to MAPPP. In practice though, one out of three local procuring authorities contemplating the use of a CP approaches MAPPP for validation. Since 2008, MAPPP also opines on EPs for AOT contracts of a value in excess of a certain threshold.

The *avis* of MAPPP, when required, is a necessary condition (although it doesn't suffice) for the start of the procurement process for a CP.

Since its creation, MAPPP has dealt with over 500 potential CP projects and has released 175 *avis* on EPs. In 2011 alone, 44 *avis* were released, 15% more than in 2010, evidencing the growing interest and use of PPPs in France.

<sup>14</sup> See annex 1 of MAPPP's *Guide méthodologique* at [http://www.economie.gouv.fr/files/files/directions\\_services/ppp/GuideContratPartenariat.pdf](http://www.economie.gouv.fr/files/files/directions_services/ppp/GuideContratPartenariat.pdf)

Since its inception, MAPPP has only issued three negative *avis*. This apparent low failure rate is explained by the fact that MAPPP is in practice often consulted in the preparation of the EPs before they are formally submitted, allowing it to turn down potential CPs at an early stage, without going all the way to a formal *avis*.

#### MAPPP's final opinion on State projects

In addition to providing opinions on EPs, MAPPP is involved in State projects just before the relevant CP is signed. In this context, MAPPP is required to evaluate the fiscal/budgetary impact of the CP and to issue recommendations to the minister of economy and finance for him to grant his approval to the signature of the CP (this is accompanied by a parallel approval check performed by the Budget Ministry).<sup>15</sup>

Contrary to its role on State projects, MAPPP is much less involved in local projects after the EP stage.

#### **4.2.2 Support to public sector entities in the preparation, negotiation and monitoring of CPs**

In its role of supporting public sector entities, MAPPP produces guidance, analytical tools and factsheets. In particular, MAPPP has made available:

- a comprehensive PPP guide aimed at procuring authorities entitled *Les contrats de partenariat: guide méthodologique*.<sup>16</sup> The guide was first published in 2005 and has been updated several times since. The latest version (March 2011) builds on the lessons learned from existing CPs and contains a revised methodology for assessing the value for money of projects at EP stage (e.g. taking account of the potential non-financial benefits of PPPs);
- guidelines on how to carry out EPs, in particular regarding financial, legal and tax matters;
- analytical tools such as the *modèle financier d'évaluation préalable*, which is a model enabling a quantitative comparative analysis of the various procurement routes for a project;
- the *clausier-type du CP*, a tool released in 2011 and aimed at supporting procuring authorities in the drafting of CP agreements. The *clausier-type* is not a standard contract as such but provides drafting suggestions and commentaries on key contractual provisions;
- two sets of standard contractual provisions for CPs for street-lighting and energy efficiency projects; and
- technical factsheets on legal, accounting, financing or sectoral issues.

MAPPP also follows the broad implementation of projects once CPs are signed in order to be able to draw lessons from past experience and propose improvements to the PPP framework.

It is important to note that MAPPP does not lead negotiations on CPs although it is occasionally involved in negotiations on larger projects (see Section 4.2.4 below).

<sup>15</sup> The Budget Ministry will soon be granted a “gatekeeper” role upstream, at the stage of the “avis” issued by MAPPP on the EPs (i.e. before launching the procurement process).

<sup>16</sup> See [http://www.economie.gouv.fr/files/files/directions\\_services/ppp/GuideContratPartenariat.pdf](http://www.economie.gouv.fr/files/files/directions_services/ppp/GuideContratPartenariat.pdf)



### 4.2.3 Information on and promotion of CPs

MAPPP has a duty to inform on and promote CPs. It does so through:

- its website – MAPPP's website contains guidance material, analytical tools, topical notes, project lists, the *avis* issued by MAPPP on EPs and annual activity reports;<sup>17</sup>
- a close monitoring of market developments – MAPPP collects data on CPs and, through the PPP observatory (see Section 3.1), manages a database for all CPEs;
- the publication of professional newsletters on PPPs (e.g. the *lettre des PPP*);
- the organisation and participation at conferences and seminars, such as the *Club des PPP* and the *Rencontres Internationales des PPP* which take place in Paris every year;
- training activities – MAPPP is involved in many PPP training initiatives. The most significant is the *École des PPP* which it sponsors together with the IGD. The *École des PPP* has been running for four years and gathers 20 to 30 public decision makers every year. It is backed by a number of prestigious management and engineering schools and universities;
- regular contacts and participation in working groups with ministries and sectoral PPP units in the health, justice, defence, higher education sectors;
- close cooperation with the IGD on PPP issues (e.g. accounting matters, staff transfer issues, production of guidance material); and
- participation in working groups with private sector bodies (e.g. the working group set up with banks, insurance companies and investors regarding the development of capital market solutions for PPP projects).

In practice, MAPPP has frequent exchanges with many institutional and private PPP stakeholders.

### 4.2.4 MAPPP's other services

In addition to its three main tasks, MAPPP provides a number of other services. For instance:

- Management of the State guarantee scheme (see Section 3.3.2) – MAPPP appraised 15 proposals, seven of which were approved by the guarantee committee set up for the matter. MAPPP staff was significantly involved in the negotiation of the guarantee facility for the Tours-Bordeaux High Speed Rail project.
- Complex / innovative projects – Upon ministerial request, MAPPP may provide opinions on EPs for non-PPP projects which entail complex contracts or innovative financing structures.
- International activities – MAPPP is engaged with several international bodies involved in the promotion of PPPs (e.g. EPEC, the World Bank, HM Treasury in the UK, Infrastructure Quebec in Canada) and provides assistance to other PPP taskforces (e.g. the *Cellule d'Informations Financières* in Belgium). MAPPP is also involved in a number of PPP initiatives in the Mediterranean region and in French-speaking African countries.

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<sup>17</sup> MAPPP's website can be found at <http://www.economie.gouv.fr/ppp/accueil>

- Lessons from past experience – Many of the early CP projects have reached the operational phase. MAPPP is involved in the structuring of lessons learned in order to:
  - support procuring authorities which have limited or no PPP experience;
  - promote the benefits of CPs and good practice;
  - standardise PPP documentation and
  - address the pending legal uncertainties.
- Helpdesk – MAPPP provides helpdesk services to public and private sector stakeholders.
- Legislation – Although MAPPP is not formally consulted when new PPP legislation is proposed, it usually has the opportunity to comment through the inter-ministerial committees involved in the drafting of new legislation.

#### **4.2.5 MAPPP's future focus**

MAPPP has gained significant exposure on the French market since it was set up. In its initial phase, MAPPP focused by and large on the administrative, legal and economic aspects of PPPs. With the management of the State guarantee scheme and as a result of the financial crisis, MAPPP has started to concentrate on financing matters. Together with the standardisation of contracts and the structuring of lessons learned, financing matters are likely to play a major role in MAPPP's activities in the future.

#### **4.3. Coverage**

MAPPP provides services to all procuring authorities contemplating the use of CPs, whether these are central or local government. As mentioned in Section 4.2, its role differs according to the nature of the procuring authority. MAPPP is involved in all economic sectors.

It should be noted that France also has a number of PPP units at the sectoral level such as in health and justice (see Section 5.2).

#### **4.4. Role of MAPPP in the project cycle**

Project identification, preparation, procurement, implementation monitoring and contract management are the responsibility of the relevant procuring authorities (see Section 7). As described in Section 4.2, MAPPP substantially acts as:

- an approval body for State CPs before these are put to tender;
- for local procuring authorities which opt for a MAPPP involvement, as an approval body for local CPs before these are put to tender; and
- a recommendation body for State CPs before these are signed.

Except in extraordinary circumstances (e.g. the State guarantee programme), MAPPP is not involved in the detailed procurement/negotiation of PPPs. Likewise, MAPPP would not normally be involved in any renegotiation of CPs.



#### 4.5. Location

MAPPP was originally placed under the direct responsibility of the minister of economy and finance. In 2011, MAPPP became a *service à compétence nationale* (service with national competence) placed at the Treasury department of the MEFI.

#### 4.6. Staffing

When set-up in 2005, MAPPP started operating with a staff of six professionals. Currently, MAPPP employs eight full-time persons and hosts three to four trainees every year.

MAPPP staff members are either career civil servants (currently six of them) or contracted from the private sector (currently two of them). Given its remit for managing the now expired State guarantee programme, MAPPP hired two private sector project finance specialists in 2009 for a period of two years.

MAPPP staff have a wide range of legal, financial, technical and public administration expertise. As a result, MAPPP rarely relies on consultants for its work.

The director of MAPPP is a civil servant. He is appointed by the minister of economy for an unlimited period. Until MAPPP became a *service à compétence nationale* in 2011, a non-executive chairman oversaw its activities. This role disappeared in 2011.

Interviews with the director of MAPPP suggest that it has been relatively difficult to recruit and retain experienced public sector staff despite the learning opportunities offered by MAPPP's activities. With the financial crisis, recruiting private sector staff has become easier. MAPPP is expected to increasingly source staff from the private sector in the future.

#### 4.7. Organisational structure

MAPPP has a flat organisational structure. The six *directeurs de projet* report directly to the director.

#### 4.8. Funding

MAPPP's activities are funded from the government's budget. MAPPP does not charge users/clients for its services.

#### 4.9. Reporting and accountability

MAPPP formally reports to the Treasury department of the MEFI although it enjoys a significant autonomy in its day-to-day activities.

MAPPP also reports to an "advisory committee" (*Comité d'orientation*) composed of 37 members drawn from public sector PPP stakeholders (e.g. ministries dealing with the economy, justice health, the *Cour des comptes*, the *Conseil d'État*, the mayors' association) and private sector PPP stakeholders (e.g. the contractors' association, the French banks' association). The *Comité* has a consultative function. It proposes the

main themes of MAPPP's work programme and meets once a year. Every year MAPPP produces an activity report for approval by the *Comité*.

A *Comité de développement* of 12 members (comprising members from Parliament and academia) has also recently been set up with a view to reinforce the involvement of the institutional/political spheres on PPP issues.

MAPPP has no specific audit arrangement. It is subject to the audit of a number of commissions as any other entities of the MEFI.

## 5. Key Entities in the PPP Framework

This Section sets out the other areas of government involved in shaping policy and implementing PPP projects.

Besides MAPPP, the key institutions in the PPP institutional framework in France are:

- the Ministry of Economy, Finance and Industry (which hosts MAPPP) and the Budget Ministry;
- the sectoral PPP units at the line ministries;
- the procuring authorities; and
- other bodies such as the *Institut de la Gestion Déléguée*.

France counts numerous PPP procuring authorities. They can be broken down into State or State-related and sub-national government entities. The main State or State-related entities procuring PPPs are:

- the line ministries (e.g. defence, justice, transport);
- *Réseau Ferré de France* (the French railway infrastructure company);
- health trusts (*établissements de santé*); and
- universities.

At local government level, the main procuring authorities are the municipalities or groupings of municipalities (they account for the bulk of the number of CPEs granted), the *départements* and the *régions*.

### 5.1. The Ministry of Economy, Finance and Industry and the Budget Ministry

As noted above, the *Ministère de l'Économie, des Finances et de l'Industrie* ("MEFI") is MAPPP's reference ministry. Although MAPPP enjoys significant day-to-day autonomy, this makes the MEFI central to PPP policy. As far as projects are concerned, the MEFI's role, through its Treasury department, is principally that of (i) opining on the value for money of State CPs and (ii) approving the risk matrix and financial structuring of State CPs.

The *Ministère du Budget, des Comptes publics et de la Réforme de l'État* (Budget Ministry) is required to approve, before contract signature, the affordability and budgetary sustainability of any CP contemplated at State level. A decree under preparation will require that the Budget Ministry's approval is also granted at project inception, simultaneously with MAPPP's *avis* on the EPs.

### 5.2. Line ministries and sectoral PPP units

Line ministries play a significant role and have considerable autonomy in the PPP process in their respective sectors in France. The following sectors have proved particularly active in PPPs: justice, health, defence, higher education and transport.

### 5.2.1 The justice sector and the *Agence Publique pour l'Immobilier de la Justice*

The *Agence Publique pour l'Immobilier de la Justice* (“APIJ”) is a public administration entity which operates under the supervision of the *Ministère de la Justice et des Libertés*. APIJ deals with the planning and management of large property projects relevant to the various directions of the ministry (e.g. judicial services, prison administration).

#### Mission and staffing

APIJ’s mission is to build, refurbish and/or rehabilitate court houses, prisons and other properties of the ministry. APIJ contributes to the definition of new building programmes together with the central directions of the ministry. It acts as an expert adviser on property issues, such as the evaluation of construction costs, insurance matters, environmental sustainability and operation and maintenance matters.

APIJ deals with PPPs but also with other procurement means, which helps the exchange of experience between traditional public works contracts and PPPs. APIJ is directly in charge of procuring PPP projects and enters into the PPP contracts on behalf of the ministry. APIJ has nine “programme departments” which are responsible for the implementation of projects, from feasibility studies to completion of the project works.

APIJ employs a total of approximately 100 persons. About 10 of these have competencies on PPP matters and share their knowledge with the rest of the team.

As far as PPPs are concerned, APIJ is involved in two main areas: judicial accommodation and prisons.

#### PPPs in the judicial accommodation sector

In the judicial sector (e.g. court houses), most investments are carried out through design and build contracts. PPPs are however used occasionally, although not for projects with a capital value of less than EUR 30 million. Where PPPs are used:

- APIJ only uses CPs;
- PPP projects are for new buildings rather than refurbishment programmes;
- transactions tend to be relatively small, on average around EUR 35 million, such as for the court houses in Caen, Perpignan and Lille. The exception is the Judicial City project in Paris, a EUR 560 million investment which closed in February 2012; and
- the scope of the typical PPP judicial accommodation project comprises the design, construction, maintenance, life cycle, utilities, cleaning and, occasionally, security, landscaping and reception services.

#### PPPs in the prison sector

In the prison sector, most investments are implemented through PPPs:

- APIJ has used CPs and AOTs, although the trend is towards a more systematic use of CPs. AOTs have been used where the private partner is required to provide maintenance services but no or limited “soft” services (e.g. cleaning, catering). CPs typically includes catering, laundry,

supermarket, training and work of the inmates. Prison security services are always retained by the public sector. Contracts are typically for 30 years although benchmarking takes place every seven years for soft services.

- Three PPP projects which reached financial close between 2006 and 2008 are currently in operation. The projects represent a capital cost of approximately EUR 250 million each. Each contract bundles three or four prisons. Two of these are AOTs and one is a CP.
- So far, only Eiffage and Bouygues have been awarded PPP contracts in the sector.

### PPP policy

APIJ is active in promoting sound PPP practice. In this context, APIJ:

- has produced standard clauses for PPP contracts, including clauses on benchmarking and market testing of soft services;
- makes signed contracts publicly available;
- holds internal monthly meetings where practical PPP issues are discussed;
- provides training on PPP issues; and
- participates in the *École des PPP*.

APIJ also carries out *ex post* evaluation of signed PPPs. On a relatively small sample of projects, APIJ found that:

- PPPs have better on-time construction deliveries and risk management, in particular as the private partner bears and manages the risk of archaeological finds which creates significant delays in traditional public works contracts; and
- *ex post* evaluations tend to confirm the results of the EPs: PPPs tend to be more expensive during the construction phase but significant savings are generated during the operational phase. Most savings are achieved on major maintenance due to the fact that construction quality tends to be higher with PPPs to meet long-term needs. Besides, (i) standard public works contracts tend to create interface risks during maintenance activities and (ii) budgetary constraints tend to be such that major maintenance is often omitted.

### Relationship with MAPPP

APIJ has frequent exchanges with MAPPP on many matters such as the evolution of the PPP market and financing issues. Given that the APIJ projects are State projects, MAPPP is required to validate the EPs produced by APIJ and to issue a recommendation to the MEFI before contract signature.

### Issues with PPPs in the justice sector

APIJ is currently seeking to address a number of issues arising from PPPs, such as:

- contract management – APIJ and the Ministry of Justice are responsible for project procurement and the management of PPP contracts whilst the day-to-day project management/monitoring is performed by the public entities using the projects. This can raise issues as contract provisions are not always well understood and correctly applied;

- the extent to which the interest rate risk should be borne by the public sector during the construction phase of projects – APIJ believes it is more suitable for the public sector to bear such risks as long as delays (e.g. late granting of permits) or changes to specifications are likely; and
- the lack of competition amongst contractors.

#### Future of PPPs in the justice sector

For prisons, the future of PPPs will be driven by the outcome of a consultation which is currently being carried out. 10 contracts for 20 to 25 prisons could be tendered over the next few years. APIJ intends to reduce the size of transactions to attract more competition.

### **5.2.2 The health sector and the *Agence Nationale d'Appui à la Performance des Établissements de Santé et Médico-sociaux***

The *Agence Nationale d'Appui à la Performance des Établissements de Santé et Médico-sociaux* ("ANAP") was created in 2009.

#### Mission and staffing

ANAP was created in the context of a reform of the health system. It is the result of the merger of three agencies involved in public health policy, including the *Mission Nationale d'Appui à l'Investissement Hospitalier* ("MAINH") which was created in 2003 under the Ministry of Health and played a major role in the development of PPPs in the health sector in France.

ANAP has two main missions. The first consists in improving the performance of health entities (e.g. organisation, staff and economic performance). In doing so it supports 30 *établissements de santé* and the regional health agencies (*Agences Régionales de Santé*). The second consists in valorising the sector's real estate and land assets.

ANAP has a staff of about 100 employees.

#### PPPs in the health sector

MAINH (ANAP's predecessor) was created in 2003 to meet the objectives of an ambitious health programme announced in 2002 (the *plan hôpital 2007*). The *plan* implied the reform of the pricing of health services, changes to the governance of the sector and a significant and urgent investment programme. The *plan* foresaw that at least 15% of the required investment would be carried out through PPPs.

As government-pay PPP models were not common in France at the time (this predates the PPP Law introducing the CP), MAINH adapted the BEA contract (which had been introduced in 1988) to produce a PPP contract for the health sector (the BEH). The terms of the BEH were largely inspired from the UK PFI health experience. The contracts envisaged that the maintenance of the buildings and a series of basic non-medical services would be provided by the private sector. As in the UK, the hospital entities (*établissements de santé*) would be the procuring authorities.

Under the *plan hôpital 2007*, the Ministry of Health launched a national call for project proposals from hospital entities. 35 project proposals were presented in 2003. 20 of these were selected following discussions with the newly-formed MAINH. Being BEHs, this first wave of projects were not subject to the EP process but to the approval of

regional health agencies with the support of MAINH. MAINH however produced a PPP guide to help procuring authorities with their projects.

This first wave of projects led other health authorities to push projects as PPPs even if the projects were not under the *plan hôpital 2007*. A second wave of projects was launched in 2006 under a new *plan hôpital 2012*. These were subject to the EP process. About 10 of these projects moved away from the BEH and used the CP (in particular where the private partner was required to provide energy or logistics services).

Overall, over 40 BEHs and 10 CPs reached financial close under the two *plans hôpital*. 35 hospitals have reached completion and are in operation today.

To perform its duties, MAINH had a team of 15 persons. Only two of them had a genuine PPP expertise. MAINH however relied extensively on advisers.

### Relationship with MAPPP

ANAP (and MAINH before it) has worked closely with MAPPP, in particular in the preparation of EPs for projects.

### Issues with PPPs in the health sector

The PPP initiative in the health sector has faced a series of issues, such as:

- As in most other sectors, the major contractors and their service subsidiaries were awarded all the PPP contracts.
- The Sud-Francilien Hospital Centre project which reached financial close in 2006 is facing difficulties. The BEH for the EUR 343 million project was signed with the Eiffage group. Throughout the construction period, the relationship between the public and the private partners deteriorated significantly. The project is now completed but opened with a one-year delay due to disputes between the parties. As a result, the project has attracted a lot of attention and criticisms. Some of these criticisms challenge the benefits of PPPs in general, although these are largely unfounded as the issues the project faces are not PPP-specific.

### Future of PPPs in the health sector

Hospital entities have a significant degree of autonomy in France. Outside of national investment programmes, hospitals are required to pay for their investments with their income. The indebtedness of hospitals has increased significantly over the last 10 years. Given this and the catch-up investments already made under the *plans hôpital 2007* and *2012*, PPPs are not likely to feature significantly in the health sector in the future, except for niche applications such as information systems, energy production and logistics.

## **5.2.3 The Ministry of Higher Education and Research**

### Mission and staffing

The *Ministère de l'enseignement supérieur et de la recherche* ("MESR") is in charge of defining and implementing coherent public policies for higher education and research. In particular, the MESR is responsible for the management of the property stock and programme of 83 universities and 180 higher education institutes across the country.



## PPPs in the higher education sector

Since the 1970s, universities have witnessed a significant growth which led to the construction of numerous new facilities. As a result, maintenance on existing assets was somewhat neglected. Universities properties are today often in need of significant refurbishment. This situation led the MESR to launch the *opération campus* in 2008, under which PPPs are a key feature.

The desire to promote whole-life costing, on-time delivery, innovation and a better risk allocation led the MESR to consider PPP options for the delivery of the required investments. The MESR set up in 2009 a department (*service des grands projets immobiliers*) which was granted the responsibility of managing the MESR's property programme. The *service* employs a staff of 13 with experience in project management and implementation of PPPs in other sectors.

One of the key aims of the *service* is to help universities use PPPs and, in particular, CPs. The *service* provides support to the preparation of EPs, the constitution of project teams and the recruitment of advisers. In practice, the *service* evaluates EPs before they are sent to MAPPP. It looks at the financial sustainability of projects and the related financing contributions universities will have to provide. Although the *service* only provides recommendations, its advice is normally strictly followed.

Under the *opération campus*:

- a State capital endowment of EUR 5 billion was allocated to universities for their investment in infrastructure/accommodation;<sup>18</sup>
- only the interests perceived on the capital endowment will be used to finance the investment programmes;
- the back-ended funding structure stemming from the capital endowment was thought to be particularly well suited to PPPs: the interest received on the endowment will be used by universities to finance their annual payments to the private partners;
- the MESR organised a call for proposals from universities, which attracted 66 responses. Eight projects were eventually selected; and
- the eight projects are currently at various procurement stages (most projects are using the competitive dialogue). The Grenoble School of Energy is likely to be the first CP to reach financial close in 2012.

Outside of the *opération campus*, 4 CPs for universities have been signed since 2009.

## PPP policy

In order to promote a sound use of PPPs in the sector, the *service* produced a toolkit for procuring authorities comprising typical contract clauses, a guide to the recruitment of advisers, a guide on how to get organised and documents on lessons learnt in PPPs.

## Relationship with MAPPP

MAPPP is involved in the projects under the *opération campus* programme insofar as it is required to validate the EPs produced by the procuring universities.

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<sup>18</sup> Out of the EUR 5 billion, EUR 3 billion came from the sale of shares in *Électricité de France*, the State-owned power company.



## 5.2.4 The Ministry of Defence

### Mission and staffing

The *Ministère de la Défense et des Anciens Combattants* (“MoD”) is a major public procuring authority for works and services. PPPs feature as one of the procurement mode used by the MoD, in particular for building accommodation, communication systems and complex services.

As far as PPPs are concerned, the MoD is organised as follows:

- The MoD has several procuring authorities (e.g. *État-major des armées*, *Direction générale de l'armement*). Within these, project directors formulate their needs and manage the procurement of projects. The decision to opt for a PPP is however not that of the procuring authorities, but that of the minister.
- Within the MoD's *Direction des affaires financières*, a team (*mission*) is in charge of new financing/procurement means such as PPPs. The *mission* acts as support to the procuring authorities, provides expertise and validates PPP proposals. The *mission* helps the procuring authorities to prepare their EPs for submission to MAPPP and checks the affordability/budget sustainability of proposals.
- The *Direction des affaires financières* deals with the economic and financial aspects of PPPs. Amongst other things, it deals with the sustainability of the projects, their financing and the budgetary redeployment (including that of staff) induced by the PPPs. The *Direction des affaires financières* issues opinions on the EPs before they are submitted to MAPPP and to the Budget Ministry.
- Overall, about 10 people deal with PPPs at the *Direction des affaires financières* and the *mission*. Staff is made up of PPP experts recruited for this purpose. In addition, about 10 staff within the procuring authorities have PPP competences.
- For all PPP contracts of the MoD, the minister himself has to approve the outcome of the PPP test and, at signature stage, he has to approve the final PPP contract. For projects with a contract value in excess of EUR 150 million, these decisions are made by an investment committee chaired by the minister.
- Two value for money checks are carried out for MoD PPP projects. The first test takes place at EP stage. The second check is made at the best offer stage, comparing the outcome of the bidding with the original EP.
- The MoD almost systematically mandates consultants (e.g. legal, financial, IT, insurance, property) for the procurement/negotiation phase of projects.

Competitive dialogue is the only procurement means used at the MoD for PPPs, mostly because of its potential for innovation. *Ad hoc* commissions are normally formed to evaluate bids and select the preferred bidder.

### PPPs in the defence sector

The MoD has closed six PPP contracts since 2008, including the flagship EUR 992 million Balard Defence Headquarters project which closed in 2011. Other transactions of the MoD comprise an intranet for the airforce, an engineering school in Toulouse, a helicopter pilot training school in Dax, a high-level sport school in Fontainebleau and the

refurbishment of barracks. Seven other PPPs are currently in procurement for building accommodation and ships.

#### Issues with PPPs in the defence sector

The MoD has generally had a positive experience in using PPPs, although its track record is not long/significant enough to draw proper lessons. It is however concerned with (i) the impact of the financial crisis on the cost of financing for PPP projects and (ii) the fact that the public sector is obliged to bear the interest rate risk during most of the construction period.

### **5.2.5 The Ministry of Environment, Sustainable Development, Transport and Housing**

The department for transport infrastructure at the *Ministère de l'Écologie, du Développement durable, des Transports et du Logement* set up a specialised unit (known as DEPP) and granted it responsibility for projects to be implemented as CPs or as concessions. DEPP has a staff of 12. It manages the economic, legal and financial aspects of the PPP procurement process. DEPP is involved in the finalisation of PPP contracts, in cooperation with MAPPP when the contract is a CP.

DEPP only covers the transport projects directly implemented by the ministry, not those conducted by “*établissements publics*” such as *Réseau Ferré de France* (see Section 5.3 below).

### **5.3. Réseau Ferré de France**

#### Mission of Réseau Ferré de France

*Réseau Ferré de France* (“RFF”) is the French rail infrastructure manager. It is a public body in charge of the provision of a public service (*établissement public à caractère industriel et commercial*). It operates under the supervision of the Ministry of Environment, Sustainable Development, Transport and Housing. RFF employs a staff of 1,400.

#### PPPs in the rail sector

RFF is one of the main PPP procuring authorities in France. RFF has procured four major PPP projects to date:

- The GSM-R Communication project – GSM-R is the first PPP project RFF closed in 2010. This telecom project is implemented through a 15-year CP for a capital value of approximately EUR 1 billion.
- The Tours-Bordeaux High Speed Rail project – The project involves the construction of a EUR 8 billion line under a 50-year concession. The deal involves a complex financing structure blending State and regional contributions, commercial bank debt, public debt (e.g. the EIB, *Caisse des dépôts*) and on-demand guarantees from RFF, from the State (the latter being managed by MAPPP, see Sections 3.3.2 and 4.2.4) and from the EIB and the European Commission under the Loan Guarantee Instrument for Trans-European Transport Network Projects.<sup>19</sup> The EP for the project was

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<sup>19</sup> See [www.eib.org/attachments/press/2008-005-fact\\_sheet\\_en.pdf](http://www.eib.org/attachments/press/2008-005-fact_sheet_en.pdf)

validated in 2006 and the project reached financial close in June 2011. The tender for the project followed a pseudo competitive dialogue procedure.

- The Bretagne Pays de Loire High Speed Rail project – The project involves the construction of a EUR 3.4 billion high speed line under a 25-year CP. The deal reached financial close in July 2011 and is the first true rail CP. Unusually, the procurement chosen for the project was the negotiated procedure, mostly for timing reasons.
- The Nîmes-Montpellier Rail Bypass project – The CP for this EUR 2.5 billion project is expected to reach financial close in 2012. Best and final offers were submitted under a competitive dialogue procedure in October 2011 and a preferred bidder was selected in January 2012.

### Relationship with MAPPP

The CPs proposed by RFF require MAPPP's validation of the EPs.

RFF and MAPPP also worked extensively together on the approval, structuring and finalisation of the State guarantee for the Tours-Bordeaux High Speed Rail concession.

### Issues and future PPP pipeline

As far as PPPs in the rail sector are concerned, it is worth noting that:

- large rail infrastructure projects require many interactions with public stakeholders and local population. This explains the relatively long gestation period of such projects, in particular where these are undertaken as PPPs;
- the affordability of PPP projects for RFF is largely driven by the allocation of public grants to projects (in particular at the regional level). The firming up of grant commitments by the various public stakeholders takes place at a relatively late stage in the procurement process. As a result, RFF is required to carry the projects forward through the procurement/negotiation phase despite funding uncertainties;
- with the need to digest the four significant projects closed or nearing financial close over the last three years, RFF's PPP pipeline is expected to narrow down. RFF is preparing a number of EPs and expects to bring forward two or three projects (including new rail stations or refurbishment of existing sections of the network) over the next five years; and
- given the size of its projects, financing and TEN-T policy/funding issues will be of major importance for RFF. The recourse to PPPs will be in large part conditioned by value for money and bankability considerations.

## **5.4. The Institut de la Gestion Déléguée**

The *Institut de la Gestion Déléguée* ("IGD") is a corporate foundation created in 1996 and sponsored by 47 members from the private sector.<sup>20</sup> It is a non-profit organisation which aims to promote the improvements in the quality and performance of public services, in particular through the involvement of the private sector. The IGD has become an influential think tank on concession arrangements and on PPPs more

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<sup>20</sup>

<http://www.fondation-igd.org/>

generally. It has recently published a series of papers on PPP matters (e.g. the financing of PPPs, contractual structures for PPPs).

Together with MAPPP, the IGD manages the *Centre d'expertise français pour l'observatoire des partenariats public-privé* which gathers and analyses data on PPPs (see Section 3.1). The IGD also manages the *École des PPP* (see Section 4.2.2).

The IGD has seven permanent staff but involves numerous outside experts for the carrying out of its research work.

## 6. The Legal Framework for PPPs

The legal framework for PPPs in France is complex as many codes, laws, decrees and other legal means govern or affect the different types of PPP arrangement and their award procedures. Table 4 below lists the principal legal provisions governing the PPP contract forms.

**Table 4 – Principal legal provisions governing the PPP contract forms**

PPP contract	Main legal provisions governing the contract
<b>DSPs</b>	<ul style="list-style-type: none"> <li>- “Sapin” law 93-122 of January 1993</li> <li>- “Murcef” law 2001-1168 of December 2001</li> </ul>
<b>DSPs - Works concessions</b>	<ul style="list-style-type: none"> <li>- <i>Ordonnance</i> 2009-864 of July 2009</li> <li>- Law 2005-809 of July 2005</li> </ul>
<b>CPs</b>	<ul style="list-style-type: none"> <li>- <i>Ordonnance</i> 2004-559 of June 2004, as amended by law 2008-765 of July 2008 and law 2009-179 of February 2009</li> <li>- Decree 2004-1119 of October 2004 (creating MAPPP)</li> </ul>
<b>BEAs</b>	<ul style="list-style-type: none"> <li>- Law 88-13 of January 1988</li> <li>- For BEAs in police, justice and defence, a series of laws and decrees</li> </ul>
<b>BEHs</b>	<ul style="list-style-type: none"> <li>- Law 2003-591 of July 2003</li> <li>- <i>Ordonnance</i> 2003-850 of September 2003</li> </ul>
<b>AOTs / LOAs</b>	<ul style="list-style-type: none"> <li>- Law 94-631 of July 1994</li> </ul>

### 6.1. The PPP legislation of 2004

Arguably, the most important piece of legislation regarding modern PPPs in France is the *ordonnance* 2004-559 of 17 June 2004 and the laws of 2008 and 2009 that amended/complemented it (the “PPP Laws”).<sup>21</sup>

The main motivation for the PPP Laws was to fill in the gap public authorities faced between using traditional works contracts (*marchés publics*) and user-pay concession arrangements (*délégations de service public*).

The main provisions of the PPP Laws are as follows:

- it introduces the CP and defines its scope. In particular, it defines the three criteria for the use of CPs (i.e. complexity, urgency, value for money);
- it introduces MAPPP and defines its basic functions;

<sup>21</sup> An English translation of the law is available at [http://www.economie.gouv.fr/files/directions\\_services/ppp/ordonnance2004-559\\_ang.pdf](http://www.economie.gouv.fr/files/directions_services/ppp/ordonnance2004-559_ang.pdf)

- it deals with the tendering procedures for CPs, in particular the competitive dialogue;
- it defines the public authorities which can make use of CPs; and
- it defines the basic terms of a CP (e.g. duration, risk sharing, payments to the private partner, dispute resolution).

## 6.2. Procurement of PPPs

The procurement of PPPs is regulated by several texts which have a European,<sup>22</sup> national or sectoral origin. Table 5 below summarises the procurement procedures applicable to the various PPP contract types.

**Table 5 – Procurement procedures applicable to PPP contract types**

PPP contract	Award procedure
<b>DSPs</b>	<ul style="list-style-type: none"> <li>- Sealed bids</li> <li>- Simplified procedure</li> <li>- Negotiated procedure</li> </ul>
<b>CPs</b>	<ul style="list-style-type: none"> <li>- Competitive dialogue</li> <li>- Restricted bid procedure</li> <li>- Negotiated procedure</li> </ul>
<b>BEAs</b>	<ul style="list-style-type: none"> <li>- Competitive dialogue</li> <li>- Informal bidding process based on candidates references</li> </ul>
<b>BEHs</b>	<ul style="list-style-type: none"> <li>- Competitive dialogue</li> <li>- Negotiated procedure</li> </ul>
<b>AOTs / LOAs</b>	<ul style="list-style-type: none"> <li>- Competitive dialogue</li> <li>- Restricted bid procedure</li> <li>- Negotiated procedure</li> </ul>

In practice, CPEs (in particular CPs) are almost always procured using the competitive dialogue procedure. “Complexity” is the main reason invoked for using the competitive dialogue. The dialogue typically contains two phases and is carried out over a period of 9 to 12 months. Section 7.3 provides details of the award procedure typically used for CPs.

<sup>22</sup> Directive 2004/18 of March 2004 regarding public works, equipment and services contracts and Directive 2004/17 of March 2004 regarding public contracts in the water, energy, transport and postal sectors.

## 7. The Outline Project Cycle

This Section provides a general overview of the typical PPP project cycle in France. The following is based on the project cycle of a *contrat de partenariat* ("CP"). The outline project cycle is graphically represented in Figure 5 at the end of this Section.

### 7.1. Project identification

#### 7.1.1 Needs analysis and project selection

Procuring authorities (e.g. line ministries, local authorities, hospital bodies, universities) are largely responsible for determining their investment needs, although in doing so they often operate in the context of central government programmes or guidelines (e.g. *opération campus*, *plan hôpital 2007*). Procuring authorities are therefore in charge of carrying out the analyses required to demonstrate the socio-economic usefulness of the investment and for checking the fit of the project with their own policies, strategies and statutory obligations.

#### 7.1.2 PPP option

The use of a CP for a project is mainly regulated by the PPP Laws. A procuring authority can only opt for a CP if at least one of the three following conditions is met:

- the project is complex (complexity arises in particular where the authority is not able to define an efficient financial or legal structure for the project);
- the project is urgent; and
- the CP arrangement generates value for money.

### 7.2. Project preparation

The project preparation largely evolves around the carrying out an *évaluation préalable* ("EP").

#### 7.2.1 The *évaluation préalable*

Once the procuring authority is satisfied that a CP can be used for a given project, the PPP Laws require it to prepare an EP (see Section 4.2.1 and Box 1). The EP has two main objectives: (i) to verify that the project meets the criteria set out in the PPP Laws and (ii) to allow the procuring authority to set out the reasons why a CP is a better alternative to other procurement or contractual forms.

The EP preparation is a crucial and complex process which requires expertise on legal, financing, accounting and technical matters. MAPPP has produced numerous analysis tools and guidance aimed at helping procuring authorities to prepare their EPs. MAPPP offers methodological support for the preparation of EPs but does not carry out the EPs itself. Procuring authorities therefore often rely on external consultants in the preparation of EPs (and beyond).

Once the underlying analysis for an EP is carried out, the procuring authority prepares an EP report. The report must set out a general presentation of the project, the

objectives of the authority, an analysis of the costs with and without the CP and the consequential budgetary allocation.

### 7.2.2 Approval of the *évaluation préalable*

Producing an EP report is mandatory for all projects. However, only EP reports for State CPs have to be submitted to MAPPP for validation. EP reports for local projects must be submitted to the relevant decision-making body of the procuring authority (e.g. local council). As noted in Section 4.2.1, local procuring authorities can nonetheless submit their EP reports to MAPPP on a voluntary basis.

Once an EP report is submitted to it, MAPPP is required to provide an *avis* usually within three to four weeks. MAPPP's *avis* is binding for State CPs but not for local projects which seek MAPPP's *avis* (although, in practice, procuring authorities cannot disregard MAPPP's recommendation).

## 7.3. Project procurement

Once an EP is validated and all the necessary approvals are secured, the procuring authority typically finalises the project studies, puts together a project team and governance structure and appoints advisers in view of the procurement phase. The responsibility for procuring the CP rests with the procuring authority. MAPPP is not involved in this process.

### 7.3.1 Three procedures

The PPP Laws foresee three procedures for the granting of a CP:

- competitive dialogue – the competitive dialogue should be used every time the procuring authority wishes to stimulate private sector innovation on technical, legal or financial matters. The competitive dialogue is by far the most used procedure for the award of CPs;
- restricted procedure – this procedure is comparable to the one used for the award of traditional works contracts; and
- negotiated procedure – this procedure can be used for CPs since 2008 for projects below a certain size.

### 7.3.2 Defining the authority's needs

The procuring authority has to define the detailed needs that the project will have to meet. For the restricted and negotiated procedures, it will do so through setting out the project specifications (*cahier des charges*). For the competitive dialogue, the procuring authority is required to prepare an output-based functional programme for the project (*programme fonctionnel*).

### 7.3.3 Conduct of the procedure

The procuring authority prepares an tender notice (*avis d'appel public à la concurrence*) which is published in the Official Journal of the EU. The tender notice comes with an information document (*dossier de consultation des entreprises*) and the functional programme or *cahier des charges* depending on the tender procedure chosen. A draft PPP contract (prepared by the procuring authority and its advisers) is typically attached to the *dossier de consultation*.



The PPP Laws require procuring authorities to allow potential bidders at least 40 days to register their interest to bid. Bidders are then shortlisted on the basis of the criteria expressed in the tender notice or in the *dossier de consultation*.

The bidding process *per se* will depend on the award procedure chosen. For the competitive dialogue, the procuring authority initiates a dialogue with each bidder with a view to enable the bidder to fine-tune its proposal and the procuring authority to define its project in greater detail. The dialogue typically implies two or three phases, which are normally carried over a period of nine to twelve months.

The PPP Laws require the dialogue to cater for the production of final offers from the bidders (*offres finales*). The procurement authority invites the bidders to make a detailed offer based on the solution(s) the authority has retained. The final offer contains a technical offer, a service offer and a financial offer. The offers also typically contain a proposed PPP contract.

In order to ensure an efficient use of the competitive dialogue, MAPPP and the IGD have promoted a charter (*charte du dialogue compétitif*) which was adopted in January 2007 and which contains 10 principles the parties to the dialogue should observe.

#### 7.3.4 Contract award and final approvals

CPs are typically awarded on the basis of the most economically advantageous offer. The PPP Laws require the award criteria to contain at least the global cost of the offers, the proposed performance targets and the share of the contract which the bidders intend to grant to small and medium size companies. The award criteria must be weighted or, at least, ranked.

The decisions to award the contract and the authorisation to sign it are taken by the relevant decision-making body of the procuring authority. For State CPs, MAPPP is required to opine on the final terms of the PPP contract. MAPPP's opinion is transmitted to the minister of economy and finance, who, together with the budget minister (in charge of the budgetary implications of the project), has to grant his formal approval to the contract signature.

The PPP Laws also impose a stand-still period between notification of the preferred bidder and contract signature. Notification is published in the Official Journal of the EU.

#### 7.3.5 Signature of the PPP contract and financial close

Once detailed negotiations on the PPP contract and the financing and project agreements are completed, signature of the PPP contract and financial close typically take place simultaneously. With regard to interest rate hedging operations, recent practice has been that these are concluded during the construction period, often once all the project construction permits and authorisations have been secured. MAPPP is not involved in the signature/financial close process (although it can advise the procuring authority at its request when deemed necessary).

Once signature has taken place, the procuring authority is obliged to send MAPPP a copy of the signed CP.

## **7.4. Project implementation**

### **7.4.1 Contract management**

Contract management responsibilities rest with the procuring authority during the construction and operational phases of the project. MAPPP has no role in this respect.

### **7.4.2 Renegotiation and dispute resolution**

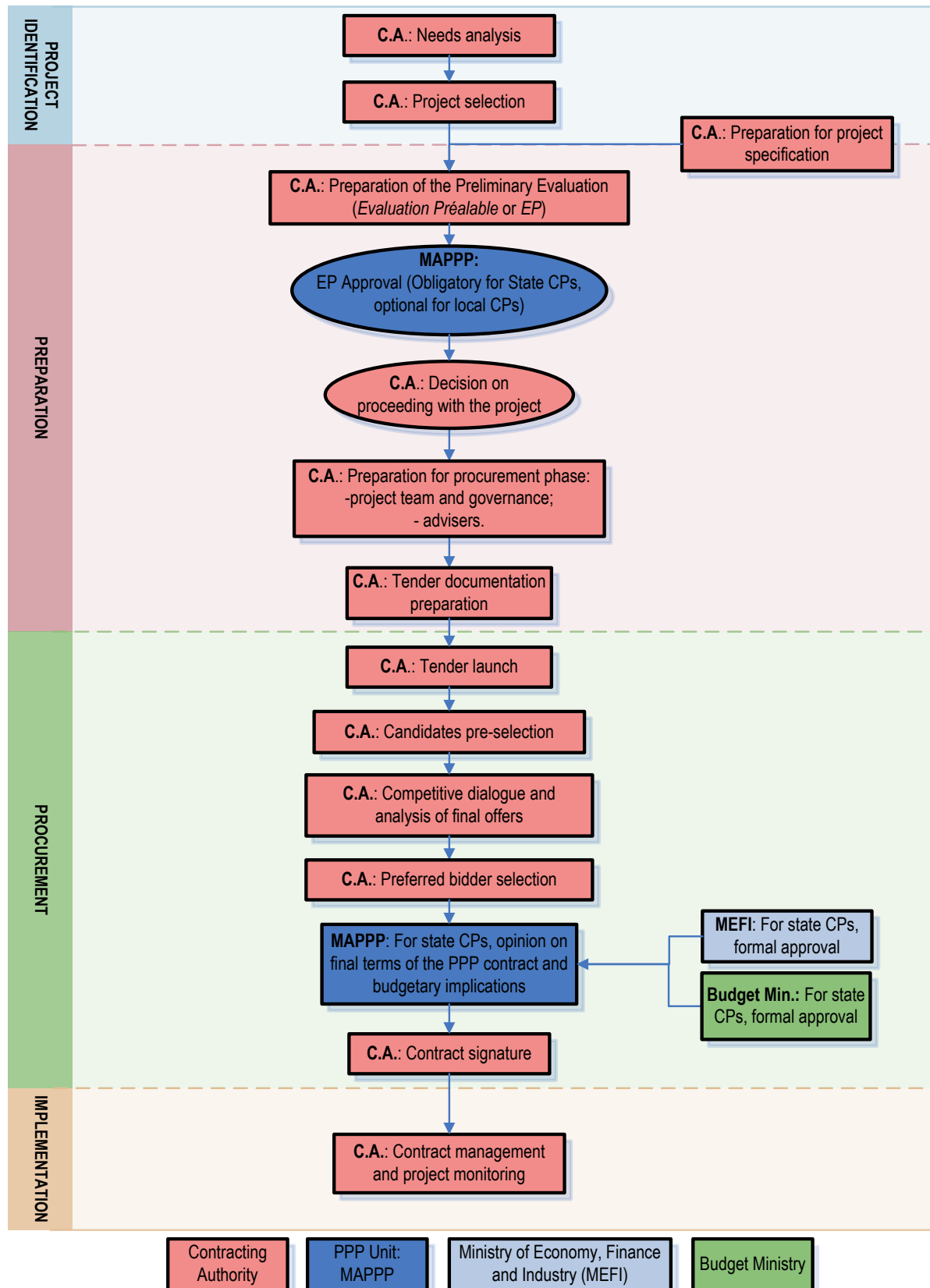
MAPPP can be called to support the procuring authority during the project life, but MAPPP's approval is not necessary for any renegotiation materially changing the obligations of the parties to the PPP contract, whether during construction or the operational period.

The PPP contract sets the modalities for the prevention and resolution of disputes between the parties. These typically comprise conciliation mechanisms and arbitration provisions.

### **7.4.3 Project monitoring**

Responsibility for monitoring PPP projects rests with the procuring authority. MAPPP is not involved in the detailed monitoring of specific projects. MAPPP however seeks to collect information on project performance in order to produce guidance on lessons learnt from past experience.

Figure 5 – Outline project cycle for a CP



## **ANNEX 1 - Key characteristics of the main “government-pay” PPP contracts in France**

	<b>CP</b>	<b>BEA / BEH</b>	<b>AOT / LOA</b>
<b>Object of the contract</b>	Global contract for the design, construction, operation, finance and maintenance of an asset	The object is mostly linked to the building; non building services are limited	The object is linked to a mission of general interest and contains an obligation on the private partner to build and an option for the authority to buy the asset
<b>Sectors</b>	All	Justice, police, health, social housing, fire and rescue services	Police, justice, defence
<b>Procuring authority</b>	All public authorities	Local / regional authorities	The State and the local authorities
<b>Preliminary project evaluation</b>	Mandatory - the public administration should set out the reasons of the recourse to a PPP (in terms of complexity, urgency and value for money)	Not mandatory except for the health sector (BEH)	Mandatory for State projects beyond a certain value threshold
<b>Procurement procedures</b>	Formalised procedures (competitive dialogue, negotiated or restricted procedure)	More flexibility than for CPs, except for BEH	Formalised procedures (competitive dialogue, negotiated or restricted procedure)
<b>Ownership of the project land</b>	Public ownership – the private partner holds an authorisation to occupy the public land	Public or private property	Public ownership
<b>Ownership of the project assets</b>	Public ownership	<i>De facto</i> transfer to the private partner for the duration of the contract	<i>De facto</i> transfer to the private partner for the duration of the contract
<b>Remuneration of the private partner</b>	Public payments (possibility of some user revenues)	Public payments	Public payments

	<b>CP</b>	<b>BEA / BEH</b>	<b>AOT / LOA</b>
<b>Design activity</b>	Design can be carried out by the public authority or by the private partner (in part or in total)	Design carried out by the private partner	Design carried out by the private partner
<b>Contract duration</b>	Linked to the life of the asset or the tenor of the financing (typically 20 to 30 years)	Between 18 and 99 years	Maximum 70 years
<b>Ownership of the assets upon termination of the contract</b>	Public ownership	The asset are transferred back the public authority	The assets are dismantled unless it has been agreed that the public authority would own and maintain them







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