

Legal, Financial and Governmental PPP Initiatives

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1. Introduction

This paper gives an overview of the existing Public Private Partnership (PPP) acts in the EU Member states, the existing national economic measures supporting establishment of PPP projects, PPP guidelines and, furthermore, the existing national central governmental PPP units. After mapping these four subjects in the EU member states, the paper focuses on the solutions chosen in France, United Kingdom, and Ireland. The purpose of the paper is to provide specific knowledge on PPP instruments to countries as Denmark, which lack on both legal instruments, as well as PPP projects in general. This knowledge might provide a new perspective on how to improve the PPP marked through legal, financial, and governmental measures concerning PPP. The paper focuses on legal act, central PPP units and financial instruments as support of PPP.

1.1. The PPP market

The market for PPP and also the co-operation between the public and private sectors for the development and operation of infrastructure for a wide range of economic activities has increased. Years ago, PPP arrangements were only driven by limitations in public funds to cover investments needs, but today PPP is also driven by the interest of increasing the quality and efficiency of public services in general.¹

¹ Tvarnø (ED), An international analysis - from a legal and economic perspective, the EU-commission, 2010.

In many countries within the EU, PPPs has been a significant tool to solve infrastructure needs as a cost-efficient (lower life-cycle cost) alternative creating benefits to both the public and private sector and in regard to develop growth and innovation.² Furthermore, PPP can be used to develop more efficient ways of providing facilities to run services, such as schools, hospitals, and prisons etc. The aim of the PPP is to meet the needs of the national or local society and to utilize resources from both the public and private sector³ through collaboration.⁴ Hence, PPP involves cooperation, public procurement, and aims to improve both the economy and the quality of the infrastructure project. Furthermore, PPPs can provide additional capital, set up alternative management procedures and implementation skills, and an optimal use of resources.⁵

By the 2014 public procurement directive, EU has broadened the PPP perspective by introducing the economic tool of life-cycle-cost to the legal framework in the EU. The introduction of procurement in a best life-cycle-cost perspective is a significant and relevant tool used to optimise PPP projects. The legal definition of the life-cycle-cost is: all costs over the life cycle of works, supplies or services including research, development, production, transport, use, maintenance and end-of-life disposal cost and pollution. Without the life cost perspective, which is a key driver in an optimal PPP, the relevance of the PPP disappears.⁶

As a benefit to PPP and public procurement in general, the EU Commission has removed the prior ban on negotiation. Thus, under the 2014/24/EU directive, it is possible to negotiate the terms of the contracts with companies to obtain the service that in the best way suits the public needs. The EU Commission has recognised that PPP is a relevant tool to both public and private parties, but must be supported in order to be efficient.⁷

1.2. Promoting PPPs through legally binding PPP acts in the EU member states

There is no universally accepted definition of PPP concept; hence each country has to establish a national definition within the national law. The different national perspective on PPP differs throughout the EU. On one side the British (Anglo-Saxon) conception is marked by a tradition of unwritten law and prevalence of the will of the parties, on the other side, the French conception of a written law distinguishes two large families of contracts characterized by the scope of the assignment and the method of remuneration of the other party: the concessions and contracts are related to the first, and PPP

http://openarchive.cbs.dk/bitstream/handle/10398/8422/public-private_partnership.pdf?sequence=1

² Tvarnø, Why the EU Public Procurement Law Should Contain Rules that Allow Negotiation for Public Private Partnerships: Innovation Calls for Negotiating Opportunities, in Ølykke, Hansen & Tvarnø (eds), EU Public Procurement, Modernisation, Growth and Innovation: Discussions on the 2011 Proposals for Procurement Directives, Djøf, 2012, pp. 201-219.

³ Osborne, Public Private Partnerships, Theory and practice in international perspective, Routledge, Taylor & Francis, 1998.

⁴ Huxham, Chris and Vangen, Siv (1996). Working together, key themes in the management of relationships between public and non-profit organizations. *International Journal of Public Sector Management*, 9(7) pp. 5–17.

⁵ Tvarnø, Negotiating Efficient PPP Contracts, conference paper, 2014, [http://research.cbs.dk/da/publications/uuid\(53a3cdad-a979-4a67-98a0-4f3d73db4f7f\).html](http://research.cbs.dk/da/publications/uuid(53a3cdad-a979-4a67-98a0-4f3d73db4f7f).html)

⁶ Tvarnø, P3 is more than just private funding - An EU Procurement Law Perspective, conference paper, 2015, [http://research.cbs.dk/da/publications/uuid\(f77339a9-7c62-4d61-948e-c440f4b32c36\).html](http://research.cbs.dk/da/publications/uuid(f77339a9-7c62-4d61-948e-c440f4b32c36).html)

⁷ Ibid.

contracts are related to the second family.⁸

The establishment of a strong PPP sector does not come by itself. It requires more than just the political will to ensure a solid public and private business case regarding e.g. infrastructure projects. By adopting a PPP act, it is possible to ensure a coherent approach to PPPs in the public sector, given the complexity and long-term scope of PPPs that provide key elements of public services.

OECD recommends that governments establish a *clear, predictable and legitimate institutional framework supported by competent and well-resourced authorities*.⁹ Furthermore, OECD emphasizes the awareness of the relative costs, benefits, risks, active consultation and engagement with stakeholders (and end-users) by ensuring that all significant regulation affecting the operation of PPP is clear, transparent and enforced.¹⁰ The different types of PPP measures within the EU member states illustrate that different legal measures can provide either a strong or a weak PPP sector. This paper aims at presenting a map concerning the different PPP legal, financial, and governmental measures in the EU member states and to discuss and suggest possible future PPP measures in Denmark.

1.3. Promoting PPP through Governmental PPP units

The main reason for establishing a PPP unit is the complexity of PPPs, the need of public skills to ensure value for money, the need of public skills to ensure coordination and professionalism, and the need of public skills to create, manage and evaluate a PPP both efficiently and effectively. A central PPP unit can provide these skills and can invest in the sufficient knowledge on in-depth financial, legal, economic, and project management skills.¹¹

An efficient functioning central PPP unit requires a clear mandate, necessary independence, and appropriately resources. Hence, a central PPP unit can support the responsible state- or local public authority in procuring and if necessary, operating the PPP.¹²

Thus, a central PPP unit must be supported by statute to ensure efficiency, the creation of a significant PPP market and value for money for the public sector. OECD emphasises that all key institutional roles and responsibilities should be maintained. This requires that procuring authorities, Public-Private Partnerships Units, the Central Budget Authority, the Supreme Audit Institution and sector regulators will be entrusted with clear mandates and sufficient resources to ensure a prudent procurement process and clear lines of accountability.¹³ This paper aims at discussing the benefits from establishing a central PPP unit in Denmark through a discussion on the exiting experience in the other EU member states.

⁸ *Mission d'appui aux PPP*, typologie des PPP: comparaison juridique et terminologique des PPP, dans les conceptions française et anglo-saxonne, MAPPP-13-02, Version du 06-05-2013, p. 2.

⁹ OECD, Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships, May 2012, p. 4.

¹⁰ Ibid.

¹¹ Ibid, p. 9.

¹² See for the Canadian data and arguments on central PPP units Tvarnø, Danish Public-Private Partnerships in a Comparative Perspective, Erhvervsretlige emner (eds) Peter Arnt Nielsen; Peter Koerver Schmidt; Katja Dyppel Weber, Djøf, 2015, pp. 325-348.

¹³ OECD, Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships, May 2012, p. 4.

2. PPP in an EU perspective

The various PPP policies in the different member states result in different PPP outcome. In this section of the paper, the focus is on whether a member state has adopted a PPP act, which first of all defines what a PPP is, secondly, has legislation that promotes the use of PPP through economic measures, thirdly has PPP guideline framed by the Government in order to make the PPP process aligned and finally, has a central PPP unit that will procure PPP projects and thus centralise the PPP knowledge, skills, and competences at a specific government authority.

Half of the member states have PPP regulation explicitly defining PPP projects in the national law of the member state. Only five member states have legislation promoting the use of PPP through economic initiatives. Eleven member states have governmental non-legally binding PPP guidelines to supervise the public sector and the private industry in procuring, bidding on and contracting a PPP project. Thirteen member states have prioritized to establish a central PPP unit to support the use of PPP, to procure the PPP projects, and in some cases to run the PPP projects. In the following three sections, this paper will go into details in regard to three member states and the legislative PPP choices.¹⁴

France has a specific PPP act and for a period France had an act promoting PPPs through economic stimulations or financial instruments. Furthermore, France has PPP guidelines and has established a central PPP agency. As the only member state, Ireland is meeting all four PPP elements in the table above. Thus, Ireland both has a PPP act, legislation promoting PPP through economic initiatives, PPP guidelines, and a central PPP unit procuring PPP projects. On one hand, United Kingdom has the highest amount of PPP projects in the EU, but contradictory has no specific PPP act that defines PPP, no legislation including economic initiatives promoting PPPs and no central unit procuring PPPs. On the other hand, in 2010, the United Kingdom evaluated the PPP experience of more than 700 PPP projects and in that regard presented a new PPP strategy (PF2) that discussed how to improve the use of PPPs in the future. The PPP experience in these three member states is different and relevant in regard to discussing legal PPP in other member states in EU.

3. The French PPP regulation

France had the first PPP act, the *Ordonnance sur les contrats de partenariat*, in 2004.¹⁵ The 2004 PPP-Act was amended in 2008.¹⁶ The 2004/2008 PPP-Act¹⁷ defines a PPP

¹⁴ <http://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concession-laws>

http://www.eib.org/epec/resources/publications/epec_establishing_and_reforming_ppp_units_en1, and governmental homepages accessed April 2016.

¹⁵ Ordonnance n° 2004-559 du 17 juin 2004, Version consolidée 04 avril 2016. See <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000256180&categorieLien=cid>

¹⁶ LOI n° 2008-735 du 28 juillet 2008 relative aux contrats de partenariat, version consolidée au 04 avril 2016. See

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019261845&categorieLien=id>

¹⁷ François-Guilhem Vaissier, Hugues Martin-Sisteron and Anna Seniuta, France in Bruno Werneck and Mário Saadi (eds) *The Public-Private Partnership Law Review*, London, 2015.

contract and thus includes an explicit legal PPP definition.¹⁸ Due to the 2004 PPP-Act, the PPP contract is an administrative contract under which a public entity entrusts to a private party, for a period set according to the amortisation of investment or agreed financing terms, a comprehensive project relating to the design, the construction or conversion, the maintenance, operation or management of works, equipment or intangible assets necessary to the public service, as well as to the total or partial financing of the latter. Due to the PPP contract, the public authority will pay rents to the private partner in exchange of the performance of the mission.¹⁹

Hence, PPP contracts are defined as administrative contracts under French law. This distinction is important, as the contractual relationship in an administrative contract is different from a private contractual relationship.

Furthermore, the specific use of PPP contracts is strictly regulated in the 2004 PPP-Act. PPP partnership contracts:

“...are characterised by the payment of rents by the public authority to the private partner throughout the term of the contract. This remuneration is determined for the services provided by the private partner (works, intangible investments, supplies and services) and is divided into several parts. One part represents the compensation of the partner for the supply of equipment and the cover costs for servicing the loans contracted to carry out the investment, financing costs, taxes and fees that the partner pays on its investments. The compensation also takes into account the services provided by the private partner. Finally, the compensation of the partner must cover the maintenance costs and expenses for major maintenance and the renewal of certain infrastructures.”²⁰

Since 2004, more than €18 billion have been invested in French public-private partnerships (PPPs) in various economic sectors, e.g. in transport, health, education, environment, energy efficiency, and telecommunications etc.²¹ According to article 19, in the 2004 PPP-Act, the Government and its public institutions, local authorities, and local public institutions may all enter into partnership contracts.

In 2008, the 2004 PPP-Act was amended.²² The 2008 PPP-Act broadened the access to use PPP contracts by creating a new efficiency criterion alongside the existing and strict criterion “*urgency and complexity*” in article 1. Thus, the PPP project has to be related to the construction, maintenance, operation or management of work necessary for public service, as PPPs may only be entered, if the public authority demonstrates an element of complexity, emergency, or economic efficiency.²³

¹⁸ In France, there is a specific legal difference between concessions and the legal basis for PPP projects. France regards a concession as a power delegated to a private party with all associated risks and perils and PPP projects are regarded as a new phenomenon on the basis of which no road project has yet been designed where risks and finances are shared. See [http://www.cedr.fr/home/fileadmin/user_upload/Publications/2009/e_Public_private_partnerships_\(PPP\).pdf](http://www.cedr.fr/home/fileadmin/user_upload/Publications/2009/e_Public_private_partnerships_(PPP).pdf) page 29 ff.

¹⁹ François-Guilhem Vaissier, Hugues Martin-Sisteron and Anna Seniuta, France in Bruno Werneck and Mário Saadi (eds), *The Public-Private Partnership Law Review*, London, 2015, p. 77.

²⁰ François-Guilhem Vaissier, Hugues Martin-Sisteron and Anna Seniuta, France in Bruno Werneck and Mário Saadi (eds), *The Public-Private Partnership Law Review*, London, 2015, p. 82.

²¹ François-Guilhem Vaissier, Hugues Martin-Sisteron and Anna Seniuta, France in Bruno Werneck and Mário Saadi (eds), *The Public-Private Partnership Law Review*, London, 2015, p. 74.

²² Act no 2008-735 of 28 July 2008 on partnership contracts. The 2008 PPP-Act is consolidated with the 2004 Order on PPP.

²³ François-Guilhem Vaissier, Hugues Martin-Sisteron and Anna Seniuta, France in Bruno Werneck and Mário Saadi (eds), *The Public-Private Partnership Law Review*, London, 2015, p. 78.

Article 2 includes the reasons allowing the conclusion of a partnership contract:

- The project's complexity according to its unchanged definition (impossible to define the technical means to meet its needs, or the financing of the project),
- The urgency, it being specified that the situation of delay will be taken into consideration whatever the causes of this delay,
- The new efficiency criterion of the partnership contracts in relation to the other tools of public purchasing. The criterion of deferred payment alone cannot constitute an advantage justifying recourse to the partnership contract.²⁴

Furthermore, the 2008 PPP-Act clarified several provisions and neutralises the main imbalances of competition with the other methods of public purchasing in tax and regulatory terms.²⁵ Article 3 concerns the transparency and equal treatment in the evaluation.

Article 5 concerns the PPP procurement procedures and Article 8 defines the concept of total cost as follows:

"Total cost of the offer means the sum, in current value, generated by the design, financing, construction or conversion, upkeep, maintenance, operation or management of structures, facilities, or intangible assets, and the provision of services planned for the term of the contract".²⁶

Furthermore, a PPP contract must (according to the PPP-Act article 1, article 11 and article 12) include several mandatory provisions such as:

- The duration of the contract.
- The conditions for sharing risks between the public authority and its co-contracting party,
- The performance objectives assigned to the co-contracting party,
- The payment terms, and
- The consequences of termination of the contract.²⁷

3.1. The French central governmental PPP Unit

France has a central PPP unit called The *Mission d'appui aux partenariats public-privé*.²⁸ *Mission d'appui aux partenariats public-privé*²⁹ is a dedicated PPP unit of the Ministry of the Economy that assists public authorities in implementing PPP contracts. *Mission d'appui aux partenariats public-privé* was set-up in May 2005 with a cross-sectoral scope for the whole public sphere. *Mission d'appui aux partenariats public-privé* is primarily responsible for the validation of the preliminary evaluations, prepared by procuring authorities before launching a tender, and in preparing and negotiating the

²⁴ LOI n° 2008-735 du 28 juillet 2008 relative aux contrats de partenariat (1), NOR: ECEX0774541L, Version consolidée au 31 mars 2016 (Order No. 2004-559 of 17 June 2004 on partnership contracts). http://www.economie.gouv.fr/files/directions_services/ppp/ordonnance2004-559_ang.pdf

²⁵ LOI n° 2008-735 du 28 juillet 2008 relative aux contrats de partenariat (1), NOR: ECEX0774541L, Version consolidée au 31 mars 2016 (Order No. 2004-559 of 17 June 2004 on partnership contracts). http://www.economie.gouv.fr/files/directions_services/ppp/ordonnance2004-559_ang.pdf

²⁶ LOI n° 2008-735 du 28 juillet 2008 relative aux contrats de partenariat (1), NOR: ECEX0774541L, Version consolidée au 31 mars 2016 (Order No. 2004-559 of 17 June 2004 on partnership contracts). http://www.economie.gouv.fr/files/directions_services/ppp/ordonnance2004-559_ang.pdf

²⁷ François-Guilhem Vaissier, Hugues Martin-Sisteron and Anna Seniuta, France in Bruno Werneck and Mário Saadi (eds), *The Public-Private Partnership Law Review*, London, 2015, p. 79.

²⁸ http://www.economie.gouv.fr/files/directions_services/ppp/mapp_profile_ang.pdf

²⁹ Order No. 2004-1119 of 19 October 2004.

PPP contract.³⁰ State procuring authorities (e.g., ministries and public institutions) are obliged to submit their preliminary evaluation to *Mission d'appui aux partenariats public-privé* for its validation. Local authorities³¹ are also obliged to submit their preliminary evaluations to the *Mission d'appui aux partenariats public-privé* for its validation.³²

France has become one of the most buoyant markets in the world for “government-pay PPPs”. Since the introduction of the french act on *contrat de partenariat* and *Mission d'appui aux partenariats public-privé* more than 200 government-pay PPP projects have reached financial close with an aggregate investment value in excess of EUR 12 billion.³³

Thus, since 2011, *Mission d'appui aux partenariats public-privé* has delivered a “service with national competence” and is placed at the Treasury department of the Ministry of Economy, Finance and Industry.

Besides being a PPP project gate-keeper, providing support to public sector entities in the preparation, negotiation and monitoring of *contrats de partenariat* and inform on and promotes the use of *contrats de partenariat*, *Mission d'appui aux partenariats public-privé* is a key feature of the French PPP market and a significant reason for the PPP success in France. 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%.³⁴

3.2. Promoting PPP through public funding/guarantee system

In 2009, the French Government established a *temporary* guarantee system for priority PPP,³⁵ hence there are no longer any state guarantees *per se* issued for PPPs in France. Local authorities may, however, guarantee loans subscribed by the project company under a concession agreement, or a partnership contract.³⁶

The 2009 “Stimulus Package for PPP³⁷ - *le Plan de relance* - regarded public spending during the economic crises and included several PPP initiatives. The 2009-

³⁰ François-Guilhem Vaissier, Hugues Martin-Sisteron and Anna Seniuta, France in Bruno Werneck and Mário Saadi (eds), *The Public-Private Partnership Law Review*, London, 2015, p. 78.

³¹ Furthermore, in accordance with the 2008 PPP-Act in article 9, last paragraph, PPP contracts must be communicated to *Mission d'appui aux partenariats public-privé* after their signature due to statistics and economic required analyses. Furthermore, the procurement of a PPP follows specific French PPP public procurement rules implicating the principles from the EU public procurement law. This is not covered by the analyses in this paper.

³² François-Guilhem Vaissier, Hugues Martin-Sisteron and Anna Seniuta, France in Bruno Werneck and Mário Saadi (eds), *The Public-Private Partnership Law Review*, London, 2015, p. 78.

³³ http://www.eib.org/epec/resources/epec_france_public_en.pdf

³⁴ http://www.eib.org/epec/resources/epec_france_public_en.pdf

³⁵ Tvarnø, CD, *Danish Public-Private Partnerships in a Comparative Perspective*, 2015 in Nielsen mfl. Erhvervsret, DJØF.

³⁶ François-Guilhem Vaissier, Hugues Martin-Sisteron and Anna Seniuta, France in Bruno Werneck and Mário Saadi (eds) *The Public-Private Partnership Law Review*, London, 2015, p. 82.

³⁷ Law No. 2009-122 of February 4, 2009, *Journal Officiel de la Republique Francaise*, Feb. 5, 2009, p. 2032. See also European PPP Expertise Centre, *Market Update*, 2013 p. 2 and [http://www.cedr.fr/home/fileadmin/user_upload/Publications/2009/e_Public_private_partnerships_\(PPP\).pdf](http://www.cedr.fr/home/fileadmin/user_upload/Publications/2009/e_Public_private_partnerships_(PPP).pdf).

⁴³ *Plan de relance: Des programmes de construction et d'investissement publics et privés, dans ses dispositions relatives aux contrats de partenariat - Strategy to support public infrastructure:* <http://www.plan-de-relance.fr/index.php>.

Plan de relance introduced a PPP guarantee that allowed up to 80 % of the cost of a PPP project (awarded by the French Ministry of Economy), either as a loan or securities to be financed by the signatory of the PPP contract or the bank financing of the project.³⁸

Furthermore, possibilities to apply for co-financing was introduced by the *2009-Plan de relance*. Both instruments had the aim of boosting the PPP market in France by setting up a legal and economic system.³⁹

This PPP financial instrument is no longer in function in France, but moved France to be the second largest PPP market in the EU in 2012 measured by the number of projects,⁴⁰ and thus created a significant and competitive PPP market in France.

4. The Irish PPP regulation

Ireland adopted a PPP act in 2002 called the State Authorities (Public Private Partnership) act.⁴¹ In 2006, the National Development Finance Agency developed the “Template PPP Project Agreement” and a PPP guideline that has a clause-by-clause commentary on the Template Project Agreement.⁴² The Template PPP Project agreement concerns 25–30 year design–build–finance–operate or design–build–finance–maintain PPP contracts.

The Irish PPP act explicitly defines PPP projects. A PPP contract must firstly have a minimum duration of five years without any upper limit on the length of the PPP contract, secondly, will typically involve a monthly payment by the authorities to the PPP company and will, finally, be based on the whole-life costs of designing, constructing, operating, maintaining, and financing the project alongside an agreed profit for the project company.⁴³

There are no statutory constraints on particular sectors preventing the use of PPPs. However, in practice, the operations side of accommodation projects are confined to ‘soft services’ such as cleaning and catering and there has been no attempt to outsource services in, e.g. the health, education, and prison sectors.⁴⁴

4.1. The Irish central governmental PPP unit

By the National Development Finance Agency 2002 act,⁴⁵ the Irish government decided that the National Development Finance Agency should procure all PPP projects over €30 million. Thus, the National Development Finance Agency procures all PPP

³⁸ Tvarnø, CD, Danish Public-Private Partnerships in a Comparative Perspective, in Nielsen mfl. Erhvervsret, DJØF, 2015.

³⁹ Milica Zatezalo-Falatar, Public Private Partnerships in France — State Guarantee Supports the Congested Pipeline, Columbia Journal of European Law, 16 page 71- (2010).

⁴⁰ EPEC, 2012, France, PPP Units and Related Institutional Framework, p. 11.

⁴¹ STATE AUTHORITIES (PUBLIC PRIVATE PARTNERSHIP ARRANGEMENTS) ACT, Number 1 of 2002

⁴² www.ndfa.ie/Publications/stdDocumentation.htm.

⁴³ Mary Dunne, Ireland In Bruno Werneck and Mário Saadi, The public private partnership law review, 2015, Chapter 8.

⁴⁴ Mary Dunne, Ireland In Bruno Werneck and Mário Saadi, The public private partnership law review, 2015, Chapter 8.

⁴⁵ National development finance agency act, *Number 29 of 2002*, <http://ppp.gov.ie/wp-content/uploads/2014/02/NDFAA2902.pdf>

projects, except PPP projects regarding transport and water. The National Roads Authority and the Railway Procurement Agency carry out PPP road and rail projects.

The National Development Finance Agency 2002 and 2007⁴⁶ Act allow the National Development Finance Agency to procure a Centre of Expertise for procuring Public Private Partnership projects on behalf of the State authorities. Thus, the National Development Finance Agency hold the power to enter into PPPs and after worth transfer the PPP project to the relevant State authority, or to act as agents for State authorities for PPP procurement.

Furthermore, the National Development Finance Agency provides advice to State authorities, including Government departments, to assist them in evaluating financial risks and costs of public investment projects, assess optimal financing for PPP projects and in certain circumstances, raise finance for public investment projects.

Hence, the National Development Finance Agency advertises the PPP project, runs the procurement process and negotiates all project documentation on behalf of the specific public authority, which signs the contract.

4.2. Promoting PPP through stimulus packages

From 2012-2014, the Irish government announced four stimulus packages including a number of PPP programmes, but does not give state guarantees for PPP projects.⁴⁷ The four Irish Stimulus Announcements:⁴⁸

-July 2012 – A €2¼ billion Stimulus Package which included a new €1½ billion PPP programme involving projects across the education, roads, healthcare and justice sectors.

-June 2013 – announcement of €150m Exchequer investment in schools, energy efficiency and roads projects.

-Budget 2014 – announcement that, along with the €200m already committed to the National Children’s Hospital, some €200m would be invested from the Lottery Licence transaction.

-May 2014 - Exchequer investment of €200m to fund new projects in a range of sectors including new road schemes, social housing to meet acute needs arising in that area and a range of tourist related works to help support long term jobs.

PPP projects in Ireland became relevant due to an urgent need to deliver in the late 1990’s which resulted in the Irish government announcing eight pilot PPP projects in 1999 and, furthermore, stated in the National Development Plan 2000-2006 in November 1999 that the PPP programme would be prioritised further. Thus, more than 70 PPP projects were taken into consideration in 2001, but only a few came through the procurement process.

Due to the worldwide economic crisis in 2008, the PPP concept was set on hold for a period, just to receive a major boost in July 2012 because of the ‘Stimulus Plan’ for the Irish economy. Hence, several suspended PPP projects were re-opened and new PPP

⁴⁶ National development finance agency Act (amendment), Number 16 of 2007, http://ppp.gov.ie/wp/files/documents/legislation/national_development_finance_agency_amendment_act_2007_a1607.pdf

⁴⁷ Mary Dunne, Ireland In Bruno Werneck and Mário Saadi, The public private partnership law review, 2015, Chapter 8.

⁴⁸<http://www.per.gov.ie/en/minister-for-public-expenditure-and-reform-brendan-howlin-td-announces-phase-4-infrastructure-stimulus-investing-in-recovery-and-growth-2/>

projects were announced. Due to the first 2012 Stimulus plan, 43 PPP projects was in operation by September 2012 and 40 projects were under procurement or construction.⁴⁹

5. The British PPP regulation

United Kingdom is the member state in EU with the longest and largest experience of PPP. Thus, this section will not go through the existing data and legal status, but instead analyse the PF2 strategy launched by the Government in 2012. In this strategy, the Treasury defines PPPs as: “models that are characterised by joint working and risk sharing between the public sector and private industry including relatively simple outsourcing-type partnerships (in which the services is provided on short or medium-term contracts), or longer-run private finance partnerships such as the Private Finance Initiative (PFI) to ensure *”driving forward efficiencies; getting projects built to time and to budget; and in creating the correct disciplines and incentives on the private sector to manage risk effectively.”*⁵⁰

The United Kingdom introduced PPPs in order to engage the private sector in the design, build, finance, and operation of public infrastructure. The aim was to deliver good quality and well maintained buildings and infrastructures that could provide more value for money for the taxpayer. PPP has been used in the United Kingdom in more than 700 projects, of which many with a positive outcome, and is thus still an important part of the Government’s overall investment in public infrastructure and services.⁵¹ By March 2014, United Kingdom had 728 PPP or PFI projects with a total capital value of 56,549 million pounds.⁵²

The many lessons learned from the more than 700 PPP projects have led to the 2012 PF2 strategy stating that the PPP (PFI) model has been used on projects *”where there was insufficient long term certainty on the future requirements of services; or where fast-paced technological changes made it difficult to establish requirements for the long term”*⁵³ and thus ended in situations not creating value for the tax payers money. This situation led to the PF2 strategy and a new structure of PPPs in the United Kingdom.

Hence, the United Kingdom has no legal act that concerns, defines or supports PPPs. The Treasury is responsible for all PPP guidelines and PPP contracts in the United Kingdom, such as for example the PPP policy and guidance and the Standardisation of PF” Contracts 2012.⁵⁴

⁴⁹ Eoin Reeves, Darragh Flannery, and Donal Palcic, Are We There Yet? The Length of Tendering Periods for PPPs in Ireland, University of Limerick, Paper presented to the CBS-Sauder-Monash Public-Private Partnership Conference Series, School of Business, University of British Columbia, Vancouver, BC, Canada, June 13 – 14, 2013.

⁵⁰ HM Treasury, A new approach to public private partnerships, December 2012, p. 5. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/205112/pf2_infrastructure_new_approach_to_public_private_parnerships_051212.pdf

⁵¹ Ibid.

⁵² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387228/pfi_projects_2014_summary_data_final_15122014.pdf

⁵³ HM Treasury, A new approach to public private partnerships, December 2012, p. 6. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/205112/pf2_infrastructure_new_approach_to_public_private_parnerships_051212.pdf

⁵⁴ http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/infrastructure_ppp_procurement.htm

5.1. The British perspective on a central governmental PPP unit

The first central PPP unit in UK was established in 2000. Partnerships UK was designed to be the central focal point for all PPP and PFI activities across the UK government and focused on a number of significant projects, helping departments to set priorities from the outset while trying to ease negotiations and obtain value for money. The Government Resources and Accounts Act from 2000 provided legal provision for establishing Partnerships UK and the purpose was to improve the process of planning, negotiating and completing PPPs.

Partnerships UK reflected the Governments desire to have a central consulting service for public sector clients in all PPP sectors and to develop and harmonise the PPP processes and had a staff consisting of 80 members, more than GBP 20 million of equity investments and was involved in virtually all the Government's PPP projects at one level or another.

In 2009, the Infrastructure UK unit was established to absorb the tasks from Partnerships UK and to accommodate a wider remit and coordinate infrastructure planning as a whole more effectively and not focus solely on PPP and PFI. A Chief Executive appointed by HM Treasury reporting to the Permanent Secretary of HM Treasury managed Infrastructure UK.⁵⁵

In 2016, PPP projects are no longer procured by central PPP agency in UK, but by the local authorities, the NHS Trusts, the Foundation Trusts, and the individual central government department.

In regard to the PF2 strategy, it has been addressed that centralisation and improved professionalism of public sector procurement would be relevant among other things supported by international examples of centralised procurement units in countries like Canada. Thus, the UK Government recognises centralisation of procurement to a certain degree, but not as far as establishing one single, centralised PPP procurement unit.

To improve the UK public sector procurement skills in general, the Infrastructure UK and the Major Projects Authority has merged in the beginning of 2016, with the aim of centralising the government's expertise, knowledge, and skills at managing and delivering major economic projects. This new organisation is called *Infrastructure and Projects Authority* and holds the expertise in the financing, delivery, and assurance of PPP projects, as large-scale infrastructure projects, the Thames Tideway Tunnel, and major transformation programmes such as Universal Credit.

Furthermore, a central unit in the Department will procure the Priority Schools Building Programme for Education called the Education Funding Agency and the Government encourages this strategy of central procurement unit in other authorities.⁵⁶

Thus, United Kingdom did establish a strong PPP unit to boost the PPP. Furthermore, the United Kingdom has and will continue to have a strong market oriented view on PPP. As the only member state in the EU, the United Kingdom has established more than 700 PPP projects supported by a significant effort through distinctive policies and thus, the public authorities now hold the competence to procure and maintenance efficient PPP projects themselves. Due to the achieved public skills, the United Kingdom will not introduce legally binding measures, but will, in

⁵⁵ European PPP Expertise Centre, United Kingdom – England, PPP Units and Related Institutional Framework, 2012

http://www.eib.org/epec/resources/publications/epec_uk_england_public_en.pdf

⁵⁶ HM Treasury, A new approach to public private partnerships, December 2012, p. 9.

accordance with the PF2 strategy ensure efficient PPP projects in the future from within the public sector itself.

5.2. Promoting PPP through an Equity Strategy

In the PF2 strategy, the Government announced that it would act as a minority investor in future PF2 projects.⁵⁷ In the public document "*A new approach to public private partnerships: consultation on the terms of public sector equity participation in PF2 projects*" ('consultation paper'),⁵⁸ the Government has been considered in the structuring of the arrangements for PF2's public sector equity, and has published the final "Standard PF2 Equity Documents" which contains the commercial principles in regard to the Government's PPP policy.

Hence, the UK Government will not support every PPP project with public investments. If public funding is relevant, it will be reflected in the procurement documents. This means:

"...the Government has a firm intention to invest, subject to the transaction satisfying the Treasury PF2 equity unit's eligibility criteria ('Eligibility Criteria')."⁵⁹

To ensure the right procedure through the government authorities in general, the Treasury PF2 equity unit will carry out a due diligence on the final bids submitted to an Authority including: *information regarding risk allocation between ProjectCo and its supply chain, the creditworthiness of supply chain contractors and the other shareholders and details of the proposed funding arrangements, including term sheets.*⁶⁰ Hereafter, the Investment Committee of the Treasury PF2 equity unit will determine the bid, and will thereby satisfy the Eligibility Criteria at financial close and inform the public authority on the result.

6. The lack of regulatory Danish PPP initiatives

Danish law does not define PPP by a legal statute nor does the Danish Government use financial instruments to support the establishment of PPP projects. In Denmark, a central governmental PPP unit is not prioritized.

PPP is defined in section 2 in the Danish Public Order on PPP.⁶¹ Hence, a Governmental public building owner must in concern of a building subject to the Act on State Construction⁶² consider if a construction could benefit from a PPP perspective.⁶³

⁵⁷ Ibid.

⁵⁸ <https://www.gov.uk/government/consultations/a-new-approach-to-public-private-partnerships-consultation-on-the-terms-of-public-sector-equity-participation-in-pf2-projects>

⁵⁹ The Eligibility Criteria is published on www.gov.uk, following their approval by the Investment Committee of the Treasury PF2 equity unit.

⁶⁰ HM Treasury, Government response to: A new approach to public private partnerships consultation on the terms of public sector equity participation in PF2 projects, 2013. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/250122/PU1572_government_response_to_public_sector_equity_consultation.pdf

⁶¹ Government Order on PPP, Bekendtgørelse om kvalitet, OPP og totaløkonomi i offentligt byggeri, no. 1179 of oktober 4, 2013.

⁶² Act on Governmental construction, Lov om statens byggevirksomhed, no. 1712 of December 16, 2010.

According to the not legally binding PPP guideline⁶⁴ connected to the Public Order on PPP,⁶⁵ a PPP is defined as a collaboration that includes a high private involvement in public construction and operation of buildings. Considering the limited number of existing Danish PPPs, neither the first nor the second PPP strategy have had a significant effect on establishing a PPP marked in Denmark. Hence, due to Danish national law, PPP projects are defined in the Governmental Order on PPP constructions,⁶⁶ section 4 as a construction that is built on the basis of a comprehensive agreement on design, construction, operation, and private financing of a building in a specified number of years.

The definition and the Governmental Order apply to the construction, rebuilding and extension of buildings and facilities associated with them which is part of a public-private partnership when the building is:

- Constructed for use by the state,
- Financed by more than 50% loans or grants from the state or
- Constructed for the use of institutions that receive operating subsidies from the state when the grant is at least 50 percent.⁶⁷

It can be argued that the lack of PPP projects in Denmark constitute a risk of losing future potential wealth, innovation, and competitive advantages.⁶⁸ Opposite to Denmark, France has had a non-binding PPP strategy supporting the strict French legally binding PPP act. Furthermore, France supported the establishment of PPP projects through economic measures defined in a legal act for several years in order to boost the public private collaboration and the PPP market in France.

⁶³ Tvarnø, Danish Public-Private Partnerships, in a Comparative Perspective, in Erhvervsretlige emner, Peter Arnt Nielsen, Peter Koerver Schmidt & Katja Dyppel Weber (eds), Djøf, 2015, pp. 325-348.

⁶⁴ Guideline regarding PPP (2013): Vejledning til bekendtgørelse om kvalitet, OPP og totaløkonomi i offentligt byggeri, oktober 11, 2013. In 2004, the Danish Government presented the first Danish PPP political strategy. This policy statement concluded that the public sector could benefit from a market perspective and could increase its effectivity and flexibility by using the private industry to solve public tasks through PPP's. Strategy regarding PPP (2004): Handlingsplan for Offentlig-Private Partnerskaber (OPP), Regeringen, januar 2004, Økonomi- og Erhvervsministeriet. In 2011, the Danish Government presented a second Danish strategy including PPP: Strategy regarding PPP (2011) Strategi til fremme af offentlig-privat samarbejde, Regeringen, 2011:43, Økonomi- og Erhvervsministeriet (OPS-strategien). The purpose of the second political strategy was to increase growth and productivity through competition on public tasks and services. Its objective was to facilitate collaboration among public and private parties,⁶⁴ through providing more simple public procurement rules incorporated by a Danish Public procurement Act, and increasing the contracting out of public services. See also Tvarnø, Danish Public-Private Partnerships, in a Comparative Perspective, in Erhvervsretlige emner, Peter Arnt Nielsen, Peter Koerver Schmidt & Katja Dyppel Weber (eds), Djøf, 2015, pp. 325-348.

⁶⁵ Government Order on PPP, Bekendtgørelse om kvalitet, OPP og totaløkonomi i offentligt byggeri, no. 1179 of oktober 4, 2013.

⁶⁶ Public Government Order on PPP (2013).

⁶⁷ The data build on The Danish Competition and Consumer Authority, Erfaringer fra de danske OPP-projekter, konkurrence- og forbrugeranalyse 04, 2012, http://www.kfst.dk/Offentligkonkurrence/~/_media/KFST/Offentlig%20konkurrence/Undersoegelse%20af%20danske%20OPPerfaringer/Undersoegelse%20af%20de%20danske%20OPPerfaringer.pdf supported with updated local data from municipalities.

⁶⁸ Tvarnø, The Problems for PPPs of Budget Restrictions on Municipal Authorities in Denmark, Public Procurement Law Review, Vol. 2015, Nr. 4, 2015, p. NA118-NA123.

Similar to France, Ireland has established both a legal act defining PPP, a central PPP unit procuring and supporting the operation of PPP projects, and has been supporting the establishment of PPP projects through economic measures.

The non-binding Danish PPP strategy has not provided a Danish PPP market, even though it has existed since 2004. Due to the political, economic, and legal experiences from UK, France and Ireland, Denmark could improve the PPP market through a legally binding PPP act, economic investments and furthermore, a central PPP unit could ensure a significant public PPP expertise, save governmental transaction costs, and meet the private sector with more dynamic, efficiency and PPP skills.⁶⁹

7. The OECD perspective on PPP

OECD argues that PPPs operate best in a legal and regulatory environment based upon transparency, clarity about the legal framework, and where the terms in the PPP contract is enforced.

Hence, OECD defines PPP as:

“...an agreement between the government and one or more private partners (which may include the operators and the financiers) according to which the private partners deliver the service in such manner that the service delivery objectives of the government are aligned with the profit objectives of the private partners and where effectiveness of the alignment depends on a sufficient transfer of risk to the private partners.⁷⁰

OECD argues that before regulating PPP, a national central PPP unit should be established to ensure the efficient and proper knowledge on the PPP market.⁷¹

Additionally, OECD argues that central PPP units are a critical element in supporting efficient PPP projects within the member state.⁷² A central PPP unit must ensure the public sectors capacity to create, procure, manage, and evaluate PPPs. Furthermore, a central PPP unit can ensure the creation of a PPP market, the budget terms, commitment, the honour of future payments, provide professional knowledge and contract management, establish a centre of knowledge, separate PPP practice from PPP policy and propose relevant regulatory instruments to the policy makers.⁷³

As shown above in subsection 1, many EU member states have established some form of PPP capability to implement PPPs, usually in the form of a specialist and centralised national PPP unit. OECD argues that the establishing of a PPP unit can provide technical expertise within government and can be an effective way to strengthen government's capacity to select, prepare, deliver, and manage PPP projects efficiently.⁷⁴

⁶⁹ Tvarnø, Danish Public-Private Partnerships, in a Comparative Perspective, in Erhvervsretlige emner, Peter Arnt Nielsen, Peter Koerver Schmidt & Katja Dyppel Weber (eds), Djøf, 2015, p. 325-348.

⁷⁰ Ibid, p. 17.

⁷¹ OECD, Public-Private Partnership, In pursuit of risk sharing and value for money, 2008, p. 133.

⁷² Ibid, p.109.

⁷³ Ibid, p. 110.

⁷⁴ Ibid, p. 110.

In 2011, OECD concluded that several EU member states had PPP on the public budget and the PPP investments have only improved since:

EU member state	PPP percentage	EU member state	PPP percentage
Czech Republic	>0% - 1%	Luxembourg	>5-10 %
Finland	>10-15 %	Spain	>3-5 %
Germany	>3-5 %	UK	>15 %
Italy	>1-3 %		

Percentage of public sector infrastructure investment flow (total asset value, public and private components included) took place through PPPs in 2011.⁷⁵

8. Conclusion

For more than a decade, Denmark has had a PPP strategy that has not been supported by any legally binding rules or political strategies with the result of a significant lack of a Danish PPP projects.

As mentioned above, the Danish PPP strategy has not created a market for PPP in Denmark, even though it has existed since 2004 and thus it can be argued that a non-binding political instrument is not enough to ensure a PPP market in Denmark, a market several Danish Governments have tried to prioritize.

Due to the political, economic, and legal experiences from UK, France and Ireland, Denmark could improve the PPP market through a legally binding PPP act, economic investments and furthermore, a central PPP unit could ensure a significant public PPP expertise, save governmental transaction costs, and meet the private sector with more dynamic, efficiency and PPP skills.⁷⁶

The experiences from the EU member states and in this paper specifically France, UK, and Ireland can provide solutions on how to create a more efficient PPP regime in Denmark. It is recommended that the Danish Government establishes a central PPP unit, creates a binding legal act on PPP including a definition of PPP, and consider to promote PPPs through economic measures as in France and Ireland.

⁷⁵ Burger & Hawkesworth. Capital Budgeting and Procurement Practices'. OECD 2013. The survey was conducted during the period June-August 2012. The UK topped the list with the percentage of public sector infrastructure investment that takes place through PPPs exceeding 15%.

⁷⁶ Tvarnø, Danish Public-Private Partnerships, in a *Comparative Perspective*, in Erhvervsretlige emner, Peter Arnt Nielsen, Peter Koerver Schmidt & Katja Dyppel Weber (eds), Djøf, 2015, pp. 325-348.