

Public-private Partnerships

Contents

1. Green Paper on Public-private Partnerships and Community Law on Public Contracts and Concessions, document COM (2004) 327 final (*excerpt*)
2. State authorities (Public private partnerships arrangements) Act, 2002 (Ireland)
3. Explanatory memorandum, 2001 (Ireland)
4. Art. 3 comma 15-*ter*, Codice dei contratti pubblici, 2006 as amended 2008 (Italy)



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.4.2004
COM(2004) 327 final

GREEN PAPER
ON PUBLIC-PRIVATE PARTNERSHIPS AND COMMUNITY LAW ON PUBLIC
CONTRACTS AND CONCESSIONS

(presented by the Commission)

1. DEVELOPMENT OF THE PUBLIC-PRIVATE PARTNERSHIP: FACTS AND CHALLENGES

1.1. The “public-private partnership” phenomenon

1. The term public-private partnership ("PPP") is not defined at Community level. In general, the term refers to forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service.
2. The following elements normally characterise PPPs:
 - The relatively long duration of the relationship, involving cooperation between the public partner and the private partner on different aspects of a planned project.
 - The method of funding the project, in part from the private sector, sometimes by means of complex arrangements between the various players. Nonetheless, public funds - in some cases rather substantial - may be added to the private funds.
 - The important role of the economic operator, who participates at different stages in the project (design, completion, implementation, funding). The public partner concentrates primarily on defining the objectives to be attained in terms of public interest, quality of services provided and pricing policy, and it takes responsibility for monitoring compliance with these objectives.
 - The distribution of risks between the public partner and the private partner, to whom the risks generally borne by the public sector are transferred. However, a PPP does not necessarily mean that the private partner assumes all the risks, or even the major share of the risks linked to the project. The precise distribution of risk is determined case by case, according to the respective ability of the parties concerned to assess, control and cope with this risk.
3. During the last decade, the PPP phenomenon developed in many fields falling within the scope of the public sector. Various factors explain the increased recourse to PPPs. In view of the budget constraints confronting Member States, it meets a need for private funding for the public sector. Another explanation is the desire to benefit more in public life from the know-how and working methods of the private sector. The development of the PPP is also part of the more general change in the role of the State in the economy, moving from a role of direct operator to one of organiser, regulator and controller.
4. The public authorities of Member States often have recourse to PPP arrangements to undertake infrastructure projects, in particular in sectors such as transport, public health, education and national security. At European level, it was recognised that recourse to PPPs could help to put in place trans-European transport networks, which had fallen very much behind schedule, mainly owing to a lack of funding.¹ As part of the Initiative for Growth, the Council has approved a series of measures designed to

¹ See Communication from the Commission of 23 April 2003 "Developing the trans-European transport network: innovative funding solutions - interoperability of electronic toll collection systems", COM (2003) 132, and the Report of the high-level group on the trans-European transport network of 27 June 2003.

increase investment in the infrastructure of the trans-European transport network and also in the fields of innovation, research and development, mainly through forms of PPPs.²

5. However, while it is true that cooperation between the public and private sectors can offer micro-economic benefits permitting execution of a project that provides value for money and meets public interest objectives, recourse to PPPs cannot be presented as a miracle solution for a public sector facing budget constraints.³ Experience shows that, for each project, it is necessary to assess whether the partnership option offers real value added compared with other options, such as the conclusion of a more traditional contract.⁴
6. The Commission also notes with interest that some Member States and accession countries have created tools to coordinate and promote PPPs, aimed, *inter alia*, at disseminating “good practice” for PPPs at national or at European level. These tools aim to make related expertise mutually available (for example the Task forces in the United Kingdom or in Italy) and thus advise users about the different forms of PPP and their stages, such as initial conception, how to choose a private partner, the best allocation of risks, the choice of contractual clauses or even the integration of community financing.
7. Public authorities have also set up partnership structures with the private sector to administer public services, particularly at local level. Public services concerned with waste management or water or energy distribution are thus increasingly being entrusted to businesses, which can be public, private, or a combination thereof. The Green Paper on services of general interest points out in this context that when a public authority decides to award the management of a service to a third party, it is bound to comply with the rules on public contracts and concessions, even if this service is deemed to be of general interest.⁵ The European Parliament also recognised that compliance with these rules can be “an effective instrument for preventing restrictions of competition, while at the same time permitting State authorities themselves to define and monitor the conditions regarding quality, availability and environmental requirements.”⁶

² Conclusions of the Presidency, Brussels European Council, 12 December 2003.

³ Eurostat, the Statistical Office of the European Communities, has on the 11th of February 2004 (cf. press release STAT/04/18) taken a decision on the accounting treatment in national accounts of contracts undertaken by government units in the framework of partnerships with non-government units. The decision specifies the impact on government deficit/surplus and debt. Eurostat recommends that the assets involved in a public-private partnership should be classified as non-government assets, and therefore recorded off balance sheet for government, if both of the following conditions are met: 1. the private partner bears the construction risk, and 2. the private partner bears at least one of either availability or demand risk.

⁴ See Communication from the Commission to the Council and to the Parliament “Public finances in EMU 2003”, published in the European Economy No 3/2003 (COM (2003) 283 final).

⁵ COM (2003)270 final. See, for the text of the Green Paper and the contributions, http://europa.eu.int/comm.secretariat_general/services_general_interest.

⁶ Resolution of the European Parliament on the Green Paper on services of general interest, adopted on 14 January 2004.

1.2 The challenge for the Internal Market: to facilitate the development of PPPs under conditions of effective competition and legal clarity.

8. This Green Paper discusses the phenomenon of PPPs from the perspective of Community legislation on public contracts and concessions. Community law does not lay down any special rules covering the phenomenon of PPPs. It nonetheless remains true that any act, whether it be contractual or unilateral, whereby a public entity entrusts the provision of an economic activity to a third party must be examined in the light of the rules and principles resulting from the Treaty, particularly as regards the principles of freedom of establishment and freedom to provide services (Articles 43 and 49 of the EC Treaty)⁷, which encompass in particular the principles of transparency, equality of treatment, proportionality and mutual recognition.⁸ Moreover, detailed provisions apply in the cases covered by the Directives relating to the coordination of procedures for the award of public contracts.^{9 10} These Directives are thus “essentially aimed at protecting the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State and, to that end, to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body governed by public law may choose to be guided by considerations other than economic ones.”¹¹ However, the application of the detailed provisions of these Directives is circumscribed by certain assumptions and mainly concerns the award of contracts.
9. The rules applicable to the selection of a private partner derive firstly from the definition of the contractual relationship which that party enters into with a

⁷ The rules on the internal market, including the rules and principles governing public contracts and concessions, apply to any economic activity, i.e. any activity which consists in providing services, goods, or carrying out works in a market, even if these services, goods or works are intended to provide a "public service", as defined by a Member State.

⁸ See Interpretative Communication of the Commission on concessions in Community law, OJ C 121, 29 April 2000.

⁹ i.e. Directives 92/50/EEC, 93/36/EEC, 93/37/EEC, 93/38/EEC, relating to the coordination of procedures for the award respectively of public service contracts, public supply contracts, public works contracts, and contracts in the water, energy, transport and telecommunications sectors. These Directives will be replaced by Directive 2004/18/EC of the European Parliament and of Council of 31 March 2004 relating to the coordination of procedures for the award of public works, supply and services contracts, and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 relating to the coordination of procedures for the award of contracts in the water, energy, transport and postal services sectors, which will be published in the near future in the OJ. The [provisional] version of the new Directives may be consulted at the website http://www.europarl.eu.int/code/concluded/default_2003_en.htm.

¹⁰ Moreover, in certain sectors, and particularly the transport sector, the organisation of a PPP may be subject to specific sectoral legislation. See Regulation (EEC) No 2408/92 of the Council on access of Community air carriers to intra-Community air routes, Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States, Council Regulation (EEC) No 1191/69 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, as amended by Regulation (EEC) No 1893/91, and the amended proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway (COM(2002) 107 final).

¹¹ Joint cases C-285/99 and C-286/99, *Impresa Lombardini v. ANAS*, Judgment of 27 November 2001, paragraph 36 and, to that effect case C-380/98, *University of Cambridge*, ECR I-8035 and case C-19/00, *SIAC construction*, ECR I-7725.

contracting body.¹² Under Community secondary legislation, any contract for pecuniary interest concluded in writing between a contracting body and an operator, which have as their object the execution of works, the execution of a work or provision of a service, is designated as a “public works or public services contract”. The concept of “concession” is defined as a contract of the same type as a public contract except for the fact that the consideration for the works to be carried out or the services to be provided consists either solely in the right to exploit the construction or service, or in this right together with payment.

10. The assessment of the elements in these definitions must, in the view of the Court, be made in such a way as to ensure that the Directive is not deprived of practical effect.¹³ For example, the formalism attached to the concept of contract under national law cannot be advanced to deprive the Directives of their practical effect. Similarly, the pecuniary nature of the contract in question does not necessarily imply the direct payment of a price by the public partner, but may derive from any other form of economic consideration received by the private partner.
11. The contracts denoted as public works or public services contracts, defined as having priority,¹⁴ are subject to the detailed provisions of Community Directives. The concessions of so-called “non-priority” works and public services contracts are governed only by some sparse provisions of secondary legislation. Lastly, some projects, and in particular services concessions, fall completely outside the scope of secondary legislation. The same is true of any assignment awarded in the form of a unilateral act.
12. The legislative framework governing the choice of private partner has thus been the subject of Community coordination at several levels and degrees of intensity, with a wide variety of approaches persisting at national level, even though any project involving the award of tasks to a third party is governed by a minimum base of principles deriving from Articles 43 to 49 of the EC Treaty.
13. The Commission has already taken initiatives under public procurement law to deal with the PPP phenomenon. In 2000 it published an Interpretive Communication on concessions and Community public procurement law,¹⁵ in which it defined, on the basis of the rules and principles derived from the Treaty and applicable secondary legislation, the outlines of the concept of concession in Community law and the obligations incumbent on the public authorities when selecting the economic operators to whom the concessions are granted. In addition, the new Directives of the European Parliament and the Council designed to modernise and simplify the Community legislative framework, establish an innovative award procedure, designed principally to meet the specific features of the award of “particularly

¹² In PPPs, the public partners are primarily national, regional or local authorities. They may also be public law bodies created to fulfil general interest tasks under State control, or certain network system operators. To simplify matters, the term “contracting body” will be used in this document to designate all of these agencies. Thus this term covers “contracting authorities” within the meaning of Directives 92/50/EEC, 93/36/EEC, 93/37/EEC and 2004/18/EC and the contracting entities of the type “public authorities” and “public undertakings” within the meaning of Directives 93/38/EEC and 2004/17/EC.

¹³ Judgment of the Court of 12 July 2001, Case C-399/98, *Scala*, ECR I-5409, see in particular points 53 to 55.

¹⁴ i.e. those listed in Annex IA of Directive 92/50/EEC or Annex XVIA of Directive 93/38/EEC.

¹⁵ Interpretative Communication on concessions under Community law, OJ C 121, 29 April 2000.

complex contracts”, and thereby certain forms of PPPs. This new procedure, designated as “competitive dialogue”, allows the public authorities to hold discussions with the applicant businesses in order to identify the solutions best suited to their needs.

14. The fact remains that many representatives of interested groups consider that the Community rules applicable to the choice of businesses called on to cooperate with a public authority under of a PPP, and their impact on the contractual relationships governing the execution of the partnership, are insufficiently clear and lack homogeneity between the different Member States. Such a situation can create a degree of uncertainty for Community players that is likely to represent a genuine obstacle to the creation or success of PPPs, to the detriment of the financing of major infrastructure projects and the development of quality public services.
15. The European Parliament invited the Commission to examine the possibility of adopting a draft Directive aimed at introducing homogeneous rules for the sector of concessions and other forms of PPPs.¹⁶ The Economic and Social Committee also considered that such a legislative initiative was called for.¹⁷
16. In the context of its Strategy for the internal market 2003-2006,¹⁸ the Commission announced that it would publish a Green Paper on PPPs and Community law on public procurement and concessions, in order to launch a debate on the best way to ensure that PPPs can develop in a context of effective competition and legal clarity. The publication of a Green Paper is also one of the actions planned under the European Initiative for Growth.¹⁹ Lastly, it responds to certain requests made in the course of the public consultation on the Green Paper on services of general interest.²⁰

1.3. Specific aim and plan of this Green Paper

17. The aim of this Green Paper is to launch a debate on the application of Community law on public contracts and concessions to the PPP phenomenon. Once underway such a debate will concentrate on the rules that should be applied when taking a decision to entrust a mission or task to a third party. This takes place downstream of the economic and organisational choice made by a local or national authority, and can in no way be perceived as attempting to make a value judgement regarding the decision to externalise the management of public services or not; this decision remains squarely within the competence of public authorities. Indeed, Community law on public contracts and concessions is neutral as regards the choice exercised by Member States to provide a public service themselves or to entrust it to a third party.
18. Put more clearly, this Green Paper aims to show the extent to which Community rules apply to the phase of selection of the private partner and to the subsequent

¹⁶ Opinion of the European Parliament (first reading) on the proposal of the Commission, COM (2000) 275, 10.05.2002.

¹⁷ Opinion, ESC, OJ C 14, 16.1.2001, rapporteur Mr Levaux, point 4.1.3 and Opinion, ESC, OJ C 193, 10.07.2001, rapporteur Mr Bo Green, point 3.5.

¹⁸ Strategy for the internal market, Priorities 2003-2006, COM (2003) 238 final.

¹⁹ Communication from the Commission "A European initiative for growth: Investing in networks and knowledge for growth and jobs", COM (2003) 690 final, 11 November 2003. This report was approved by the Brussels European Council on 12 December 2003.

²⁰ See Report on the results of the consultation on the Green Paper on general interest services. See above, footnote 5.

phase, with a view to identifying any uncertainties, and to analyse the extent to which the Community framework is suited to the imperatives and specific characteristics of PPPs. Avenues of consideration for possible Community intervention will be outlined. Since the aim of this Green Paper is to launch a consultation, no option for Community intervention has been decided on in advance. Indeed, a wide variety of instruments are available to make PPPs more open to competition in a transparent legal environment, i.e. legislative instruments, interpretative communications, actions to improve the coordination of national practice or the exchange of good practice between Member States.

19. Thus, while this Paper focuses on issues covered by the law on public contracts and concessions, it should be noted that the Commission has already adopted measures, in certain fields, designed to remove barriers to PPPs. Thus, there has already been clarification of the rules on the treatment in the national accounts of contracts entered into by public entities under partnerships with private entities.²¹ Note also that the adoption of the statute for a European company will facilitate trans-European PPPs.²²
20. As part of the analysis of this Green Paper, it is proposed to make a distinction between:
 - PPPs of a purely contractual nature, in which the partnership between the public and the private sector is based solely on contractual links, and
 - PPPs of an institutional nature, involving cooperation between the public and the private sector within a distinct entity.

This distinction is based on the observation that the diversity of PPP practices encountered in the Member States can be traced to two major models. Each of these raise specific questions regarding the application of Community law on public contracts and concessions, and merit separate study, as undertaken in the following chapters.²³

2. PURELY CONTRACTUAL PPPs AND COMMUNITY LAW ON PUBLIC CONTRACTS AND CONCESSIONS

21. The term “purely contractual PPP” refers to a partnership based solely on contractual links between the different players. It covers a variety of set-ups where one or more tasks of a greater or lesser magnitude are assigned to the private partner, and which can include the design, funding, execution, renovation or exploitation of a work or service.

²¹ See above, footnote 3.

²² Council Regulation (EC) No 2157/2001, 8 October 2001.

²³ The distinction thus made does not take account of the legal interpretations made under national law and in no way prejudices the interpretation in Community law of these types of set-ups or contracts. The sole purpose of the analysis which follows is to make a distinction between the set-ups generally termed PPPs, in order to decide, in a second phase, which rules of Community law on public contracts and concessions should apply to them.



Number 1 of 2002

**STATE AUTHORITIES (PUBLIC PRIVATE PARTNERSHIP
ARRANGEMENTS) ACT, 2002**

AN ACT TO MAKE FURTHER PROVISION IN RELATION
TO THE FUNCTIONS AND POWERS OF CERTAIN
STATE AUTHORITIES, IN PARTICULAR TO ENABLE
THEM TO ENTER INTO PUBLIC PRIVATE PARTNER-
SHIP ARRANGEMENTS, AND TO PROVIDE FOR
RELATED MATTERS. [21st February, 2002]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1.—(1) In this Act, except where the context otherwise requires— Interpretation.

“appropriate Minister” means any Minister of the Government on whom functions stand conferred or who has general responsibility in respect of or in connection with the public private partnership arrangement concerned;

“asset” includes an existing asset or an asset to be provided under a public private partnership arrangement;

“company” means a company within the meaning of section 2 of the Companies Act, 1963;

“construction” includes building, refurbishment, maintenance, repair, improvement, demolition, extension and replacement;

“direct agreement” has the meaning given to it by *section 3(1)(c)*;

“functions” includes powers and duties, and a reference to the performance of functions includes, with respect to powers and duties, a reference to the exercise of the powers and the carrying out of the duties;

“local authority” means a county council, city council or town council for the purposes of the Local Government Act, 2001;

“operation” includes management and maintenance;

“partner” has the meaning given to it by *section 3(1)*;

[No. 1.] *State Authorities (Public Private Partnership Arrangements) Act,* [2002.]
2002.

S.1 “public private partnership arrangement” has the meaning given to it by *section 3(1)*;

“State authority” shall be construed in accordance with *section 2*.

(2) In this Act—

(a) a reference to a section or Schedule is a reference to a section of, or a Schedule to, this Act unless it is indicated that reference to some other enactment is intended, and

(b) a reference to a subsection or paragraph is a reference to the subsection or paragraph of the provision in which the reference occurs, unless it is indicated that reference to some other provision is intended.

(3) In this Act, a reference to any other enactment shall be construed as a reference to that enactment as amended, extended or adapted by or under any subsequent enactment.

State authority. **2.**—Each person or body specified in the *Schedule* is, subject to *section 7*, a State authority for the purposes of this Act.

Public private partnership arrangements. **3.**—(1) Without prejudice to the functions of a State authority under any other enactment, a State authority may, either itself or in conjunction with any other person (including another State authority)—

(a) enter into an arrangement (in this Act referred to as a “public private partnership arrangement”) with a person (in this Act referred to as a “partner”) for the performance of functions of the State authority specified in the arrangement in relation to—

(i) the design and construction of an asset, together with the operation of services relating to it and the provision of finance, if required, for such design, construction and operation, or

(ii) the construction of an asset, together with the operation of services relating to it and the provision of finance, if required, for such construction and operation, or

(iii) the design and construction of an asset, together with the provision of finance for such design and construction, or

(iv) the provision of services relating to an asset for not less than 5 years and the provision of finance, if required, for such services,

(b) subject to *subsection (4)*, arrange or provide for a payment to a partner,

(c) enter, where appropriate, into an agreement (in this Act referred to as a “direct agreement”) with a person who has arranged or provided funding for the partner for the carrying out of the public private partnership arrangement,

[2002.] *State Authorities (Public Private Partnership Arrangements) Act,* [No. 1.]
2002.

- (d) transfer an interest, or part of an interest, of the State authority in an asset or part of an asset, to the partner, or, subject to the prior consent of the appropriate Minister or, if the State authority is a Minister of the Government, subject to the consent of the Minister for Finance, to a nominee of the partner by transfer, assignment, conveyance, grant of lease or licence or otherwise, S.3
- (e) take a transfer of an interest of the partner or a nominee of the partner, in an asset or part of an asset, by transfer, assignment, conveyance, grant or surrender of lease or licence or otherwise.

(2) A State authority may, with the consent of the appropriate Minister—

- (a) either itself or in conjunction with any other person (including another State authority) cause a company to be formed and registered, or
- (b) become a shareholder in an existing company,

for the purposes of a public private partnership arrangement or of entering into such an arrangement.

(3) A public private partnership arrangement may include terms and conditions in relation to the performance by the partner concerned of the partner's obligations under the arrangement as agreed by the State authority.

- (4) (a) Where a payment is arranged or provided for pursuant to *section 3(1)(b)* the Minister for Finance may, at any time until entry into the public private partnership arrangement by the State authority, give directions to the appropriate Minister in relation to the aggregate value of exchequer moneys committed to such arrangements, as he or she considers necessary.
- (b) The appropriate Minister shall, in performing his or her functions, have regard to any directions given by the Minister for Finance under this section.

(5) Functions conferred on a State authority by this section are in addition to and not in substitution for any other functions of the authority.

4.—(1) For so long as it continues in force, a public private partnership arrangement shall operate to confer on the partner concerned the functions of the State authority specified in the arrangement, subject to any terms and conditions so specified. Functions of partner and State authority.

(2) A function conferred on a partner by a public private partnership arrangement—

- (a) may be performed by the partner in the partner's own name, subject to the general superintendence and control of the State authority concerned, and
- (b) shall, notwithstanding such arrangement, continue to be vested in the State authority concerned concurrently with the partner and may be performed by either or both of them.

[No. 1.] *State Authorities (Public Private Partnership Arrangements) Act,* [2002.]
2002.

S.4 (3) The conferral of a function of a Minister of the Government on a partner by a public private partnership arrangement shall not affect the Minister's responsibility to Dáil Éireann or as a member of the Government for the performance of the function.

(4) In this section "functions", in relation to a State authority, includes functions of any other State authority to be performed by it pursuant to an agreement or arrangement duly made by it with that other authority.

Effect of public private partnership arrangements.

5.—Where an agreement or arrangement was entered into on a date before the commencement of this Act, and that agreement or arrangement would have been a public private partnership arrangement or direct agreement if this Act had been in operation on such date, then the agreement or arrangement, as the case may be, shall have effect and be taken always to have had effect as if this Act was in operation when the arrangement or agreement was entered into.

Directions.

6.—(1) In relation to a company to be formed and registered, or a company that is formed and registered under *section 3(2)*, an appropriate Minister may, either before, or at the time of entering into a public private partnership arrangement and, without prejudice to the requirements of the Companies Acts, 1963 to 2001, give written directions to either or both—

(a) the State authority concerned, and

(b) where the company has been so formed and registered, the company,

concerning the management, accountability, accounting and financial affairs of such a company and, in relation to such a company that is formed and registered, its participation in the relevant public private partnership arrangement.

(2) In relation to a company that is formed and registered under *section 3(2)*, an appropriate Minister may, without prejudice to the requirements of the Companies Acts, 1963 to 2001, at any time after the company enters into a public private partnership arrangement, give directions to either or both—

(a) the State authority concerned, and

(b) the company,

concerning matters of policy in relation to the public private partnership arrangement concerned or such arrangements generally.

(3) A State authority and a company shall comply with any directions given under this section.

(4) The appropriate Minister may amend or revoke a direction under this section.

Amendment of *Schedule*.

7.—(1) Where the Minister for Finance, following consultation with any appropriate Minister, is of the opinion that—

(a) a public authority not standing specified as a State authority in the *Schedule* ought, having regard to the purposes of this Act, to stand so specified, or

[2002.] *State Authorities (Public Private Partnership Arrangements) Act, 2002.* [No. 1.]

- (b) having regard to the amalgamation, dissolution or change of name of a State authority, the State authority ought to cease to be specified in the *Schedule* or to be so specified under a different name or description,

he or she may, by order, amend the *Schedule* by adding the name of a person or body to it or by deleting the name of a person or body specified in it or by so adding and deleting, as the case may be.

(2) Where an order is proposed to be made under this section, a draft of it shall be laid before each House of the Oireachtas.

(3) The order shall not be made if a resolution disapproving of the draft is passed by either such House within the next subsequent 21 days on which it has sat after the draft is laid before it.

(4) In this section “public authority” means—

(a) a person or body which at any time stood specified in the *Schedule*,

(b) a board, authority or other body (other than a company) established by or under statute,

(c) a company in which all the shares are held—

(i) by or on behalf of a Minister of the Government, or

(ii) by directors appointed by a Minister of the Government,

or

(d) a company in which all the shares are held by a board, authority or body referred to in *paragraph (b)* or by a company referred to in *paragraph (c)*.

8.—The expenses incurred by the Minister for Finance in the administration of this Act shall be paid out of moneys provided by the Oireachtas and those incurred by any other Minister of the Government shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of such moneys.

9.—(1) This Act may be cited as the State Authorities (Public Private Partnership Arrangements) Act, 2002.

(2) This Act shall come into operation on the day that is four weeks after the date of its passing.

SCHEDULE

Section 2.

STATE AUTHORITIES

A Minister of the Government.

A local authority.

The Commissioners of Public Works in Ireland.

The National Roads Authority.

[No. 1.] *State Authorities (Public Private Partnership Arrangements) Act,* [2002.]
2002.

SCH.

A health board established under the Health Act, 1970.

The Eastern Regional Health Authority.

A university within the meaning of the Universities Act, 1997, other than Trinity College and the University of Dublin.

The Dublin Institute of Technology.

A college within the meaning of section 2 of the Regional Technical Colleges Act, 1992.

A vocational education committee within the meaning of section 7 of the Vocational Education Act, 1930.

Courts Service.

A harbour authority within the meaning of the Harbours Act, 1946.



**AN BILLE UM ÚDARÁIS STÁIT (SOCRUITHE LE
HAGHAIDH COMHPHÁIRTÍOCHTAÍ POIBLÍ
PRÍOBHÁIDEACHA), 2001**

**STATE AUTHORITIES (PUBLIC PRIVATE PARTNERSHIP
ARRANGEMENTS) BILL, 2001**

EXPLANATORY MEMORANDUM

Introduction

Public private partnerships are arrangements between the public sector and the private sector for the delivery by the private sector of certain public infrastructure and/or public services, which traditionally would have been provided by the public sector. Public private partnerships covered under the Bill include arrangements with the private sector partner in relation to either the design and construction of an asset where operation is linked to the design and construction element (which may include the provision of finance) or arrangements to provide services relating to an asset for a period of not less than 5 years.

The purpose of the Bill is to verify that State authorities have the statutory powers to enter into new procurement arrangements. These powers supplement the existing powers of State authorities under relevant existing legislation. Traditional outsourcing of contracts or arrangements whereby the private sector designs and constructs an asset for the public sector are not covered in the Bill.

The Bill also empowers State authorities to form companies and to enter into joint ventures for the purpose of a public private partnership and gives State authorities the legal capacity necessary to contract with the private financiers of public private partnerships. The Bill further provides that the functions of a State authority may be conferred under the public private partnership arrangement to the private sector, subject to the general control of the State authority.

The State authorities covered by the Bill are named specifically in the *Schedule*.

Section 1 is an interpretation section that defines certain terms used in the Bill.

Section 2 provides that the State authorities under the Bill are those named in the *Schedule*.

Section 3 provides what is meant by the term public private partnership arrangement. It also provides that a State authority may arrange or provide for payments to a private sector partner and that the State authority has the power to contract with a person who has provided (or arranged the provision of) funding for the public private

partnership arrangement. This relates to direct (or “step-in”) agreements. A State authority may form a company or become a shareholder in a company and may transfer an asset of the State authority to the partner. Under a PPP arrangement such a transfer would generally be for a defined period only. An asset could include a series of different assets.

Section 4 provides that the functions specified in the public private partnership arrangement may be conferred upon the partner and may be performed by the partner in its own name subject to the control of the State authority. Notwithstanding this, the functions shall continue to be vested in the State authority and the relevant Minister’s responsibility for the performance of that function is not affected. Local authorities or bodies may agree that their functions will be performed by a lead local authority pursuant to section 59 of the Local Government Act, 1955 or the Roads Act, 1993 provided the relevant local authorities or bodies are State authorities at the time of the agreement.

Section 5 empowers a State authority to enter in good faith into a public private partnership arrangement and an arrangement with the private sector financiers of the public private partnership arrangement.

Section 6 provides that where a State authority has formed a company or become a shareholder in an existing company formed and registered under the Act the appropriate Minister is authorised to give written directions to the State authority or the company in relation to the management, accountability, accounting and financial affairs of that company and to issue general guidance in relation to the formation of companies under *section 3(2)*. It lists the matters upon which directions may be issued and provides that a State authority and a company must comply with directions issued to them.

Section 7 provides that the Minister for Finance, in consultation with the appropriate Minister, may amend the *Schedule* by adding or deleting a public authority by way of order, provided that a draft of the order is laid before both houses of the Oireachtas. It also sets out what is meant by the term public authorities.

Section 8 is a standard provision to the effect that expenses incurred in the administration of the Bill shall be paid out of moneys provided by the Oireachtas.

Section 9 is the short title of the Act and provides that the Act shall come into operation four weeks after it is passed.

The *Schedule* lists the State authorities covered by the Act.

An Roinn Airgeadais.
Meitheamh, 2001.

Art. 3.

Definizioni (art. 1, direttiva 2004/18; articoli 1, 2.1., direttiva 2004/17; articoli 2, 19, legge n. 109/1994; articoli 1, 2, 9, decreto legislativo n. 358/1992; articoli 2, 3, 6, decreto legislativo n. 157/1995; articoli 2, 7, 12, decreto legislativo n. 158/1995; art. 19, comma 4, decreto legislativo n. 402/1998; art. 24, legge n. 62/2004)

1. Ai fini del presente codice si applicano le definizioni che seguono.

15-ter. Ai fini del presente codice, i "contratti di partenariato pubblico privato" sono contratti aventi per oggetto una o piu' prestazioni quali la progettazione, la costruzione, la gestione o la manutenzione di un'opera pubblica o di pubblica utilita', oppure la fornitura di un servizio, compreso in ogni caso il finanziamento totale o parziale a carico di privati, anche in forme diverse, di tali prestazioni, con allocazione dei rischi ai sensi delle prescrizioni e degli indirizzi comunitari vigenti.

Rientrano, a titolo esemplificativo, tra i contratti di partenariato pubblico privato la concessione di lavori, la concessione di servizi, la locazione finanziaria, l'affidamento di lavori mediante finanza di progetto, le societa' miste. Possono rientrare altresì tra le operazioni di partenariato pubblico privato l'affidamento a contraente generale ove il corrispettivo per la realizzazione dell'opera sia in tutto o in parte posticipato e collegato alla disponibilita' dell'opera per il committente o per utenti terzi. Fatti salvi gli obblighi di comunicazione previsti dall'art. 44, comma 1-bis del decreto-legge 31 dicembre 2007, n. 248, convertito, con modificazioni, dalla legge 28 febbraio 2008, n. 31, alle operazioni di partenariato pubblico privato si applicano i contenuti delle decisioni Eurostat.