

PPP in France - Healthcare Sector

The first sector to take advantage of wide-ranging liberalising legislation passed in July 2003, the healthcare sector is now producing its first public private partnerships (PPP) as part of the French Government's ambitious investment programme, "*Hôpital 2007*".

Linklaters is currently acting for the preferred bidder on the first pathfinder PPP project in this sector. Our Paris PPP team takes a closer look at some of the key aspects of this new market.

"Hôpital 2007"

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

Legal framework

The basis of the legislative reform underpinning the *Hôpital 2007* programme was laid by a government order modifying the Public Health Code which was adopted in September 2003¹ (the **Hospital Order**) and has now been ratified and completed by a law recently passed by Parliament (the **August 2004 Law**)². The significance of these reforms, in brief, is that they allow global tenders of design, construction and maintenance aspects to be conducted and permit deferred payment mechanisms, neither of which elements were possible under the

¹ Ordonnance n° 2003-850 of 4 September 2003 *portant simplification de l'organisation et du fonctionnement du système de santé*.

² Law n° 2004-806 of 9 August 2004 *relative à la politique de santé publique*.

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public procurement code (*code des marchés publics*) prior to these derogations.

The Hospital Order provides for both traditional procurement and PPP models. Under the traditional procurement model, the overall responsibility for the works (*maîtrise d'ouvrage*)³ and the financing of them remain with the public sector. Under the PPP model, the *maîtrise d'ouvrage* is entrusted from the outset to a private participant who also bears responsibility for the financing in return for receiving deferred payments from the hospital. This overview focuses primarily on the PPP model.

The basic contractual structure for hospital projects under the Hôpital 2007 programme is that of the long term administrative lease. This structure is described in more detail below. Since June 2004, however, when the government order on "partnership contracts" was passed (the **PPP Order**) it is also possible to implement hospital projects under the flexible new tool of the partnership contract⁴. Linklaters' recent special report (*France - Partnership Contracts - French Government Order*), rather than this overview, analyses the key characteristics of the partnership contract.

Key public sector participants in healthcare PPPs

The healthcare sector in France is decentralised. The relevant granting authority resides therefore at local authority level, represented by specialist healthcare establishments known as *établissements publics de santé* ("EPS")⁵.

The underlying funding source for the EPS is essentially reliant on social security contributions, with a global annual budget being determined for each EPS at the regional level by the head of the *agence régionale d'hospitalisation* (ARH). In practice, five year investment programmes are established by the ARHs in conjunction with the various EPSs within their region.

³ Pursuant to article 2 of law n° 85-704 of 12 July 1985 'a party providing the *maîtrise d'ouvrage*, bears overall responsibility for the works, ensuring the feasibility of the scheme, defining the parameters, ensuring the financing, choosing the technical solution and entering into contracts with the contractors of its choice'.

⁴ Ordonnance n° 2004-559 du 17 juin 2004 *sur les contrats de partenariat*.

⁵ The regime applicable to the EPS is provided by article L. 6141-1 of the public health code (*Code de la santé publique*).

At the national level, the Ministry for Health is supported in the implementation of the "Hôpital 2007" Programme by an affiliated unit named the *Mission nationale d'appui à l'investissement hospitalier*⁶ ("MAINH "). The aim of the MAINH is to provide technical supervision and support to the ARHs and EPSs from inception of individual schemes onwards. The MAINH is responsible for the development of legal and financial framework and is currently drawing up guidelines on the comparison between traditional public procurement and PPP techniques, the application of the competitive dialogue and on certain "key clauses" in order to facilitate the use of these new legal tools.

A closer look at the EPS

The EPS is a public entity governed by administrative law. As a consequence of this categorisation, a number of specific characteristics relating to enforcement proceedings, insolvency and court judgements should be borne in mind.

It is a general principle of French public law that public entities, including entities such as the EPS, benefit from a form of immunity from execution known as the *privilège des voies d'exécution*. It should also be noted that public persons are not subject to insolvency proceedings. Similarly, a public person cannot be liquidated, otherwise than by an instrument of the State, in which case the assets and liabilities would necessarily be transferred to a separate entity.

Under a law of 16 July 1980, where a final judgment has been made against a public person ordering the payment of a sum of money, an order to pay the relevant amount must be made within 2 months of the date of the notification of the court decision. Failing such order within the prescribed period, the supervising authority for the entity in question must make the order. If there are insufficient funds available to the public entity to meet the payment, then the supervising authority must issue an injunction against the entity ordering that the necessary resources be created or identified. If the public entity does not comply with such injunction, the supervising authority can impose it on the public entity or raise the necessary resources.

⁶ Created by Law n° 2002-1487 of 20 December 2002 for financing the social security in 2003.

It has sometimes been said, including by internationally recognised rating agencies, that the above procedure amounts to all French public utilities being ultimately guaranteed by the French State. This is clearly an overstatement, since legally speaking, there is no State guarantee. In credit risks terms, it is probably fair to say that the risk is not so much whether payment will be ultimately made, but when it will be made, for what amount and possibly against what concessions from the creditor.

Contractual structure

As mentioned above, where an EPS decides to implement a particular project by way of PPP, it may do so on the basis of a long term administrative lease known as the *bail emphytéotique hospitalier* ("**BEH**").

In this scenario, the EPS grants the BEH (at a "peppercorn" rent) to the private partner who thereby benefits from the right to occupy the public land subject to its obligation to build and, as the case may be, maintain specified facilities. The BEH is to be concluded for a long period (between 18 and 99 years) and effectively allows the lessee to temporarily own buildings on the public domain subject to the obligation to return such assets to the EPS at the end of the BEH free of charge.

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

In principle, implementation as a partnership contract under the PPP Order could provide an attractive alternative to the two-tier BEH/CND structure described above.

Tendering procedure

The Hospital Order anticipates specific tendering procedures to apply to healthcare projects, including the possibility, for complex projects, of conducting a competitive dialogue.

The Hospital Order and the August 2004 Law are to be supplemented by decrees that will set out precisely how the procedures are to be run. The relevant decrees are expected to be published and adopted in the coming weeks and will apply to both BEH hospital schemes and to partnership contracts under the PPP Order alike.

Financing/security options

The Hospital Order anticipates the possibility of financing by way of *crédit bail* (leasing mechanism) involving the participation of a credit institution which would directly hold certain rights under the BEH. Although this approach has been practiced in the past, the legal viability of such structure was not beyond doubt prior to the Hospital Order being passed, particularly in the face of general principles of inalienability of the public domain (*domanialité*). In practice, this type of arrangement is often accompanied by a tripartite or "direct " agreement between EPS, lessee and credit institution governing the various rights and responsibilities of the parties upon early termination of the BEH.

The Hospital Order also provides that the rights under the BEH to occupy public land and to temporarily own buildings thereon may, in certain circumstances, be mortgaged as security for debts for money borrowed to finance the construction of the buildings or improvement works.

The latest development in the financing of hospital PPPs is the transposition⁷ of the new regime relating to the transfer of receivables (*cession de créances*) applicable to partnership contracts. The net effect of transposing such provisions is that BEH/CND contracts may provide for a part of the payment stream relating to investment costs to be isolated and assigned with equivalent effect to that of a *Dailly accepté* without the necessity of complying with some of the formal requirements otherwise applicable to such transfers. This new development may well lead to securitisation opportunities for PPP hospital projects in the near future. The impact of such a mechanism in the context of principles of public accounting has, however, not yet been clearly established.

⁷ pursuant to the August 2004 Law

Projects to come

In addition to the *Douai Logipôle* project, several other projects have recently been launched by way of PPP. One such project is the *Centre hospitalier universitaire de Caen*, which was one of the pre-selected projects for which the *Caisse des dépôts et consignations* conducted a legal and financial study⁸. The BEH approach will also be used for projects such as the *Centre hospitalier du sud francilien* at Corbeil-Essonnes, the *Centre hospitalier universitaire de Rennes*, *Centre les Tilleroyes* at Besançon and the ophthalmological hospital *Quinze Vingts* in Paris.

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⁸ See Linklaters Special Report, *PPP In France*, December 2003.