

Addressing conflicts of interest in public-private partnerships (PPPs)

SUMMARY

The term 'public-private partnership' (PPP) is used to describe a broad and varied spectrum of **cooperative relationships** between public actors (governments, agencies and international organisations, or a combination thereof) and private actors (companies or not-for-profit entities). There is therefore no standard global definition of precisely what a PPP is.

PPPs have increased in number over the past decade. This has given rise to concerns regarding the **exposure of PPPs to the risk of conflicts of interest**. Such risks may arise, for example, with the possibility that preference is given to national tenderers or applicants whenever a contract is awarded by the public contracting authorities; or through the possibility that weaker actors may be excluded from participating in a PPP because of the preference given *a priori* to stronger actors.

The EU attempts to **strike a balance by combining broad definitions of conflicts of interest with a number of legal tools tailored to identifying, managing and resolving specific conflicts**. The legal tools currently in place to avoid conflicts of interest in this context can be divided into two broad categories. Hard-law tools include provisions for ensuring that public officials perform their duties in a fair and unbiased way. These rules apply along the entire decision-making process concerning PPPs. To complement such rules, a vast array of soft-law tools is also in place, including criteria to guide decisions of public actors on support to enterprises or financial intermediaries, support for internationally recognised guidelines and principles, and commitment towards voluntary initiatives to increased fiscal transparency.



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A definition of Public-Private Partnerships

In general, the term 'public-private partnership' (PPP) is used to describe a broad and varied spectrum of **cooperative relationship** between public actors (governments, agencies and international organisations, or a combination thereof) and private actors. To simplify, however, two broad types of PPPs can be identified: (a) the first type consists of **partnerships operating in the field of development and cooperation**.¹ Private actors are involved with the aim of achieving greater impact in development outcomes; (b) the second type of PPP is concerned with **funding, constructing, renovating or operating infrastructure or the provision of a service**. Here a private partner is involved in the various phases (planning, implementation and operation) of a project (co-)financed by the public sector. Such PPPs can be set up either by funding a new company – the capital of which is held jointly by the public contracting entity and the private partner(s) – or through the participation of a private partner in an existing publicly owned company.

The Rise of PPPs

Over the past decade, PPPs have increased in numbers across the world. According to the latest estimate available, **Europe leads the infrastructure PPP market, concentrating more than 45% of the nominal value of all PPPs worldwide**.² This growth of PPPs has been followed by an ever-growing secondary market, with clear exit options encouraging private investors to get involved. Public authorities at all levels have shown great interest in cooperating with the private sector when operating in the field of development aid, or when ensuring the provision of infrastructure or a service. The growth of PPPs can be explained when observing the benefits they (promise to) provide. These benefits are said to be brought, on the one hand, from the management practices, know-how and creativity that corporations bring to a project; and, on the other hand, from the unique in-the-field expertise of public actors, from the unmatched reach they have with their public counterparts, and from the responsibility they take for monitoring compliance with the objectives of the PPP. More specifically, there are **four beneficial outcomes** that are commonly associated with the establishment of PPPs: (a) first, it is presumed that **private actors have special skills to understand market needs**; (b) second, employing PPPs in an age of budgetary constraints may help to **produce results in a timely and cost-effective way**; (c) third, benefits may also concern the **reduction of administrative burdens**; (d) fourth, PPPs are supposed to bring a broader sharing of risks between its private and public parts.

PPPs at national level

The United Kingdom (UK) was the first European government to make explicit efforts aimed at developing PPPs in the field of development cooperation. In the United States (US) the initial emphasis on PPPs came under the Clinton administration, with the '[Reinventing Government](#)' initiative. Following on from 'Reinventing Government', Presidents Bush and Obama continued to support PPPs. The US Agency for International Development (USAID) established its office for PPPs – the '[Global Development Alliance](#)' – in 2001. **Today, no fewer than 31 countries worldwide have operational PPPs units**.³

PPPs at international level

Not only national governments, but international organisations too support the creation of PPPs, which are usually devoted to aid to developing countries. And there are many examples. In September 2011, for instance, the UN World Food Programme teamed up

in partnership with PepsiCo – named '[Enterprise EthioPEA](#)' – to alleviate hunger and poverty while supporting sustainable growth in Ethiopia. Further cases are '[Roll Back Malaria](#)', the '[Safe Injection Global Network](#)', and the '[Stop TB Partnership](#)' (all PPPs with their secretariats hosted by the World Health Organization, WHO), and the '[Global Alliance for Vaccines and Immunisation](#)', which has its secretariat at the United Nations Children's Fund (UNICEF).

PPPs in the European Union

The European Union (EU) also uses PPPs to implement its policies on development and cooperation, as well as to provide new infrastructure and public services. PPPs operating in the field of development cooperation are an important part of the EU's external action. PPPs are implemented as part of support given to developing countries to strengthen the private sector. The EU, however, has not established its own agency for PPPs, nor has it created a documentation centre or observatory, although debate among EU institutions on the topic has run for a decade or more.⁴

PPPs are also widespread in the field of infrastructure and public services. Over the past decade, the EU has approved several measures for increasing commitment from private actors in the fields of transport infrastructure, innovation, research and development, to name but a few. In 2013, the European Commission launched [eight contractual PPPs](#). These PPPs are aimed at leveraging €6 billion of investments to be allocated through calls for proposals under Horizon 2020, the programme supporting research and innovation. Also of interest is the '[Innovative Medicines Initiative](#)', a PPP between the European Federation of Pharmaceutical Industries and Associations (EFPIA) and the European Commission. The aim of this PPP is to identify and overcome bottlenecks to the development of innovative treatments.

In conjunction with efforts to increase the use of PPPs, EU institutions have elaborated a framework of rules to be applied when a private party is selected to be part of a partnership with a public body, and these rules also apply in cases in which PPPs are created by Member States. Under EU law, if national public bodies decide to create a PPP, and thus involve third parties in public contracts or concessions, then the EU rules for public procurement and concessions must be complied with.

As a first attempt to regulate this topic, the Commission in 2000 adopted an [interpretative Communication](#) on concessions and Community procurement law. In 2004, a [Green Paper](#) on PPPs and Community Law on Public Contracts and Concessions was published. In addition to these efforts, [Directive 2004/18/EC](#) established a new award procedure, designed to meet the specific features of complex contracts (as PPPs fundamentally are). This procedure is known as '[Competitive Dialogue](#)'. A [Communication](#) from the Commission followed the Green Paper in 2005. In 2006, the European Parliament called again on the Commission to provide further clarifications on the application of procurement law to the creations of PPPs in connection with the

Three examples of PPPs

[EU PPP on Big Data](#): Investment is expected to reach around €2.5 billion in the 2016-20 period. The Commission has earmarked a budget of around €500 million in Horizon 2020. Each euro of that EU investment is expected to trigger €4 of private sector investment (i.e. around €2 billion).

[Channel Tunnel Rail Link \(CTRL\)](#): The UK's CTRL was initially envisaged as a PPP concession. The CTRL leveraged £5 billion of investments. The [European Investment Bank](#) lent £200 million towards the construction of the first section of the CTRL.

[Perpignan–Figueras rail concession](#). A substantial subsidy consisting of an EU grant and state subsidies covered 57% of the construction costs. The remaining funds were provided by private partners, in the form of own equity and commercial loans.

award of a contract or concession. Previous call for harmonisation of rules for PPPs came from the [Parliament in 2002](#) and (in [January](#) and [July 2001](#)) from the European Economic and Social Committee. The Commission followed these calls in 2008, with a new [Communication](#). Finally, the Financial Regulation approved in 2012 introduced new rules about PPPs (to be analysed in the following paragraphs).

PPPs and conflicts of interest

While it is true that PPPs offer a number of potential benefits, they cannot be considered a miracle solution. On the contrary, an increasingly commercialised public sector that works closely with companies and not-for-profit organisations gives rise to growing concerns of various types (e.g. the use of PPPs to 'hide' public debt). PPPs also involve risks of **conflicts of interest**. Such conflicts may be of different natures, and may concern both private actors and public operators. In respect of public officials, conflicts of interest may arise between their individual private interests and their public duties in three cases: (a) When **granting oneself or others unjustified direct or indirect advantages**. Typically, such conflicts arise when preference is given to national tenderers or applicants whenever a contract is awarded by the public contracting authorities. Growing attention has been given in recent years to the issue of 'revolving doors' through which individuals move from political or administrative posts to the private sector or vice versa, which is particularly problematic when the firm concerned has contractual relationships with the administration. (b) When **refusing to grant a beneficiary the rights or advantages to which that beneficiary is entitled**. This is the case when weaker actors (e.g. consumer groups, which usually have fewer resources) may be excluded from participating in PPPs because of the preference given *a priori* to stronger actors (e.g. international non-governmental organisations). (c) When **committing undue or wrongful acts or failing to carry out acts that are mandatory**.⁵

Hard-law tools for dealing with conflicting interests in PPPs

There is general agreement among policy-makers that **a single 'one size fits all' solution for managing conflicts of interest does not exist**. An overly permissive approach to controlling the exercise of private interests may result in ineffective solutions to avoid conflicts; whereas too severe an approach may be unworkable or even counter-productive in practice (for instance, it may deter potential interested parties from joining a PPP). It is for this reason that the EU – as well as other international public bodies, such as the [Organisation for Economic Co-operation and Development](#) and the [WHO](#) – attempts to strike a balance by combining broad definitions of conflicts of interest with a number of tools tailored to identifying, and managing specific conflicts. This approach was fundamental to modifications to the Financial Regulation adopted in 2012, following the identification of weaknesses due to lack of flexibility in the EU's previous budgetary and financial rules.

According to the general definition currently in use in the EU, a conflict of interests may come into play when 'the impartial and objective exercise of the functions of a financial actor or other person is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with a recipient'.⁶ Drawing on this definition, the EU rules are aimed at: (a) first, **ensuring that public officials perform their duties in a fair and unbiased way**, and that official decisions are not improperly affected by self-interest; (b) and, second, at **securing financial transparency along the entire decision-making process leading to the creation of PPPs**. These rules are applied in compliance with data protection legislation.

Furthermore, these rules are aimed at avoiding a disproportionate administrative burden. At the same time, EU institutions provide consistent support to proposals for reforms of national systems that may increase good fiscal governance (transparency, exchange of information and fair tax competition).⁷

Early stage

The majority of EU rules concerning conflict of interests concerns the phase in which PPPs are established, i.e. when decisions on support to enterprises or financial intermediaries (through direct grants or subsidised business development services) are about to be taken. This, for instance, in development PPPs is considered the phase in which conflicts of interest are more likely to occur. It is therefore argued that if a public donor/investor succeeds in finding partners from the private sector who are not only interested in their own financial success but also in the developmental side of what they are doing, then conflicts of interest may be less likely to occur along the life of the partnership.⁸ The EU Financial Regulation establishes that candidates or tenderers that are subject to a conflict of interests during the procurement procedure cannot be awarded a contract.⁹ Similar rules apply to the selection of financial intermediaries of the EU as well as to remunerated external experts.¹⁰ The same rules apply in cases in which decentralised EU agencies are involved.¹¹ When non-EU procurement rules and procedures are concerned (as is frequently the case in PPPs operating in the field of development assistance), EU rules establish that those apply, provided that they prevent conflicts of interest throughout the entire procurement procedure.¹²

Execution

During the execution of a contract concerning a PPP, the EU empowers national contracting authorities with supervisory control. As clarified by the European Central Bank, in this phase national contracting authorities are expected to put in place a robust governance structure that separates and explains roles in PPPs, thus preventing conflicts of interest.¹³ National contracting authorities are entitled to terminate an existing contract when they establish that operators have conflicting interests that may negatively affect the performance of the contract.¹⁴ The jurisprudence of the Court of Justice of the EU agrees on this point.¹⁵

Reporting phase

Finally, transparency and avoidance of conflicts of interest is required in the reporting phase of a project. The Council's [Operational Framework on Aid Effectiveness](#), for instance, endorses public disclosure of information on aid volume and allocation, and availability of data on global aid flows in a timely manner and in formats accessible to the general public.

Soft-law tools for avoiding conflicting interests in PPPs

To complement the rules set out in EU regulations, a number of soft-law tools to address the topic of conflicting interests also exist at EU level. While these tools have grown in relevance over the years, it must be borne in mind that they seldom provide means for enforcement. They are rather considered as forms of soft leverage on both public bodies and companies, who are invited to ensure that they have policies in place to prevent bribery, tax evasion, and conflicts of interest. Having said that, soft-law tools to avoid conflicts of interest in PPPs include:

- The **guidelines adopted by the Commission to guide national public authorities' decisions on support to enterprises or financial intermediaries** (these guidelines

operate only for PPPs concerned with development and cooperation).¹⁶

- **Endorsement of recognised international guidelines and principles** stating that business practices should be informed by the principle of business transparency and the fight against corruption (including of course the avoidance of conflicts of interest). While such guidelines are numerous,¹⁷ one of the most important is the [UN Guidebook on Promoting good governance in PPPs](#).
- **Support for the introduction of statements/charters in PPPs that aim to resolve any conflict of interests.** Examples of this kind include the [Oxford Alliance on Health](#) and the [EPODE European Network](#).
- **Support given to voluntary initiatives from the private sector (companies or NGOs) to commit to increased fiscal transparency.** The [Extractive Industry Transparency Initiative](#) (EITI) is thus far one of the most acknowledged initiatives of this kind. Launched in 2013, the EITI aims at, first, creating a global transparency standard to shed light on all payments made by extractive-industry companies to governments of resource-rich developing countries; and, second, cross-checking all revenues received by these governments from this industry.

Further reading

Centre for Strategic & International Studies, [Seizing the Opportunity in Public-Private Partnerships: Strengthening Capacity at the State Department](#), 2011;

G. Grieger, [The Extractive Industries Transparency Initiative: state of play](#), European Parliamentary Research Service Briefing;

E. Istrate, R. Puentes, [Moving Forward on Public Private Partnerships: US and International Experience with PPPs Units](#), Brookings-Rockefeller, 2011;

J-C Juncker, [A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the next European Commission](#), 2014;

M. Latek, [L'engagement du secteur privé dans la coopération au développement](#), European Parliamentary Research Service In-Depth analysis.

Endnotes

¹ See Centre for Strategic & International Studies, *Seizing the Opportunity in Public-Private Partnerships: Strengthening Capacity at the State Department*, 2011. In the report PPPs concerned with cooperation and development are described as: 'an approach to solving development problems through a coordinated and concerted effort between governmental and non-governmental actors, including companies and civil society, leveraging the resources, expertise, or market efforts to achieve greater impact and sustainability in development outcomes'.

² See E. Istrate, R. Puentes, *Moving Forward on Public Private Partnerships: US and International Experience with PPPs Units*, Brookings-Rockefeller, 2011

³ See E. Istrate, R. Puentes, *Moving Forward on Public Private Partnerships: US and International Experience with PPPs Units*, Brookings-Rockefeller, 2011

⁴ See for instance European Parliament, Resolution on public private partnerships and Community law on public procurement and concessions (2006/2043(INI)), Paragraph 18.

⁵ See Article 32 of the European Commission Delegated Regulation (EU) No 1268/2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union.

⁶ See Article 57, *Financial rules applicable to the general budget of the Union*.

⁷ See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM(2011) 637 final, 'Increasing the Impact of EU Development Policy: an Agenda for Change'.

⁸ See R.H Schmidt, N. Moisa, *Public -Private Partnerships (PPP) in Financial Development in South-East Europe*, 2004

⁹ See Article 107, *Financial rules applicable to the general budget of the Union*.

¹⁰ See, respectively, articles 139 and 204, *Financial rules applicable to the general budget of the Union*.

- ¹¹ See Guidelines on the Prevention and Management on Conflicts of Interest in EU Decentralised Agencies, 2013
- ¹² See Article 38 of the European Commission Delegated Regulation (EU) No 1268/2012 *on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union*
- ¹³ See European Central Bank, State Guarantees in PPPs, 2011
- ¹⁴ See Art. 149 of the European Commission Delegated Regulation (EU) No 1268/2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union
- ¹⁵ See European Court of Justice, Case C-324/98. The Court affirmed that the 'obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed'.
- ¹⁶ See European Commission Communication COM(2014) 263.
- ¹⁷ These include the following: the [UN Global Compact](#), the [UN guiding Principles on business and Human rights](#), the [UN Convention against Corruption](#), the [International Labour Organisation Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy](#), the [ISO 26000 Guidance Standard on Social Responsibility](#) and the Organisation for Economic Co-operation and Development's [Guidelines for Multinational Enterprises](#)

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