

## EPEC Membership Discussion Summary Note<sup>1</sup> Standardisation of PPP contracts

(For EPEC Members only)

### Background

EPEC led a discussion on the opportunities and challenges of PPP contract standardisation (at a national level) with several of its Members at a “break-out session” during the All Members Meeting in November 2016.

Overall, EPEC shares the view of many practitioners that standardisation of PPP contracts at a national level, within specific PPP programmes and/or sectors of investment, offers significant benefits. It is worth stressing however that the diversity of languages, legal systems, political and institutional frameworks, PPP experience and track-record across EU Member States means that a “one-size fits all” PPP contract for the whole EU is unlikely to be feasible. Notwithstanding this, EPEC firmly believes that the convergence of PPP contracting principles across the EU is extremely valuable and should be promoted.

As the practical experience of PPP contract standardisation varies widely across the EPEC Membership, the purpose of the “break-out session” was to share views and experiences, focussed on the “*why, how, when and what*” of contract standardisation, to prompt discussion on best practice and lessons learned.

### Examples of PPP contract standardisation in the EU

The clearest examples of PPP contract standardisation are found in:

- **UK - England:** PF2 guidance, sector-specific standard contracts (e.g. schools, health, prisons);<sup>2</sup>
- **UK - Scotland:** Template hub DBFM Agreement;<sup>3</sup>
- **The Netherlands:** Model DBFM Agreements DG Waterways & Public Works and the Model DBFMO Agreement Government Building Agency;<sup>4</sup>
- **Ireland:** Template Project Agreement (accommodation projects);<sup>5</sup> and
- **France:** *Clausier Type*.<sup>6</sup>

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<sup>1</sup> This note is a working document of the EPEC membership. It has been prepared to facilitate the exchange of information and experiences amongst EPEC members and other PPP practitioners in the field of public-private partnerships (PPPs). As a result, the findings analyses, interpretations and conclusions contained in it cannot be relied upon. For more information about EPEC and its membership please visit [www.eib.org/epec](http://www.eib.org/epec).

<sup>2</sup> Click [here](#) to access the PF2 guidance documents. Note that these documents are currently under review and due to be updated. For further information on these and other standard contracts applicable in the UK (England) contact EPEC Member, The Infrastructure and Projects Authority, at [james.ballingall@ipa.gov.uk](mailto:james.ballingall@ipa.gov.uk).

<sup>3</sup> Click [here](#) to access the template hub DBFM documents. For further information contact EPEC Member, The Scottish Futures Trust, at [mailbox@scottishfuturestrust.org.uk](mailto:mailbox@scottishfuturestrust.org.uk).

<sup>4</sup> Click [here](#) to access the Model Agreements. For further information contact EPEC Member, the PPI Unit at The Ministry of Finance, at [finsec.gt@minfin.nl](mailto:finsec.gt@minfin.nl).

<sup>5</sup> Click [here](#) to access the Template Project Agreement for accommodation projects. Note that these documents are currently under review and due to be updated. For further information contact EPEC Member, The National Development Finance Agency, at [info@ndfa.ie](mailto:info@ndfa.ie).

<sup>6</sup> Click [here](#) to access the *Clausier Type*. For further information contact EPEC Member, FIN INFRA, at [fininfra@dgtrésor.gouv.fr](mailto:fininfra@dgtrésor.gouv.fr).

PPP contract standardisation appears to be most developed and most widely used in the UK (England and Scotland), the Netherlands and Ireland. Whilst work to standardise PPP contracts has been done in France (and also Belgium), it has been less consistently or comprehensively applied in practice. Italy is currently going through a process to develop its first standard PPP contract.

## Why standardise?

The following key motivations for creating PPP contracting standards were discussed:

- **saving time** and cost in PPP preparation and procurement;
- promoting **best practice** in risk allocation and value for money;
- strengthening the **negotiating position** of individual procuring authorities;
- creating a stable framework for **attracting and retaining market interest**;
- providing a **platform for rolling-out government policy** across projects (e.g. particular public sector contracting terms, Eurostat treatment of projects); and
- creating consistency that supports collaborative **contract management and benchmarking** across projects in construction/operation.

## How to standardise?

- **Development:** formal/official standardisation usually happens when it falls within the mandate of a central (national or sector-specific) PPP unit. Even where no formal/official standards exist (or where they contain gaps), market forces help to create a convergence of approaches and drafting in PPP contracts (e.g. when provisions are copied from project to project). This “softer” form of standardisation still has its benefits (e.g. reduced transaction costs) and is helped when PPP contracts are published, but it is obviously more difficult to control (e.g. the market being selective about the precedent it chooses to quote in order to improve its commercial negotiating position and precedent being repeated without proper understanding or consideration of project-specific circumstances).
- **Application:** PPP policy dictates whether use of the standards on individual projects is mandatory or simply advisory. Clearly the benefits of standardisation (see the motivations mentioned above) are most likely to arise where its use is mandatory **and** there is an effective way of reinforcing this (e.g. linking use of the standards to conditions of project funding and/or approval). Where the standards are mandatory, the extent to which they are applied can also depend, for example, on whether the flexibility to adapt for project-specific reasons is left to the discretion of the individual projects or whether it is monitored by, and requires the approval of, the PPP unit. In situations where standardisation has only advisory status, the market needs to understand and believe in its benefits. This requires some promotion by the PPP unit, although Members observe that the market can be quite effective in doing this itself.
- **Management:** the ongoing management of PPP contract standardisation generally falls within the remit of the PPP unit (or, in some cases, another relevant central procurement unit). This management function involves updating documentation to reflect legal, policy or market developments and (where applicable) approving departures from the standards on individual projects. These tasks tend to be undertaken by the PPP (or other) unit’s internal resource (in some cases resource that is dedicated to these specific tasks). Support from external advisers (mainly lawyers) is required from time to time but, as a key element of PPP policy, it is important that the standard contract is (and is seen to be) “owned” and controlled by the PPP (or other) unit rather than outsourced to the market.

This indicates that standardisation is best supported by a PPP (or other) unit with the requisite PPP commercial and contract skills both to develop and update the standards and to make prudent and timely decisions on departures from the standards on individual projects.

### When to standardise?

Standardisation is generally seen to be appropriate in the context of a pipeline or programme of PPP investment in projects that share common principles and/or features. This makes the time and cost of the standardisation exercise itself worthwhile.

This also provides opportunities for the standards to be tested and changed as required as lessons are learned from project to project. The formal launch of standard contracts used in the EU has tended to follow a piloting exercise – the proposed standard is tried and tested on one or more projects (in some cases following an initial market consultation exercise), adjusted with the benefit of seeing the market work with and respond to it, and then rolled-out as the official standard for the rest of the pipeline or programme.

### What to standardise?

Different approaches have been taken:

- **Key commercial/contracting principles and definitions**, applicable across sectors (e.g. PF2 in UK-England);
- **Style contract clauses** accompanied by commercial/drafting guidance, applicable across sectors (e.g. *Clausier Type* in France, PF2 in UK-England); and
- **Full standard contracts**, applicable to specific sectors or across sectors (e.g. DBFM Agreements in Netherlands, Template Project Agreement in Ireland, hub DBFM Agreement in UK-Scotland).

UK-Scotland is possibly unique in the extent to which it has standardised the PPP contract. Its template documents include parts of the contract that contain technical information (e.g. design, architectural, construction and service specifications and payment mechanism). They leave scope for detailed development of issues at a project-specific level, but do provide a clear and consistent framework and approach for the technical aspects of the project.

On most, if not all, PPP projects, the technical information (e.g. specifications) tends to be dealt with separately from the main body of the contract. Given that this information ultimately forms part of the contract, several Members see that this creates a risk of inconsistency and contradiction between what is negotiated and drafted by the technical team in the technical documents and what is negotiated and drafted by the legal team in the main body of the contract. Several Members have come across this (and the disputes and delays it can lead to) in practice and recognise the benefits of the type of work done by UK-Scotland as a way of minimising this risk. The risk can also be minimised by providing guidance to technical teams in how to negotiate and draft technical documents in a manner that is consistent with the main contract.

### Challenges of contract standardisation?

Once standards have been developed, the main challenges are believed to be:

- Keeping the standards **relevant and up to date** (which can be a resource intensive task for the PPP unit);

- Achieving an **appropriate balance** between what should be standard and what should be project-specific;
- **Avoiding gradual erosion** of the standards as they are used (and departed from) from project to project (this is linked to earlier comments about how to ensure that the standards are applied); and
- **Encouraging** the use of the standard form where it is not mandatory.

### Can EPEC do anything to help?

EPEC may be able to support:

- **Members looking at initiating PPP contract standardisation** in their countries. For example, EPEC has engaged on a policy assignment relating to the development of a standard PPP contract for Italy. Under this assignment, EPEC has provided comments on the draft standard contract and acted as a sounding-board in the review and evaluation of a market consultation exercise; or
- Members interested in **obtaining/sharing ideas**, information, best practice and lessons learned on PPP contract standards from/with other Members. For example, EPEC would be happy to facilitate discussion (open to all) on a particular aspect such as standardising technical information, or to facilitate a bilateral discussion between specific Members.

Members with any queries or suggestions on how EPEC might support them on this topic should get in touch with the EPEC team at [epec@eib.org](mailto:epec@eib.org).