



Dáil Éireann

An Coiste um Chuntais Phoiblí

An Chéad Tuarascáil Eatramhach, 2007 Rochtain ar an Eilimint Phríobháideach de Chomhpháirtíochtaí Poiblí Príobháideacha – Comparáid Idirnáisiúnta

Márta, 2007

Dáil Éireann

Committee of Public Accounts

First Interim Report, 2007 Access to the Private Element of Public Private Partnerships – An International Comparison

March, 2007

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Chairman's Preface

This report of the Committee of Public Accounts (PAC) is concerned with parliamentary scrutiny of the private aspect of public private partnerships entered into by State bodies.

The scrutiny of PPPs is an issue that the Committee first commented on in an interim report published in May 2005. Specifically, the Committee recommended that:

“the Department of Finance should consider how effective parliamentary oversight of PPPs can best be secured and report on this to the Committee of Public Accounts.”.

The Minister for Finance, through his ‘Minute’ to the Committee, replied in July 2006 that he is “satisfied that (current) arrangements are adequate to facilitate parliamentary oversight of PPPs.”.

The Committee, having discussed the ‘Minute’ of the Minister, decided that the matter warranted further examination and to that end appointed Deputy Dan Boyle to act as rapporteur to prepare a draft report for its consideration. This is the conclusion of the Committee’s consideration of the report prepared by Deputy Boyle.

The Committee recommends this report to Dáil Éireann.

A handwritten signature in black ink, appearing to read 'Michael Noonan', written over a horizontal line.

**Michael Noonan, T.D.,
Chairman**

March, 2007

Members of the Committee of Public Accounts

FIANNA FÁIL

Seán Ardagh T.D.	Dublin South-Central
John Curran T.D.	Dublin Mid-West
John Dennehy T.D.	Cork South-Central
Seán Fleming T.D.	Laois-Offaly
John McGuinness T.D. (Vice-Chairman)	Carlow-Kilkenny
Michael Smith T.D. ⁴	Tipperary North

FINE GAEL

John Deasy T.D. ²	Waterford
Tom Hayes T.D. ³	Tipperary South
Michael Noonan T.D. ¹ (Chairman)	Limerick East

LABOUR

Joan Burton T.D. ⁵	Dublin West
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GREEN PARTY

Dan Boyle T.D.	Cork South-Central
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SOCIALIST PARTY

Joe Higgins T.D.	Dublin West
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1 Deputy Michael Noonan replaced Deputy Padraic McCormack by order of the House on 18th June, 2003.

2 Deputy John Deasy replaced Deputy Paul Connaughton by order of the House on 20th October, 2004.

3 Deputy Tom Hayes replaced Deputy John Perry by order of the House on 20th October, 2004

Deputy Michael Noonan elected as new Chairman on 21st October 2004

4 Deputy Michael Smith replaced Deputy Batt O’Keeffe by order of the House on 16th November, 2004.

5 Deputy Joan Burton replaced Deputy Pat Rabbitte by order of the house on 29th November, 2005.

Orders of Reference of the Committee of Public Accounts

156. (1) There shall stand established, following the reassembly of the Dáil subsequent to a General Election, a Standing Committee, to be known as the Committee of Public Accounts, to examine and report to the Dáil upon—
- (a) the accounts showing the appropriation of the sums granted by the Dáil to meet the public expenditure and such other accounts as they see fit (not being accounts of persons included in the Second Schedule of the Comptroller and Auditor General (Amendment) Act, 1993) which are audited by the Comptroller and Auditor General and presented to the Dáil, together with any reports by the Comptroller and Auditor General thereon:

Provided that in relation to accounts other than Appropriation Accounts, only accounts for a financial year beginning not earlier than 1 January, 1994, shall be examined by the Committee;
 - (b) the Comptroller and Auditor General's reports on his or her examinations of economy, efficiency, effectiveness evaluation systems, procedures and practices; and
 - (c) other reports carried out by the Comptroller and Auditor General under the Act.
- (2) The Committee may suggest alterations and improvements in the form of the Estimates submitted to the Dáil.
- (3) The Committee may proceed with its examination of an account or a report of the Comptroller and Auditor General at any time after that account or report is presented to Dáil Éireann.
- (4) The Committee shall have the following powers:
- (a) power to send for persons, papers and records as defined in Standing Order 83;
 - (b) power to take oral and written evidence as defined in Standing Order 81(1);
 - (c) power to appoint sub-Committees as defined in Standing Order 81(3);
 - (d) power to engage consultants as defined in Standing Order 81(8); and
 - (e) power to travel as defined in Standing Order 81(9).
- (5) Every report which the Committee proposes to make shall, on adoption by the Committee, be laid before the Dáil forthwith whereupon the Committee shall be empowered to print and publish such report together with such related documents as it thinks fit.

- (6) The Committee shall present an annual progress report to Dáil Éireann on its activities and plans.
- (7) The Committee shall refrain from—
 - (a) enquiring into in public session, or publishing, confidential information regarding the activities and plans of a Government Department or office, or of a body which is subject to audit, examination or inspection by the Comptroller and Auditor General, if so requested either by a member of the Government, or the body concerned; and
 - (b) enquiring into the merits of a policy or policies of the Government or a member of the Government or the merits of the objectives of such policies.
- (8) The Committee may, without prejudice to the independence of the Comptroller and Auditor General in determining the work to be carried out by his or her Office or the manner in which it is carried out, in private communication, make such suggestions to the Comptroller and Auditor General regarding that work as it sees fit.
- (9) The Committee shall consist of twelve members, none of whom shall be a member of the Government or a Minister of State, and four of whom shall constitute a quorum. The Committee and any sub-Committee which it may appoint shall be constituted so as to be impartially representative of the Dáil.

The Report

Section 1 Introduction and Background to this Study

1.1 Definition

The term “public-private partnership” (PPP) has been in general use since the 1990s. However, there is no widely agreed, single definition or model of a PPP. The term PPP covers a range of different structures where the private sector delivers a public project or service. Concession-based transport and utilities projects have existed in EU member countries for many years, particularly in France, Italy and Spain, with revenues derived from payments by end-users, e.g. road tolls.

The UK’s Private Finance Initiative (PFI) expanded this concept to a broader range of public infrastructure and combined it with the introduction of services being paid for by the public sector rather than the end-users. The use of PPPs has now spread to most EU member countries and depending on the country and the politics of the time, the term can cover a spectrum of models. These range from relatively short term management contracts (with little or no capital expenditure), through concession contracts (which may encompass the design and build of substantial capital assets along with the provision of a range of services and the financing of the entire construction and operation), to joint ventures and partial privatisations where there is a sharing of ownership between the public and private sectors.

1.2 Off-Balance Sheet Treatment of PPPs

One of the reasons for the popularity of PPPs with governments is the fact that under Eurostat guidance or local accounting rules, many PPP transactions can be classified as off the public sector’s balance sheet. This means the authority will only account for the annual payments it makes to the PPP company, and not for the assets and liabilities of the project, including its debt. The off-balance sheet treatment of PPPs is attractive in so far as long-term obligations under PPPs do not appear under governments’ overall budgets. Annual government budgets show instead the annual payments for the services received, thereby helping to keep government deficits within the reference value of 3% of GDP, as per the Stability and Growth Pact adopted in 1997 to strengthen the Maastricht Treaty provisions. As a corollary of this, the public may not be adequately informed of the true condition of the State’s finances. This leads to a lack of accountability.

Alternatively it is also argued that the value of PPPs in terms of financial relief to the Exchequer is more than just an accountancy issue. PPPs can relieve Exchequer spending not just nominally, but also substantially, by balancing budgets and reducing public debt. The underlying economics

argument here is that in many European economies, public sector investment has been crowding out private sector investment for many years. PPP is a means of substituting public sector investment (and hence debt) for private sector investment (and hence debt) in a manner that is still directed by central government.

The issue of financial relief to the Exchequer should be taken into particular account in making cross-country comparisons involving Ireland, as we have a much lower level of Debt-to-GDP than other European countries where the PPP model is gaining currency. At the same time, our level of private debt is alarmingly high. Thus, one of the main reasons for turning to PPP in countries such as Germany does not currently apply to Ireland and raises questions about an increasing use of financially driven PPPs in this country.

The current stated position of the Department of Finance is that, on a case by case basis, the decision to opt or not for a PPP solution is governed solely by value for money considerations.

1.3 Accountability Issues

PPPs provide public infrastructure in many areas of life, from schools to roads and prisons. However, the full details of many such projects, often large-scale and high profile have not been subject to public scrutiny. This has caused some disquiet among commentators and public representatives charged with keeping a watchful eye on public spending.

In particular, the excessive use of “Commercial-in-confidence clauses” (the private entity’s cost structure and profit margins) prevents the full disclosure of details such as the value for money comparison and the expected return on investment.

The alternative argument is that PPPs, by making a particular investment project subject to market forces, may be automatically creating a kind of market accountability which is absent in traditional forms of public sector investment. Where consumers pay to use a service, the quality of the service will affect profitability, making the operator automatically accountable to the service users by means of the profit motive.

The extent to which this is the case will depend on the degree of competition and whether the service is a necessity or a luxury. PPPs that put into place monopolies for necessity services (e.g. waste collection) will be less subject to market accountability than those for competitive, luxury services (e.g. a concession to run a motorway rest stop). In this way, investment in the

railway network could increase the effectiveness of road transport PPPs by enhancing the market accountability mechanism.

The mechanisms of market accountability and public accountability can to some extent be mutually compatible: Monopoly PPPs require public accountability because these markets don't function. But in these cases there is less of a justification for a commercial confidentiality clause, which seeks to protect market-sensitive data from competitors. Against this, PPPs in competitive sectors may require commercial confidentiality, but at least offer market accountability through the mechanism of the market.

The Public Accounts and Estimates Committee of Victoria (Australia) stated in its report on Commercial in-Confidence Material and the Public Interest:

Members of the public are entitled to know, as an aspect of assessing the economic and social management of the government of the day, what contracts are entered into on their behalf, and on what terms and conditions. They are entitled to know what public moneys are expended, both directly and indirectly, and precisely what is to be delivered under the terms of the contract. They are equally entitled to know how legal and financial risks are allocated between the contracting parties. They are entitled to know what monitoring and enforcement procedures exist in the event of contractual default.

George Monbiot, a well-known and acknowledged critic of PFIs in the UK put it like this:

Poor visibility corrupts; invisibility corrupts absolutely. The private finance initiative, which is the means by which billions of pounds of new public projects in the United Kingdom are now being funded, is doubly obscure: first because it is so complicated and appears so boring that few people have grasped its implications; secondly, because so many of the crucial details are hidden from public view by the blanket ban on disclosure known as "commercial confidentiality".

1.4 Access to Information on the Private Element of PPPs

Public Private Partnerships have been playing an increasingly important role in Ireland. The transport and water and waste sectors have seen the most activity to date within Ireland, with the most deals closed and in procurement. In particular, there have been four road PPP projects closed in the past five years with a further six in procurement, including the €400m N6 Galway to Ballinasloe road PPP contract.

The role of the National Development Finance Agency (NDFA) was re-defined to include responsibility for the procurement of all new PPP projects in the central government area (with the exception of road and rail). The Government has also announced a series of new PPP projects in the courts/prisons, health and education sectors and has set specific targets for projects financed through PPPs.

There are 73 PPP projects on the NDFA's most recent list, ranging from roads, courts, school building and refurbishment, sewage treatment plants, prisons, light rail, residential re-development and drainage.

However, limited parliamentary access to key information on major PPP contracts has diminished accountability of Government to the Dáil.

In May 2005, the Public Accounts Committee (PAC) recommended that:

*“The Department of Finance should consider how effective parliamentary oversight of PPPs can best be secured and report on this to the Committee of Public Accounts”*¹

The Minister for Finance responded in his ‘Minute’ to the Committee:

“As regards Parliamentary oversight of PPPs, the Minister notes the oversight on individual Ministerial portfolios exercised by the relevant Select Committees of the House, who may examine all issues within the ambit of Ministers. In addition, he notes the current powers of the Committee as set out in legislation and in its terms of reference. He also notes that all PPP projects are subject to examination by the Comptroller and Auditor General.

All documentation held by State authorities entering into PPP projects is fully available for review by the Comptroller and Auditor General for reporting by him, as appropriate, whether these relate to PPP projects funded by Exchequer unitary payments or projects funded by user charges. Arrangements for VFM examinations by the Comptroller and Auditor General have provided access to a substantial amount of relevant information, including the financial model used by the winning bidder in the PPP arrangement. The financial model includes the discounted cash flows for the project, based on the risk transfer to the private sector consortium reflected in the project contract and also includes information on the internal rates of return on private sector investment in the project. This access is illustrated by the VFM report on the Bundled Schools project.

¹Interim Report on hearings on Transport of the Committee in the period October 2003 to July 2004, p 49

The Select Committees of the House and the Committee of Public Accounts can request documentation from State authorities in the course of its proceedings and the Minister expects that authorities would respond positively to such requests, addressing, where relevant, considerations of commercial sensitivity or confidentiality and of legal professional privilege.

Expenditure in relation to PPPs remunerated by unitary payments is presented in a separate Subhead in the Estimates, which facilitates consideration by the relevant Select Committee. These are in turn accounted for in the relevant Appropriation Accounts and the relevant Accounting Officer may be required to give evidence to the Committee in relation to these.

The Minister is satisfied that these arrangements are adequate to facilitate Parliamentary oversight of PPPs.”

Following this response, the Committee decided to investigate the way in which similar projects are dealt with in other jurisdictions and has undertaken to conduct a comparative study so that it would be in a position to make firm recommendations, based on international best practice.

To this end contact was made with EUROCONSTRUCT contacts in 19 European countries. However, it was found that many construction experts are not at all familiar with the finer detail of accountability of the PPP vehicle. It was also decided that it was probably most instructive to look at the countries with the most developed PPP portfolio, namely the UK, Australia and Canada. The Australian experience was found to be particularly educational.

The PAC in recent years has held several plenary sessions relating to significant PPP projects. These meetings of the committee were informed by particular chapters of the annual reports of the Comptroller and Auditor General, as well as a number of Value For Money reports that also emanated from his office. Among the projects examined have been

- The West Link Toll Bridge/M50;
- The Grouped Schools Project;
- The Cork School of Music; and
- The Beaumont Hospital Car Park

While the circumstances applying to each of these projects vary widely, and the history of each differs, some common threads have appeared. The largest common factor has been the frustration expressed at the Committee of either not having appropriate access to information relating to these projects, or being publicly unable to refer to information deemed to be commercially

sensitive. This committee believes that this obstacle needs to be overcome. Public accountability and value for money are very important issues.

It should be noted that the National Development Finance Agency (Amendment) Bill 2006 is currently proceeding through the Houses of the Oireachtas. If enacted it would provide a statutory framework for the oversight of many PPP projects. This report outlines further approaches to oversight that exist in other jurisdictions and should also be adopted here.

Section 2, sets the scene by briefly looking at the PPP experience in Ireland and in selected countries in Europe and beyond.

In **Section 3**, examines the access to the private aspects of PPPs to PACs in a number of countries.

Section 4 contains draft recommendations, including suggestions for future study.

Section 2 PPP Experience in Ireland and Selected other Countries

2.1 European PPP Experience

In 2004 and 2005, around 206 PPP deals worth approximately US\$52 billion/€42 billion were closed in the world, of which 152 projects with a value of US\$26 billion/€21 billion were in Europe (in this case referring to the EU Member States, the EU acceding countries (Bulgaria and Romania), the EU candidate country Turkey, and Norway). From January 1994 to September 2005, it is estimated that PPP deals with a value of approximately US\$120 billion/€100 billion closed across Europe. Of these deals, two thirds closed in the UK, with the other PPP hotspots of Spain and Portugal accounting for 9-10% each.

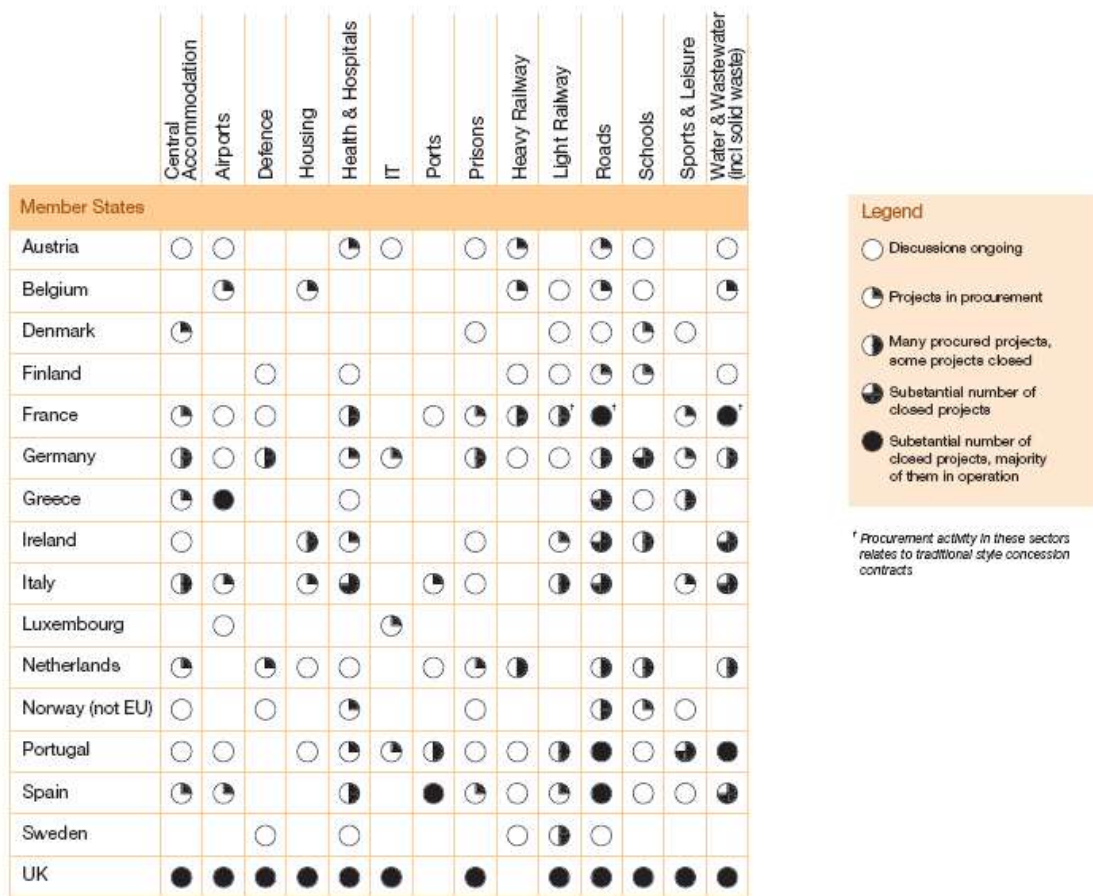
The UK showed substantially more PPP activity than the rest of Europe with 118 deals closed in 2004 and 2005, with the next most active PPP market – Spain – closing 12 deals during the same period.

The first chart shows the state of PPP development in the EU 15 countries.

Many countries start using PPPs in the provision of road infrastructure, moving on to their use in other sectors, such as water and waste treatment, education, health, energy.

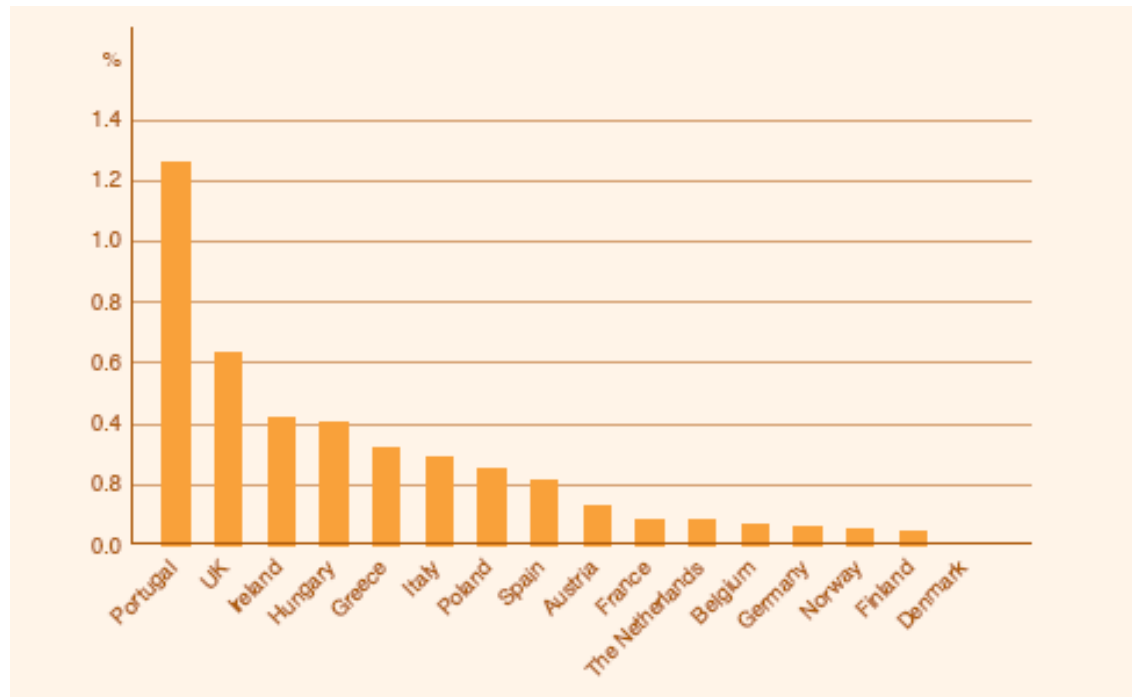
The chart shows that roads and water and wastewater were the most frequently used sectors across the sample of countries. These are the two sectors where Ireland has a substantial number of closed projects. The UK is the most advanced country with respect to PPP (PFI) use, having substantial numbers of closed projects, the majority of them in operation.

PPPs in EU 15 Countries



While the UK closed the greatest number of PPP deals in 2000-2005, if PPP activity is considered as a percentage of GDP, Portugal has the greatest involvement with PPPs relative to its GDP, with Ireland ranking third. Hungary and Greece also have high levels of PPP usage relative to Gross Domestic Product as the next figure shows.

Average 2000-2005 PPP Activity as a Percentage of Mean GDP



In the Coalition Agreement document of 2005, the German Federal Government's coalition partners CDU/CSU and the SPD agreed to introduce new legislation in early 2007 to facilitate new PPP projects and simplify the bureaucratic process, for which a PPP Task Force was set up by the Government. A vote on the new legislation is planned for April 2007.

However, concerns have arisen among the President and Vice President of the Courts of Auditors at how the PPP procedure is currently being handled, in particular in relation to what long-term risks and obligations were presented to the Exchequer by PPP investments.

On foot of this a Parliamentary Question was asked on 12/02/2007 detailing concerns about the degree of transparency. No response from the Government has yet been made. (Source: German Bundestag; 2006 Annual Report of the Bundesrechnungshof)

2.2 Outside Europe: PPP Experience in Australia, Canada, Japan

The chart shows that Australia is one of the most advanced countries with respect to the use of PPPs, having substantial number of closed and

operational projects in the airports, ports and roads sectors. Prisons and water and wastewater projects are also very advanced.

Japan has concentrated its PPP projects in the sectors of central accommodation (i.e. government offices) and schools.

The United States by contrast have only reached procurement stage in the prisons, light railway and water & wastewater sectors, with most other sectors at ongoing discussions stage.

PPPs in Non EU Countries

Country	Central Accommodation	Airports	Defence	Housing	Health & Hospitals	IT	Ports	Prisons	Heavy Railway	Light Railway	Roads	Schools	Sports & Leisure	Water & Wastewater (incl solid waste)
Australia														
Canada														
Japan														
Mexico														
Singapore														
South Africa														
United States														

Legend

- Discussions ongoing
- Projects in procurement
- Many procured projects, some projects closed
- Substantial number of closed projects
- Substantial number of closed projects, majority of them in operation

Section 3 Public Accountability of PPPs – International Experience

Introduction:

The monitoring of PPPs takes place at several levels. The fundamental level is the relationship between the public sector's operational team – say from within the Department of Health and the private company. Recent studies on operational PPPs and PFIs in the UK have found that authorities were surprised by the level of input required of them in contract monitoring. It was frequently seen as substantially higher than had originally been anticipated. This was both in terms of the local authority team and also with users (e.g. in schools by school staff). Respondents to a survey by PUK questioned whether this level of resource was sustainable over the typical 25 year life of a contract. Since most projects operational in the UK at the moment have only been up and running for a few years, it is not yet clear if these concerns will be borne out.

The former Auditor-General of the State of Victoria in Australia indicated that he was concerned about the ongoing oversight and monitoring arrangements for PPPs, and the potential to lose corporate memory over the life of the contract:

Typically ... project teams are established ... However, once the arrangements are established and operating, these teams generally are dispersed, with a resultant loss of detailed knowledge of the arrangements. This represents a major issue impacting on the effective ongoing oversight of the arrangements ... A further issue that emerges from these long term 'outsourcing' arrangements is that, over time, there is a loss of expertise in the effective oversight of these arrangements given that the State may no longer be involved in areas similar to those subject to PPPs, and therefore individuals responsible for oversight functions may not fully appreciate the associated management issues. Therefore, it is important that effective strategies are developed by the public sector to mitigate these risks. This is particularly important given the public sector's ongoing duty of care associated with key aspects of public sector service delivery.

To address community concerns about the lack of transparency and accountability of PPP projects, most governments have strengthened governance processes and systems for evaluation and review.

Given that corporate memory tends to be short term, it is of particular importance that elected representatives are fully informed and have access to all relevant information. However, the access to Commercial-in-confidence information by public representatives and the public still remains a contested issue.

Below is a summary of the mechanisms for public accountability in place in a number of countries which have had considerable experience with PPPs.

3.1 United Kingdom

The UK has continued to widen its use of PPPs across a number of sectors. According to UK Treasury figures, over 450 deals with a value of more than £34 billion (approx. €50 billion) were signed between 1999 and 2004. A number of big ticket schemes are being procured such as the widening of the M25 (circa £2.0 billion/ €3 billion), Ministry of Defence Military Accommodation (circa £2.5 billion/€4 billion) and a number of large hospitals. But equally significant has been the growing use of PPPs, sometimes on a grouped-together basis, to procure smaller facilities such as the Building Schools for the Future programme with an estimated capital investment of £2.2 billion (€3.25 billion) to be shared between the first 2005-06 wave of 180 schools and the National Health Service's Local Improvement Finance Trusts programme, with about 51 projects, of which approximately 36 projects have closed. There are a large number of operational facilities that have been delivered using the PFI structure. However in spite of this considerable activity, PPPs represent a relatively small proportion of public sector investment in public services.

The UK Government has introduced a number of reforms to enhance the transparency of PPPs and PFIs and accountability, including publishing estimates of future payments for each PPP/PFI and publishing the capital value of contracts signed to date and in the process of being procured. Much of the information on PPPs/PFIs is available through the HM Treasury website, including an online database of projects.

In order to improve further the transparency of future deal flows, departments will, from the 2007 Comprehensive Spending Review, publish all Stage 1 value for money assessments that are undertaken in order to determine their likely PFI spend on programmes.

The UK Department of Health's approach to contract summaries is based on a template that specifies the information that should be provided, including:

- Background details, such as the project specification, investment objectives and the expected timing of key dates;
- Project details, such as the total capital cost, the scope of facilities management services included in the contract and details of the consortium partners;
- Capacity details, such as demand assumptions and scope for future flexibility;

- Staffing/TUPE (Transfer of Undertakings (Protection of Employment)) details, such as the number and timing of any staff being transferred or seconded to the consortium;
- Financial details, such as the unitary charge amount and the indexation basis; and
- Other key details, such as derogations from the standard contract and the terms allowing deductions from the unitary charge.
- The Department's disclosure is based on the principle that it should 'respond positively to requests for information' where possible.

Other UK Departments are being encouraged to operate under the same guidelines as the Department of Health so that:

- the outline business case for projects will be published on the website of the procuring authority within three months of final approval; and
- the strategic business case for projects (bar commercially confidential information) will be published on the website of the procuring authority within three months of financial close.

The UK PAC committee members can ask witnesses to attend a session if the National Audit Office does not provide the information sought. We were told that they have not tended to have had a major problem with private partners withholding requested information, at least at the operating company level.

Indeed the UK business community has been reported as not being opposed to information about contracts being available to the public on the web. However, it was also alleged that PFI projects were the only game in town. If departments did not follow this route then projects were unlikely to receive funding. Thus there was a clear need for a public interest test.

As we have seen above, the UK is in an advanced position with respect to PFIs in all sectors of the economy, involving a substantial number of closed projects, with the majority of them in operation. This gives rise to a different set of problems, among them the issue of refinancing and of the possibility of massive financial gains for the private partner. The PAC took evidence on this issue in recent months.

3.2 Australia

PPPs in Australia have been used to deliver economic infrastructure such as toll-roads, with the private sector taking full market risk, and social infrastructure such as hospitals, prisons and schools, which are based principally on payments for availability and Key Performance Indicators. Full adoption of the PPP model

varies considerably across jurisdictions. Victoria and New South Wales (NSW) are at the forefront. Queensland, Western Australia and the Northern Territories have each completed one PPP.

3.2.1 Victoria

The Victorian Public Accounts and Estimates Committee (PAEC) does not have direct access to all the information held by the private sector consortiums. They have conducted a study specifically on the issue on Commercial-in-confidence and the public interest.

Some of their key findings included:

- Claims based on commercial confidentiality are now being used too broadly by the public sector as a means of preventing disclosure of a wide range of information.
- One of the options for treating commercially sensitive material would be recourse to the Freedom of Information Act.
- The legislation governing the private sector (i.e. management responsibility for information disclosure to shareholders) has demanded growth in volume, frequency and quality of information that publicly listed companies are obliged to provide to shareholders, notwithstanding arguments about the commercial sensitivity of that material. Since the goals and obligations of government to the public are broader than those of an ordinary commercial company to its shareholders, the range of information that is publicly available must be broader for government activities.
- Thus, parliamentary committees and the Auditor General should have the legislative authority to report commercial in confidence material when it is in the public interest for the information to be revealed.

In its most recent report, the PAEC made some more concrete proposals with respect to accountability arrangements.

Recommendation 11 The Victorian Government should:

- (a) Improve opportunities for parliamentary oversight of public private partnership financial arrangements and commitments;
- (b) After the contractual arrangements relating to a public private partnership project have been finalised, the responsible Minister and the Department

of Treasury and Finance brief the Public Accounts and Estimates Committee on the details; and

- (c) Advise Parliament when significant variations are made to a PPP contract, beyond the initial contractual arrangements. (*PAEC 2006, p. 105*)

Recommendation 12 That:

- (a) prior to tenders being submitted for public private partnership projects, agencies should ensure applicants are aware of the limits of what will and will not be considered as commercial in confidence in relation to PPP contracts; and
- (b) In determining whether a claim for commercial confidentiality is justified, the onus of proof should be with the tenderer, who should be required to substantiate that disclosure would be harmful to their commercial interests. (*PAEC 2006, p. 105*)

Recommendation 13 That:

- (a) After public private partnership contracts are signed, the contracts are published on the Partnerships Victoria website within three months;
- (b) A succinct (approximately three page) summary of the contract and a value for money report be prepared, modelled on the British Columbia value for money report
- (c) The Victorian Auditor-General review the details included in the contract summary and certify that it is an adequate reflection of the terms and conditions of the contract and arrange for the publication of the statement on the *Partnerships Victoria* website. (*PAEC 2006, p. 117*).

The Executive Officer of the Victorian PAEC indicated the following:

- Many of the recommendations made by the committee in its 2006 report have been taken on board by the government.
- As recommended above, sometime after the PPP contract is signed it is put on the internet; although there can be a considerable delay in this occurring up to six months). Certain information can be blacked out because it has been assessed as commercial in confidence.
- The Committee has the power to take evidence from the private sector consortium but they may decline to answer questions that are commercial in confidence.

- The Auditor-General has access to documentation that the Committee cannot access for example Cabinet material, and the full details contained in a PPP contract. In addition, the Auditor-General can access private sector records - although this is unusual - and report to Parliament on any administrative or financial issues relating to the deal. However, the Auditor-General can not report to the public on any aspect of the policy.
- The PAEC can also ask questions about PPP arrangements during estimates hearings - public hearings that are held with all Ministers and senior public officials to review the government's budget - including following up with written questions and then reporting on these matters to the Parliament.
- The Committee's October 2006 report provides a practical solution particularly the suggestion that the Auditor-General should have a role in determining whether certain information is legitimately commercial in confidence.
- One way that the PAEC has been able to overcome some of the problems with commercial in confidence material and hence the restriction on publication is to negotiate with the agency/individual/business on some wording that would be mutually acceptable. This usually means excluding specific details and including general information.
- While parliamentary committees are able to take evidence in private about commercial in confidence matters, they are unable to disclose the information. This restriction means that the Committee can not release information or documentation even though it may be in the public interest. Thus a committee can inform itself fully on an issue, but is unable to use the information.

3.2.2 *New South Wales*

The Public Accounts Committee of New South Wales does not have an ongoing role in scrutinising particular PPP projects. However, the Committee has conducted a number of inquiries into PPPs over the years, most recently in June 2006. The issue of public availability of information about the private elements of contracts was an issue during this inquiry and the Committee recommended increasing the level of disclosure of information to the public.

The Committee expressed the view that contracts should eventually be disclosed in their entirety, which would allow ongoing assessment of a Project and reassurance to the community that the public interest is being maintained.

The Committee stated that it is able to call for papers, people and things under the Standing Orders and it has used these powers in the past to require people to produce information. While it does not routinely use these powers to seek particular information about PPP projects, in 2005, when the Committee investigated the comparative value for money from publicly and privately operated correctional centres, the private operator of a centre voluntarily provided complete information to the Committee on a confidential basis.

The reports of these inquiries and the government responses can be found on the Committee's website: <http://www.parliament.nsw.gov.au/publicaccounts>

The NSW Government's guidelines for the publication of information about PPPs (called Privately Financed Projects there) were updated as a result of the Committee's 2006 report.

The Parliament of New South Wales is bicameral. The upper house, the Legislative Council, frequently calls for the Government to table papers about confidential matters such as contracts for major PPPs. These are often only available for inspection by members of that house.

All PFPs are subject to Ministerial Memorandum No.2000-11 and the *Freedom of Information Amendment (Open Government—Disclosure of Contracts) Bill 2006*, as amended from time to time, which sets specific disclosure requirements arising from NSW Government tenders and contracts.

Taking the example of a PPP schools project, the following related documents are included:

Related Documents : [Contract Summary \(1MB\)](#) [Project Deed - and schedules excluding commercial in confidence](#), [Auditor General's Performance Audit](#)

Detailed below are the items to be disclosed for all contracts and for contracts over \$5 million Australian. However, as Schedule 3 shows, there is still a considerable list of commercial in confidence information listed.

Schedule 1: Items to be disclosed for <u>all</u> contracts	Schedule 2: Additional items to be disclosed for contracts over \$5 million involving private sector financing, land swaps, asset transfers and similar arrangements
Details of contract (description of project to be completed or goods/services to be provided or property to be transferred; commencement date of the contract; the	Details of future transfers of assets of significant value to government at no or nominal cost and details of the right to receive the asset and the date of the future

period of the contract)	transfer
The full identity of the successful tenderer including details of cross ownership of relevant companies	The identification and timing of any assets transferred to the contractor by the agency
The price payable by the agency and the basis for future changes in this price	All operation and/or maintenance provisions in the contract
The significant evaluation criteria and the weightings used in tender assessment	The basis for changes (price variation clauses) in the price payable by the agency
Provisions for re-negotiation (where applicable)	The results of cost-benefit analyses of the successful tender
	The risk sharing in the construction and operational phases of the project, quantified in net present value terms (where possible) and specifying the major assumptions involved
	Significant guarantees or undertakings between the parties, including loans entered into or agreed to be entered into
	To the extent not covered above, the remaining key non-commercial-in-confidence elements of the contractual arrangements

Schedule 3: Commercial –in-confidence information –
Items not to be disclosed for any contracts
<ul style="list-style-type: none"> • The contractor’s financing arrangements
<ul style="list-style-type: none"> • The contractor’s cost structure or profit margins
<ul style="list-style-type: none"> • Items of the contractor having an intellectual property characteristic (e.g. non-tangible property that is the result of creativity, such as patentable ideas or inventions, trademarks, copyrights, etc.)
<ul style="list-style-type: none"> • Any other matters where disclosure would place the contractor at a substantial commercial disadvantage with its competitors both at the time of entering into the contract and at any later date when there would be an effect on future competitive arrangements

NOTE: In addition to these guidelines privately funded public infrastructure projects will still need to comply with the disclosure guidelines set out in the *Guidelines for Private Sector Participation in the Provision of Public Infrastructure*.

3.3 Canada

After a lengthy development process, the PPP model is gaining ground in Canada. The provinces of Alberta, Ontario and British Columbia have been the most active supporters of the PPP framework while interest in Quebec is also growing. British Columbia has seen the most activity having successfully closed eight transactions since mid-2004. Activity has been driven by the need to expand social infrastructure within budget constraints. In June 2002, the province established Partnerships British Columbia (PBC), created to provide “public agencies with expert advice and support to explore and, where supported by a sound business case, to implement P3s (PPPs) and other innovative approaches to provide public infrastructure and services”.

British Columbia

The following arrangements apply in British Columbia where, after the financial close on all PPP projects:

- a) A value for money disclosure report is published. This report describes the rationale, objectives and processes that led to the decision to use the PPP option. It explains how value for money was measured and how it is expected to be achieved in the context of current market conditions. It also includes a risk allocation summary and key terms on the contract;
- b) Fairness and probity opinions for large projects are published; and
- c) The Auditor General reviews the value for money disclosure report prepared by Partnerships British Columbia and assesses whether the report fairly describes the context, decisions, procurement processes and results to date of the project and publishes his report. After the agreement is finalised, the contract is published with a summary that includes the financial details and obligations of both parties.

An example of such a project report is *Achieving Value for Money Kicking Horse Canyon – Phase 2 Project*, published on the internet in June 2006. It runs to 22 pages and contains a high level of detail including:

- Procurement timetable
- Evaluation details, including the report of a Fairness Auditor and a Conflict of Interest Adjudicator

- Competitive Selection Costs
- Key terms of contract including performance payments, financing and risk allocation summary
- Value for money, including how the taxpayer is protected from a cost-overrun
- Contract Monitoring and performance

The Victorian PAEC was particularly impressed with the arrangements that apply in British Columbia. It used it as an example of steps taken by a government to improve the transparency and accountability of PPP arrangements and to demonstrate that community interests are being protected.

Section 4 Conclusions and Recommendations

When compared to the three countries listed in Section 3, Ireland has still a long way to go with respect to public accountability. The experience in these countries is summarised below.

United Kingdom

The UK government has responded to criticism of its extensive PFI programme by enhancing transparency and accountability.

The UK Public Accounts Committee can ask witnesses to attend sessions if the National Audit Office does not provide the information sought.

Australia

The Victorian Public Accounts and Estimates Committee (PAEC) has been very active in pursuing the right to access PPP information over the years. The Victorian government puts PPP contracts onto its website after they have been signed, even though this can still take longer than the recommended three month period. In addition the PAEC can ask questions about PPP arrangements during estimate hearings. They are trying to overcome the commercial in confidence clause by directly negotiating with the private partner on wording that might be mutually acceptable. They can also take evidence in private about commercial in confidence matters, but are unable to release that information or documentation even though it might be in the public interest.

In New South Wales all PFPs (Privately Funded Projects) are subject to the Freedom of Information amendment Bill 2006 which sets detailed disclosure standards. In addition, the New South Wales Public Accounts Committee is able to call for papers and people and has used this power in the past to attain information about PFPs.

Canada

In British Columbia, detailed project information is placed on the web after close of contract. The Auditor General reviews the value for money disclosure report. Evaluation details are also published.

The Committee has taken some account of international experiences in formulating its recommendations.

Recommendations

1. Consideration should be given to overcoming difficulties in relation to the Committee's access to commercially sensitive material by legislative means.

2. The future liabilities associated with PPPs should be computed and a transparent means of accounting for them should be developed in line with best practice.
3. Value for money should remain the sole justification for the consideration of PPPs in Ireland.
4. Contracts should eventually, after an appropriate time interval (say three months after completion) be disclosed in their entirety which would allow ongoing assessment of a project and provide reassurance to the public that their interest was being respected.
5. Commercially sensitive papers relating to contracts on major PPPs should be available for inspection by members of the PAC on a confidential basis where necessary for the discharge of the Committee's functions.

The thrust of the following recommendations made by the PAEC of Victoria (2006) are equally appropriate in the Irish situation.

6. Prior to tenders being submitted for PPPs, agencies should ensure applicants are aware of the limits of what will and will not be considered as "commercial in confidence" in relation to PPP contracts.
7. The onus of proof whether a claim to commercial confidentiality is justified should be with the tenderer. It should not be up to the public body. The Comptroller and Auditor General should have the last word in this decision.
8. After the contractual arrangements relating to a PPP project have been finalised, the relevant Department and / or the National Development Finance Agency should, if requested, make themselves available for briefing the PAC.
9. When a private consortium is entering into a PPP it should be aware that it will be open to scrutiny by the PAC on the element of its business that relates to the PPP.
10. Provision for periodic measurement of the performance of a PPP should be built into contractual arrangements.

The ever increasing reliance on PPPs for the provision of infrastructure in Ireland as evidenced by the recent National Development Plan 2007 to 2012 indicates that this is an area of growing importance for the PAC.

The public interest would be greatly served by further study into the following areas:

- Analysis of the rationale for the PPP allocation in the various parts of the latest NDP

- Examine the need for the extensive use of PPP at a time of exceptional exchequer buoyancy
- Value for money assessment on a sample of PPPs across the sectors
- Examine the alleged benefits of a sample PPP project over an appropriate time period when compared to a conventionally procured project in the same sector.
- Evaluate the respective roles of the NDFA, CAG and the sponsoring agencies with a view to assessing whether there are sufficient structures in place to safeguard taxpayers' money/public interest.
- Periodic review of international developments in the field of public accountability of PPPs.

